

No. 40974-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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PORT OF TACOMA,
Defendant/Petitioner,

v.

KEY DEVELOPMENT INVESTMENT LLC and TRINITY
GLASS INTERNATIONAL, INC.,
Plaintiffs/Respondents

Pierce County Superior Court Case No. 09-2-06959-5

**ANSWERING BRIEF AND OPENING CROSS PETITION
BRIEF OF PLAINTIFFS KEY AND TRINITY**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUES RELATED TO PORT’S APPEAL OF RECONSIDERATION ORDER	3
III. ASSIGNMENT OF ERROR ON PLAINTIFFS’ CROSS PETITION FOR REVIEW	3
IV. ISSUES RELATED TO CROSS PETITION FOR REVIEW	3
V. STATEMENT OF THE CASE.....	4
A. Parties.....	4
B. Factual Background	4
C. Procedural Background.....	12
VI. ARGUMENT	14
A. Standard of Review.....	14
B. The “Independent Legal Duty Doctrine” Authorizes Tort Remedies For Some Purely Economic Harms Caused By A Defendant – Regardless Of Whether There May Also Be Contractual Duties Related To The Parties’ Dispute.....	15
1. Although Tort Law Primarily Provides Remedies For Physical Harm, The Common Law Also Recognizes Specific Independent Tort Duties To Avoid Economic Harm To Others.	16
2. The “Independent Legal Duty Doctrine” Focuses On The Source of the Defendant’s Legal Duty or Duties, Not The Characterization Of Plaintiffs’ Losses.	20
3. A Defendant May Have An Independent Tort Duty To Avoid Causing Economic Harm Even When The Plaintiff’s Claims Arise In The Context Of Contractual Relationships.	28
C. Trinity May Assert Each Of Its Three Tort Causes Of Action Against The Port.	29
1. The Port’s Alleged Agreement With Key Does Not Divest Trinity Of Its Tort Remedies.	29

2.	The Port Had An Independent Legal Duty Not to Harm Trinity, Regardless Of Whether The Port Might Also Have Owed Separate Contractual Duties To Key and Trinity.	32
a.	The Port Owed Trinity An Independent Legal Duty Not To Interfere With Its Business Expectancies.	32
b.	The Port Owed Trinity An Independent Legal Duty Not To Intentionally Defraud It.	36
c.	The Port Owed Trinity An Independent Legal Duty Not To Negligently Misrepresent Material Facts.	39
D.	Because the Port Also Owed Independent Legal Duties To Key, The Trial Court Erred By Dismissing Key’s Tort Claims.	41
1.	The Port Owed Key An Independent Legal Duty Not To Interfere With Its Business Expectancies.	42
2.	The Port Owed Key An Independent Legal Duty Not To Intentionally Defraud It.	44
3.	The Port Owed Key An Independent Legal Duty Not To Negligently Misrepresent Or Omit Material Facts.	46
VII.	CONCLUSION	48

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adams v. King County</i> , 164 Wn.2d 640, 192 P.3d 891 (2008).....	36
<i>Affiliated FM Ins. Co. v. LTK Consulting</i> , 170 Wn.2d 442, 243 P.3d 521 (2010).....	passim
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007).....	passim
<i>Arthur D. Little Intern., Inc. v. Dooyang Corp.</i> , 928 F. Supp. 1189 (D. Mass. 1996).....	21
<i>Atherton Condo. Apt.-Owners Ass'n Bd. of Directors v. Blume Development Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	16, 19
<i>Beckendorf v. Beckendorf</i> , 76 Wn.2d 457, 457 P.2d 603 (1969).....	21
<i>Berg v. General Motors Corp.</i> 87 Wn.2d 584 (1976).....	22, 23, 24
<i>Berschauer/Phillips Construction Co. v. Seattle School Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	passim
<i>Borish v. Russell</i> , 155 Wn.App. 892, 230 P.3d 646 (2010).....	30, 31
<i>Byrd v. English</i> , 43 S.E. 419 (Ga. 1903).....	17
<i>Calbom v. Knudtzon</i> , 65 Wn.2d 157, 396 P.2d 148 (1964).....	34
<i>Chapman v. Rideout</i> , 568 A.2d 829 (Me. 1990).....	46
<i>Connecticut Mut. Life Ins. Co. v. New York & New Haven Ry.</i> , 25 Conn. 265 (1856).....	17, 19
<i>Duffy v. Piazza Constr., Inc.</i> , 62 Wn.App. 19, 815 P.2d 267 (1991).....	17

<i>East River Steamship Corp. v. Transamerica Duval, Inc.</i> , 476 U.S. 858 (1986).....	22, 23, 24, 25
<i>Eastwood v. Horse Harbor Foundation, Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	passim
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 135 Wn.2d 820 (1998).....	45
<i>F.D. Hill & Co. v. Wallerich</i> , 67 Wn.2d 409, 407 P.2d 956 (1965).....	32
<i>Flower v. T.R.A. Industries, Inc.</i> , 127 Wn. App. 13, 111 P.3d 1192 (2005).....	38, 46
<i>FMR Corp. v. Boston Edison Co.</i> , 613 N.E.2d 902 (Mass. 1993).....	18
<i>Griffith v. Centex Real Estate Corp.</i> , 93 Wn. App. 202 (1998).....	19
<i>Haberman v. WPPSS</i> , 109 WN.2d 107, 744 P.2d 1032 (1987).....	39
<i>In re Chicago Flood Litigation</i> , 680 N.E.2d 265 (Ill. 1997).....	18, 21, 45
<i>Jackowski v. Borchelt</i> , 151 Wn. App. 1, 209 P.3d 514 (2009).....	19
<i>Janda v. Brier Realty</i> , 97 Wn.App. 45 (1999).....	46
<i>Just's, Inc v. Arrington Const. Co.</i> , 99 Idaho 462, 583 P.2d 997 (1978).....	18
<i>Kim v. Moffett</i> , 156 Wn. App. 689, 234 P.3d 279 (2010).....	30
<i>Korshund v. DynCorp Tri-Cities Servs., Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	15, 37, 43
<i>McCarthy, Lebit, Crystal & Haiman Co. v. First Union Mgt.</i> , 87 Ohio App. 3d 613, 622 N.E.2d 1093 (Ohio App.1993).....	32, 36, 42, 45
<i>Markov v. ABC Transfer & Storage Co.</i> , 76 Wn.2d 388, 457 P.2d 535 (1969).....	44, 45

<i>Mulcahy v. Farmers Ins. of Washington</i> , 152 Wn.2d 92 (2004)	4
<i>Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group</i> , 114 Wn. App. 151, 52 P.3d 30 (2002)	25, 26, 33
<i>Nota Constr. Corp. v. Keyes Assocs., Inc.</i> , 45 Mass. App. Ct. 15, 694 N.E.2d 401 (1998)	21
<i>Obde v. Schlemeyer</i> , 56 Wn.2d 449, 353 P.2d 672 (1960)	21
<i>Presnell Constr. Managers, Inc. v. EH Constr., LLC</i> , 134 S.W.3d 575 (2004)	46
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010)	14, 31
<i>Scymanski v. Dufault</i> , 80 Wn.2d 77, 491 P.2d 1050 (1972)	32, 33
<i>Sintra, Inc. v. Seattle</i> , 119 Wn.2d 1, 829 P.2d 765 (1992)	32
<i>Sprague v. Sumitomo Forestry Co.</i> , 104 Wn.2d 751, 709 P.2d 1200 (1985)	38
<i>Stanton v. Bayliner Marine Corp.</i> , 123 Wn.2d 64, 866 P.2d 15 (1993)	24
<i>Staton Hills Winery Co., Ltd. v. Collons</i> , 96 Wn. App. 590 (1999)	24
<i>Steineke v. Russi</i> , 145 Wn.App. 544, 190 P.3d 60 (2008)	36
<i>Stuart v. Coldwell Banker Commercial Group, Inc.</i> , 109 Wn.2d 406 (1987)	16, 17, 19, 22
<i>Topline Equipment, Inc. v. Stan Witty Land, Inc.</i> , 31 Wn. App. 86, 639 P.2d 825	34
<i>Town of Alma v. AZCO Constr.</i> , 10 P.3d 1256 (Colo. 2000)	21
<i>Washington Water Power Co. v. Graybar Elec. Co.</i> , 112 Wn.2d 847 (1989)	20, 23, 24, 25

<i>West Coast, Inc. v. Snohomish County</i> , 112 Wn.App. 200 (2002)	39
<i>Wilcox v. Lexington Eye Inst.</i> , 130 Wn.App. 234, 122 P.3d 729 (2005)	14
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982)	4

OTHER AUTHORITIES

PROSSER & KEETON ON TORTS, § 92	17
RESTATEMENT (2D) OF TORTS § 101	16
RESTATEMENT (2D) OF TORTS § 766C.....	16, 45, 46, 47
RESTATEMENT (2D) OF TORTS § 551	44
RESTATEMENT (2D) OF TORTS § 552	44
Sidney R. Barrett, Jr., <i>Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis</i>	18

I. INTRODUCTION

Washington tort law imposes independent legal duties to avoid harming others by tortiously interfering with their business expectancies or by intentionally or negligently misrepresenting and omitting material facts. Defendant Port of Tacoma breached these legal duties when it caused Plaintiffs Key Development Investments LLC and Trinity Glass International, Inc. to lose the opportunity to sell or lease a major piece of commercial real estate to other bidders. The Port told Plaintiffs that it definitely needed to buy the property in order to relocate another area business. But the Port actually knew that it might not need to relocate the other business, and the Port was actively pursuing alternatives to doing so – facts it failed to disclose to Plaintiffs. Instead, the Port misrepresented its interest in the property while repeatedly demanding that the property remain unleased and available for purchase by the Port. As a result, Plaintiffs turned down other valuable opportunities to re-lease or sell the property. By the time the Port disclosed the truth, it was too late for Plaintiffs to protect themselves from millions of dollars in losses. The Port’s conduct harmed both the owner of the property (Key) and its tenant (Trinity).

The Port has appealed from the trial court’s order reconsidering and reversing its original order granting the Port’s motion for summary judgment on Trinity’s tort claims. Plaintiffs have cross-appealed from the court’s order granting the Port’s motion for summary judgment on Key’s tort claims. The trial court based both of its rulings on its understanding of what the court characterized as the “economic loss rule.” The trial

court determined that the rule barred Key's tort claims because Key had signed a Letter of Intent with the Port, but that the rule did *not* bar the Trinity's tort claims because Trinity was not a party to any contract with the Port.

Since the lower court announced its decisions, the Supreme Court of Washington has clarified the scope of the principle formerly referred to as the economic loss rule, replacing it with the "Independent Legal Duty" doctrine. See *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010); *Affiliated FM Ins. Co. v. LTK Consulting*, 170 Wn.2d 442, 243 P.3d 521 (2010). Defendants cannot evade all tort liability merely because a case involves economic harms or contractual relationships. To the contrary, as the Supreme Court recognized in *Eastwood* and *Affiliated*, Washington law has historically allowed injured plaintiffs to pursue tort remedies for purely economic harms caused by violations of particular legal duties recognized at common law, regardless of whether the parties have indirect or even direct contractual relationships.

In this case, the Port had independent legal duties not interfere with Plaintiffs' business expectancies and to refrain from fraudulent and negligent misrepresentations. Plaintiffs respectfully request that this Court affirm the trial court's decision regarding Trinity, reverse the dismissal of Key's tort claims, and remand Plaintiffs' tort claims for trial together with the separate contract claims that are not part of this appeal.

II. ISSUES RELATED TO PORT'S APPEAL OF RECONSIDERATION ORDER

1. Did the trial court properly exercise its discretion when it reconsidered its original summary judgment order and correctly ruled that the economic loss rule did not bar Trinity's tort claims where Trinity was not a party to any contract with the Port?

2. Regardless of whether the parties had any contractual relationship, did the Port owe Trinity an independent legal duty not to interfere with its business expectancies?

3. Did the Port owe Trinity an independent legal duty not to intentionally defraud it?

4. Did the Port owe Trinity an independent legal duty not to negligently misrepresent material facts?

III. ASSIGNMENT OF ERROR ON PLAINTIFFS' CROSS PETITION FOR REVIEW

The trial court erred in granting the Port's motion for partial summary judgment dismissing Key's tort claims.

IV. ISSUES RELATED TO CROSS PETITION FOR REVIEW

1. Did the Port owe Key an independent legal duty not to interfere with its business expectancies?

2. Did the Port owe Key an independent legal duty not to intentionally defraud it?

3. Did the Port owe Key an independent legal duty not to negligently misrepresent or omit material facts?

V. STATEMENT OF THE CASE

A. Parties

Key Development Investment LLC is a Washington limited liability company. CP 1691 ¶ 1. Trinity Glass International, Inc. is a Washington corporation. *Id.* Key and Trinity Glass are affiliates, sharing some common ownership. *Id.* Nevertheless, the two entities are separate and independent corporations. CP 1691 ¶¶ 1-2. Key's business is the ownership, leasing, purchase and sale of real estate; Trinity's business is purchasing, manufacturing, warehousing and wholesaling of residential doors and other residential building products. CP 1691 ¶ 2.

The Port of Tacoma ("Port") is a municipal corporation that operates various facilities in the Tacoma area. CP 1691 ¶ 3.

B. Factual Background¹

In mid-2007, the Port of Tacoma publicly announced plans to redevelop its Blair Peninsula container terminal to accommodate a major new tenant, NYK Lines. CP 1691 ¶ 3. Superlon Plastics Co., Inc. used one of the properties near the terminal project. On August 8, 2007, the Port initiated a condemnation action against the Superlon property and entered into direct negotiations with Superlon to acquire its property, which the Port stated was necessary for and critical to the Port's redevelopment project. CP 1691-92 ¶¶ 6, 7; CP 1145-65.

¹ Because this appeal arises from the Port's motion for summary judgment, the Court must consider all facts and reasonable inferences in the light most favorable to Plaintiffs. *Mulcahy v. Farmers Ins. Co. of Wash.*, 152 Wn.2d 92, 98, 95 P.3d 313 (2004); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The Port's mission includes retaining businesses and jobs in the Tacoma area. CP 1692-93 ¶¶ 12-13. The Port therefore looked for another location where Superlon could carry on its business in or around the Port. CP 1692 ¶ 14. In September 2007, the Port publicly announced that Superlon was moving to Frederickson, Washington. CP 1694 ¶ 26.

Key owns a large industrial facility (the "Property") in Frederickson. CP 1693 ¶ 19. Trinity is the major tenant at the Property, where Trinity manufactured and sold composite plastic-resin doors. In 2007, Trinity was not fully utilizing the Property, and sought to be relieved of its lease obligations. CP 1694 ¶ 21. In light of Trinity's business needs, Key and Trinity wished either to find another tenant to lease the Property, or to sell the Property and terminate the Trinity lease. On April 24, 2007, the Property was listed for lease with Collier's International. CP 1694 ¶ 22. Although the Property was not formally listed for sale, brokers knew that the Property also was available for sale. *Id.*

In September 2007, Bob Hacker, a broker at CB Richard Ellis who knew of the Port's redevelopment plans, contacted Key and asked if it would consider selling its Frederickson property to the Port. CP 1694-95 ¶ 27. Key said it would be willing to consider such a sale and Mr. Hacker approached the Port, which agreed to work with CB Richard Ellis to negotiate its purchase of the Property from Key. CP 1695 ¶ 28. Although Mr. Hacker and CB Richard Ellis had no listing agreement or agency

agreement with either Key or the Port, the parties understood that they were working for the benefit of the Port. CP 1399.

Negotiations with the Port began after Jay Stewart, one of the Port's Real Estate Managers, signed a confidentiality agreement with Key in September 2007. CP 1695 ¶¶ 30-32. During these negotiations, Key was also negotiating a possible sale of the Property to Harvey Widman. On November 27, 2007, Key received a Letter of Intent from Widman, offering to buy Key's Property \$32.8 million. CP 1696 ¶ 36. With Key and Trinity's authorization, the CB Richard Ellis brokers told the Port about the Widman offer, and informed the Port that Key would be willing to forego the Widman opportunity and instead sell to the Port for \$35 million. CP 1696-97 ¶ 39

Upon learning about the Widman opportunity, the Port's representatives repeatedly and urgently represented to Key, Trinity and the brokers that (a) the Port needed to take Superlon's property for the terminal redevelopment project; (b) as a result Superlon had to be relocated; (c) Key's property was the only available property that would accommodate Superlon's physical needs and the Port's timing requirements; and (d) the Port was prepared to pay Key \$35 million for the Property. CP 1697 ¶ 40 (a) – (d).

In particular, Mr. Stewart, the Port's Property Manager who was primarily responsible for negotiating with Key, informed Key and Trinity that he had never seen any possible way they could proceed with the Port

expansion project without taking the Superlon property. CP 1697-98 ¶ 40(d). Jack Hedge, the Port's Property Manager who was primarily responsible for negotiating with Superlon, informed Key and Trinity that acquiring the Key property was "absolutely necessary" and a "certainty." CP 1698 ¶ 40(e). Relying on the Port's representations, Key and Trinity did not take advantage of the Widman opportunity. CP 1699-1670 ¶ ¶ 41-42.

Despite the Port's representations to Plaintiffs, however, its internal communications during the same period reflected a contradictory approach to the pending Superlon condemnation. By February 2008, the Port's redevelopment project actually was only at the 15% design phase, but this was kept confidential. CP 1715 ¶ 119(b). By March 11, 2008, planning had still reached only 30% completion, and the project remained an "evolving picture" that was not shared with the public, Key, or Trinity. CP 1715 ¶ 119(b); CP 1701 ¶ ¶ 44-45.

The Port had originally estimated the price for the Superlon property at \$3.3 million and pegged environmental clean-up costs at \$50,000. CP 1717-18 ¶ 119(e). By December 2007, the projected purchase price had been adjusted to \$7.5 million, and the Port's environmental consultants had preliminary confirmation of major environmental problems at the site, requiring cleanup costs eventually estimated at \$1,500,000. *Id.* The Port had already realized that providing access through the Superlon property would be much more expensive than

it had originally anticipated, and that solving the various Superlon problems would delay the expansion project schedule. Consequently, the Port secretly began to explore options other than moving Superlon to the Property. CP 1718-19 ¶ 119(f). On November 1, 2007, the Port's General Counsel suggested to Mr. Emerson – the Port's real estate director and Stewart's and Hedge's boss – that the Port re-route the bypass to avoid Superlon and eliminate the need to buy its property. *Id.*

In December 2007, Mr. Emerson instructed the Port's road and rail consultants that the design for "road and rail should avoid" Superlon. The avoidance process began with rail because moving rail lines is more difficult than re-routing roads. CP 1719 ¶ 119(g). (As the Port's consultants testified, "Rail is King." *Id.*) On February 14, 2008, the Port's Rail Consultant provided a drawing showing that "we can miss the Superlon site." *Id.* Alternatives for moving the road from Superlon were also in the works. *Id.* By January 2008, the Port's design team had developed a "suite of many concepts" to end the Port's need for the Superlon site. CP 1719 ¶ 119(f). By April 2008, at least four road options had joined the rail designs. CP 1720-21 ¶ 119(h).

Members of various Port design teams documented the Port's internal determination to avoid the Superlon property and its progress in achieving that goal. An internal e-mail, dated February 18, 2008, confirmed that the Port staff was "trying to miss a problem parcel of land" and reported "[a]lthough not finalized, this change is *highly likely*." CP

1719-20 ¶ 119(g) (emphasis added). In the minutes of a meeting held on February 21, 2008, the Port's Rail, Road, Infrastructure Working Group recorded the "severity" of the problems involving the Superlon site. CP 1718-19 ¶ 119(f). By March 26, 2008, the estimated cost of constructing road and rail on the Superlon property had increased by \$1.9 million. CP 1718.

On May 8, 2008, the Port's Senior Project Manager for the design team formally reported to his staff that "[t]he Port has decided to stop pursuing or delay acquisition of . . . Superlon." CP 1721 ¶ 119(i). The minutes of the Port's Road Rail Infrastructure Technical Working Group meeting on May 15, 2008, succinctly stated that "the bypass road through Superlon is gone." *Id.*

The Port did not communicate any of this to either Key or Trinity. Instead, while all of these efforts to avoid relocating to Superlon to the Property were going on inside the Port, Mr. Emerson, Mr. Stewart and Mr. Hedge were repeatedly telling Key and Trinity that acquisition of the Superlon property was necessary and certain, and that the Port had to purchase Key's Property and assume Trinity's leasehold rights in order to relocate Superlon. CP 1700 ¶ 44.

On March 21, 2008, the Port and Key signed an "Intent to Purchase and Right of Entry." CP 1701 ¶ 47. In the Letter of Intent, the Port confirmed the terms Key and the Port had worked out for the Purchase and Sale Agreement: a purchase price of \$35 million,

conditioned on satisfaction as to the legal and physical condition of the subject Property and Port Commission approval of purchase. CP 1699 ¶ 40(i); CP 1699-1700 ¶ 44. The Port's staff described satisfaction of these contingencies to Plaintiffs as a "formality." CP 1699-1700 ¶ 44.

On March 15 and April 3, 2008, Key received two additional long-term lease offers for major parts of its Property – one from MetalTech and the other from mkConstructs. CP 1702 ¶ 49, 50. These lease proposals would have returned over \$40,000 per month in rent to Key and would have relieved Trinity of a major part of its rent burden. *Id.* Trinity and Key expressed to the Port that Trinity had no further need for the Property and was actively seeking alternate lessees to take over its lease of the Property. CP 1702-03 ¶¶ 52-53.

Plaintiffs told the Port about each of these lease opportunities. CP 1702-03 ¶ 53. The Port responded that no long-term leases could be entered into if its transaction with Key was to go ahead as planned because long-term leases would prevent the Port from relocating Superlon to the Property. CP 1703 ¶ 54. Key and Trinity complied with the Port's direction and declined the MetalTech and mkConstructs proposals. CP 1703 ¶¶ 56, 57; CP 1704 ¶ 63. On April 15, 2008, the broker confirmed this in an e-mail to the Port. CP 1704 ¶ 64. The prospective tenants went elsewhere and as a result, Trinity remained obligated to performing under its lease agreement.

Notwithstanding the Port's representations to Key and Trinity, Mr. Emerson, the Port's real estate director, did not want the Port's lawyer to prepare a purchase and sale agreement because he was "not comfortable" with the transaction. CP 1721 ¶ 120. Mr. Bauder's April 15, 2008 e-mail reminded the Port of its obligation to keep Plaintiffs informed. As the broker told the Port, "If the real issue is that the Port does not want to enter into a PSA until you feel more comfortable with the transition, then we should let the owner know." Mr. Emerson did not respond. CP 1706 ¶ 76.

Mr. Bauder tried on his own to move the transaction forward and to get the Port to authorize a draft PSA. The draft, however, was inconsistent with the framework set forth in the Letter of Intent. CP 1708-09 ¶¶ 89-90. After receiving the draft, Mr. So, on behalf of Trinity, asked Mr. Bauder to find out the real reason for the Port's actions. CP 1708-09 ¶ 92. Mr. Bauder contacted Mr. Stewart, who in an e-mail copied to Mr. Emerson, responded that the Port was "still interested in moving forward" with the purchase of Key's Property. Mr. Emerson never mentioned that he was, in fact, "not comfortable" with moving forward. To the contrary, a few days later he assured Key and Trinity that the Port would complete the transaction. CP 1710 ¶ 99.

On May 21, 2008, the *Tacoma News Tribune* ran a story reporting Mr. Emerson's announcement that there was a "chance" that the Superlon property "might not be needed." CP 1711-12 ¶¶ 105-06; CP 1186-1188.

The revelation that there was even a “chance” that the Port might not need Superlon was of significant concern to Key and Trinity, who up to that point had been led to believe that the Port was committed to purchasing Key’s Property and terminating the Trinity lease, that there was no chance or any other option, and that the taking of Superlon’s property and its relocation were a certainty. *Id.*

Mr. So asked Mr. Bauder to contact Mr. Stewart to find out if the report was accurate. When contacted, Mr. Stewart said he did not think the newspaper story was accurate. CP 1712 ¶ 107. In a telephone call a day or so later, however, Mr. Emerson admitted to Mr. Bauder that the Port had found a way around the Superlon property. CP 1713 ¶ 114. Mr. Bauder expressed consternation that the Port had “strung them along” and said that the Port must have known for some time that it might not proceed with the transaction. CP 1714 ¶ 115. He asked Mr. Emerson why he had withheld this information. Mr. Emerson replied that he was “concerned that if Trinity knew what was going on, Trinity might sell the property to someone else.” CP 1713-14 ¶ 117.

C. Procedural Background

On November 13, 2008, Key and Trinity filed their First Amended Complaint for Damages asserting various claims and alternative legal theories, including economic tort claims for tortious interference, intentional misrepresentation, and negligent misrepresentation.

On March 5, 2010, the Port filed a Motion for Summary Judgment on Claim 1 of the Complaint, seeking summary dismissal of Plaintiffs’ tort

claims on two bases: (1) application of the economic loss rule; and (2) lack of evidence of essential elements of the three alleged torts. The Port also moved to dismiss Plaintiffs' contract claims.

On May 28, 2010, the Court granted the Port's Motion for Summary Judgment in part, finding that the Letter of Intent was a contract, and dismissing the tort claims of both Key and Trinity based on the application to the Letter of Intent of what it characterized as the "economic loss rule." CP 1040–89. The Court did not grant the Port's motion to dismiss the separate contract claims of either Plaintiff. *Id.*²

On June 4, 2010, Trinity filed a Motion for Reconsideration requesting the Court reconsider and amend its order and reinstate Trinity's tort claims on the ground that "Trinity had no contract with defendant and the economic loss rule therefore does not affect Trinity's tort claims." CP 1047-50.

On June 18, 2010, the Court entered an Order Granting Motion for Reconsideration, 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

² Key and Trinity assert various contract claims against the Port that are in addition to – and potentially in the alternative to – their three tort causes of action. Plaintiffs dispute the trial court's characterization in its Summary Judgment Order of the March 2008 Letter of Intent and its terms. However, this appeal is limited to the status of Key and Trinity's tort claims.

not be dismissed under the economic loss rule.

CP 1088-89.

On July 19, 2010, the Port filed its Notice of Discretionary Review to the Court of Appeals seeking review of the June 18, 2010 Order. CP 1774-77.

On August 2, 2010, Trinity and Key filed their Notice for Discretionary Review by Other Party Pursuant to RAP 5.2(f), seeking review of the trial court's related rulings regarding the economic loss rule. CP 1778-81. On September 21, 2010, the Court of Appeals accepted discretionary review. The trial court has stayed trial on the parties' separate contract claims, pending this Court's ruling regarding the status of Key's and Trinity's tort claims.

VI. ARGUMENT

A. Standard of Review

The Port has appealed from the trial court's order reconsidering and reversing its original decision to grant summary judgment on Trinity's tort claims. Washington appellate courts review the granting of a motion for reconsideration for abuse of discretion. *Wilcox v. Lexington Eye Inst.*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005). A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010)).

Key has appealed from the trial court's order granting summary judgment and dismissing its tort claims. Appellate courts review an order granting or denying summary judgment *de novo*, engaging in the same inquiry as the trial court. See *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). This Court considers all facts and reasonable inferences regarding the Port's summary judgment motion in the light most favorable to Key and Trinity as the nonmoving parties. *Id.*

B. The “Independent Legal Duty Doctrine” Authorizes Tort Remedies For Some Purely Economic Harms Caused By A Defendant – Regardless Of Whether There May Also Be Contractual Duties Related To The Parties’ Dispute.

The Supreme Court recently held that “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.” *Eastwood*, 170 Wn.2d at 393. Plaintiffs are not “limited to contract remedies” just because “an injury is an economic loss or the parties also have a contractual relationship.” *Id.* at 388-89. The Port necessarily acknowledges that even “in disputes between contracting parties,” a plaintiff may seek damages for the “breach of a tort duty that arises independently of the terms of the contract between the parties.” App. Br. at 12.

Under longstanding Washington law, the Port had independent legal duties to refrain from interfering with Trinity’s business expectancies and from making fraudulent and negligent misrepresentations – regardless

of whether the Port also owed separate contractual duties to Trinity as a third-party beneficiary of any agreement between the Port and Key.

1. Although Tort Law Primarily Provides Remedies For Physical Harm, The Common Law Also Recognizes Specific Independent Tort Duties To Avoid Economic Harm To Others.

The Washington Supreme Court has recognized that “tort law has traditionally redressed injuries properly classified as *physical* harm.”

Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 419 (1987) (emphasis added) (citing W. Prosser, TORTS § 101, at 665 (4th ed. 1971)). “Physical” harm means injury to persons or property.

Berschauer/Phillips Construction Co. v. Seattle School Dist. No. 1, 124 Wn.2d 816, 825, 881 P.2d 986 (1994).

As a general rule, damages for non-physical, purely economic injuries “are not recoverable under tort law.” *Atherton Condo. Apt.-Owners Ass’n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 534 n.17, 799 P.2d 250 (1990). For example, if a defendant negligently collided with another car on the Tacoma Narrows bridge, the owner and occupants of the car who suffered “physical” harm to themselves or their vehicle can sue for all damages proximately caused by the collision, including not only compensation for the physical harm itself but also for their financial or economic losses like lost wages and loss of use. But the drivers of all the other cars on the bridge that did *not* similarly suffer physical harm could not assert negligence claims against the driver who caused the collision, even if that negligent conduct caused

them to be late for work or miss a profitable sales meeting. *See, e.g.*, RESTATEMENT (2D) OF TORTS (“RESTATEMENT”) § 766C at comment b (1979) (plaintiff cannot recover in negligence for economic losses unless they result from “*physical harm* to the person or land or chattels of the plaintiff”) (emphasis added); PROSSER & KEETON ON TORTS, § 92 at 657 (5th ed. 1984) (“there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible *physical harm* to persons and tangible things”) (emphasis added); *Duffy v. Piazza Constr., Inc.*, 62 Wn.App. 19, 21-22, 815 P.2d 267 (1991) (plaintiffs may assert a negligence claim against a business partner only “when the negligence results in injury to the person or property of the one seeking to recover damages”). Because of the “safety-insurance policy” that underlies tort law, negligence principles emphasize providing legal redress for “injuries properly classified as physical harm.” *Stuart*, 109 Wn.2d at 419. In contrast, *contract* law is intended to protect “society’s interest in performance of promises” by enforcing parties’ economic expectations created by the terms of their contract. *Alejandre v. Bull*, 159 Wn.2d 674, 682, 153 P.3d 864 (2007).

The general rule barring negligence claims for economic loss absent physical harm to the claimant is one of tort law’s oldest doctrines. *See Byrd v. English*, 43 S.E. 419, 421 (Ga. 1903) (affirming dismissal of tort claim against excavator who cut third party’s power lines supplying plaintiff) (citing *Connecticut Mut. Life Ins. Co. v. New York & New Haven*

Ry., 25 Conn. 265, 274-76 (1856)). The rule’s “underlying pragmatic consideration” is that allowing damages in negligence for purely economic losses “would impose too heavy and unpredictable a burden on the defendant’s conduct” that would be “grossly disproportionate to its fault.” *Just’s, Inc v. Arrington Const. Co.*, 99 Idaho 462, 470, 583 P.2d 997 (1978); *see also Berschauer/Phillips*, 124 Wn.2d at 822 (limitation on tort claims for purely economic losses “was developed to prevent disproportionate liability”). Absent physical harm, even foreseeable losses are not recoverable:

Under traditional negligence concepts, purely economic losses are outside the scope of recovery regardless of how foreseeable those losses are. For example, it is eminently foreseeable that one’s negligence in rupturing a gas or electric line will cause pecuniary losses to businesses dependent on that gas Such liability, however, has never been recoverable in tort.

Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L.REV. 891, 908 (1989) (citations omitted). This bright-line rule for ordinary negligence claims continues to be almost uniformly followed in most jurisdictions. *See, e.g., FMR Corp. v. Boston Edison Co.*, 613 N.E.2d 902 (Mass. 1993) (collecting cases); *In re Chicago Flood Litigation*, 680 N.E.2d 265, 274 (Ill. 1997) (rule barring ordinary negligence claims absent physical harm is the “prevailing rule in America,” and is supported by the “vast majority of commentators and cases”).

Nevertheless, the law also recognizes various tort causes of action that by their nature are intended to provide a legal remedy for purely economic harm. Some of these tort claims were created by statute, like the Consumer Protection Act. *See, e.g., Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213-18, 969 P.2d 486 (1998) (consumer protection act claims for purely economic loss not among tort claims barred by economic loss rule). Numerous other tort causes of action providing redress for economic harms have been part of the common law for many decades, such as wrongful discharge in violation of public policy; waste; insurer bad faith; and fraudulent concealment. *Eastwood*, 170 Wn. at 388 (enumerating examples); *see also Jackowski v. Borchelt*, 151 Wn. App. 1, 14, 209 P.3d 514 (2009), *review granted*, 168 Wn.2d 1001, 226 P.3d 780 (2010) (economic loss rule does not “preclude all recovery for economic loss against professional agents, as [doing so would] abrogate professional malpractice claims for all cases not involving physical harm”).³ Each of these long-standing tort causes of action requires specific additional proof beyond the ordinary negligence elements of duty, breach, causation, and damages. *See, e.g., Atherton*, 115 Wn.2d at 524 (enumerating elements of fraudulent concealment claim).

³ Washington courts have on occasion declined to recognize other proposed negligence causes of action that would have provided *new* tort remedies for purely economic harms. *See, e.g., Stuart*, 109 Wn.2d at 417-18 (rejecting tort of negligent construction); *Berschauer/Phillips*, 124 Wn.2d at 823 (general contractor may not “recover purely economic damages in tort from a design professional”).

definitions of economic injuries are broad and maleable”) (internal quotations omitted).

As the Ninth Circuit has observed, the phrase “economic loss rule” has its “roots in common law limitations on recovery of damages in negligence actions in the absence of physical harm to person or property.” *Giles v. General Motors Accep.*, 494 F.3d 865, 873 (2007). Courts in many other jurisdictions therefore use the term “economic loss rule” simply to refer to this general tort rule barring ordinary negligence claims absent physical harm. *See, e.g., In re Chicago Flood Litigation*, 680 N.E.2d at 274. Over the years, courts have identified various exceptions to or exclusions from this general rule. For example, intentional torts, and in particular fraud claims, are acknowledged as an exception to the rule. *See Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960); *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969); *see also Arthur D. Little Intern., Inc. v. Dooyang Corp.*, 928 F. Supp. 1189, 1205 (D. Mass. 1996) (“The economic loss rule does not apply to harm caused by intentional misrepresentations”) (citations omitted)). Similarly, negligent misrepresentation has been widely recognized as an exception to the economic loss rule. *See e.g. Nota Constr. Corp. v. Keyes Assocs., Inc.*, 45 Mass. App. Ct. 15, 20, 694 N.E.2d 401 (1998) (“An exception to the doctrine permits recovery for economic losses resulting from negligent misrepresentation”) (footnote and citation omitted).

The term “economic loss rule” began to appear more often in the second half of the twentieth century as courts developed the new area of *products liability* law. *Giles*, 494 F.3d at 873; *Town of Alma v. AZCO Constr.*, 10 P.3d 1256, 1262 (Colo. 2000). In Washington, the terms “economic” and “noneconomic” are “derived from product liability cases,” and “can be confusing when removed from their original context.” *Eastwood*, 170 Wn.2d at 396. Products liability is a “hybrid, born of the illicit intercourse of tort and contract, unique in the law.” *Stuart*, 109 Wn.2d at 418 (citing W. Prosser, TORTS 634 (4th ed. 1971)). Courts revolving product liability disputes struggled with the issue of whether to allow tort remedies for the direct and indirect financial losses caused by defective products, including the cost of repairing or replacing the product itself as well as resulting lost profits or lost production. *See East River Steamship Corp. v. Transamerica Duval, Inc.*, 476 U.S. 858, 868 (1986) (products liability cases present the “intriguing question whether injury to a product itself may be brought in tort”). On one hand, expectations regarding the quality of the product itself are regulated by contract and warranty law. On the other hand, a defective product is tangible property that could be characterized as being physically harmed by the defendant’s alleged negligence. *Id.*

In its first case discussing tort remedies available for injuries caused by defective products, the Washington Supreme Court adopted a broad rule allowing plaintiffs to sue in tort for direct and indirect financial

losses caused by product defects, even without physical harm to persons or to any property other than the product itself. *Berg v. General Motors Corp.* 87 Wn.2d 584, 585, 555 P.2d 818 (1976). *Berg* involved a commercial fisherman who lost business when his diesel engine broke down. The Court held that “[a] manufacturer intending and foreseeing that its product would eventually be purchased by persons operating commercial ventures, owes such persons the duty not to impair that purchaser’s commercial operations by a faulty product,” because there was a “foreseeable risk that the output of the entire enterprise would be diminished or even temporarily halted.” 87 Wn.2d at 592. The decision in *Berg* “placed Washington in the company of a steadily dwindling minority of jurisdictions that allowed tort-based actions for economic loss” in product liability. *Washington Water Power Co.*, 112 Wn.2d at 858 n.7. Under *Berg*, Washington law allowed product liability plaintiffs a tort remedy for *any* damages, including such purely “economic loss” as “diminution of product value,” as well as “indirect or consequential economic loss” such as “loss profits” – regardless of whether the defective product caused any injury to persons or the plaintiffs’ other property. *Id.* at 860 n.9

In contrast with Washington’s approach in *Berg*, other jurisdictions had adopted a bright-line rule that precluded any tort remedy in products liability when the only physical harm is to the defective product itself – limiting parties to their contract and warranty remedies unless the product

damages persons or *other* property. This is the rule embraced by the United States Supreme Court in *East River* for admiralty law. 476 U.S. at 868. In the Supreme Court's succinct phrase, barring damages in products liability for purely economic harms helps ensure that contract law does not "drown in a sea of tort." *Id.* at 866. Many other jurisdictions apply *East River*'s rule to products liability claims. See *Graybar*, 112 Wn.2d at 858 (collecting cases); see also *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 91, 866 P.2d 15 (1993) (Utter concurring) ("in the traditional 'property damage' cases, the defective product damages other property. In this case, there was no damage to 'other' property") (citing *East River*, 476 U.S. at 867).

The broad Washington products liability rule adopted in *Berg* was "short-lived." *Berschauer/Phillips*, 124 Wn.2d at 822. After the Legislature enacted the Products Liability Act, which limited the availability of damages for economic losses in statutory claims, the Washington Supreme Court rejected the bright-line rules of *both Berg* and *East River*, and instead took a middle ground regarding the availability of damages for purely economic losses in products liability law. The Court recognized that the absolute rule of *East River* offered "more certainty," but concluded that it came at "too high a price." *Graybar*, 112 Wn.2d at 864. Washington therefore follows a "risk of harm" analysis, which makes available the same tort remedy that "would be available if the product defect had injured something or someone else," including

consequential economic losses, whenever a “*hazardous* product defect has injured only the product itself.” *Graybar*, 112 Wn.2d at 865-66 (emphasis added). See also *Staton Hills Winery Co., Ltd. v. Collons*, 96 Wn. App. 590, 595, 980 P.2d 784 (1999) (“a ‘risk of harm’ analysis is applicable” when the “only damage claim is for the defective product itself, and not persons or other property”); *East River*, 476 U.S. at 870 (risk of harm approach for products liability distinguishes “between the disappointed users and the endangered ones,” allowing “only the latter to sue in tort”).

For example, in *Washington Water Power Co. v. Graybar Elec. Co.*, a utility that incurred millions of dollars of direct and indirect costs caused by defective insulators was barred from asserting a negligence claim against the manufacturer. 112 Wn.2d at 859. In contrast, in *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Constr.*, the Court allowed the plaintiff to pursue a negligence claim for economic damages caused by a building’s hazardous structural failure. 119 Wn.2d 334, 351-52, 831 P.2d 724 (1992).

Even though the Washington Supreme Court rejected *East River*’s bright-line rule barring any tort claim for purely economic losses in products liability, Washington courts nevertheless have shared the *East River* court’s concern that tort law not be permitted to undermine the law of contract and parties’ ability to allocate commercial risk. See, e.g., *Berschauer/Phillips*, 124 Wn.2d at 827 (parties should not be able to “bring a cause of action in tort to recover benefits they were unable to

obtain in contractual negotiations”); *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 162, 52 P.3d 30 (2002) (“where parties to a contract allocate risk, tort remedies are unavailable”). Outside of the products liability context, Washington cases therefore used the term “economic loss rule” to refer to “a conceptual device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract.” *Berschauer/Phillips*, 124 Wn.2d at 827. As set forth in the Supreme Court’s former formulation of the rule:

The key inquiry is the *nature of the loss* and the manner in which it occurs, i.e. are the losses economic losses, with *economic losses distinguished from personal injury or injury to other property*. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be *limited to contractual remedies*.

Alejandro, 159 Wn.2d at 684 (emphasis added). This is the approach that the Port asks this Court to apply in this case, even though it has now been rejected by the Supreme Court. *See, e.g.*, App. Br. at 24 (citing *Alejandro*, 159 Wn.2d at 685-86).

This Court must follow the Supreme Court’s more recent decisions in *Eastwood* and *Affiliated*, which held that “the fact that an injury is an economic loss or the parties also have a contractual relationship is *not* an adequate ground, by itself, for holding that a plaintiff

is limited to contract remedies.” *Eastwood*, 170 Wn.2d at 388-89.⁵ In *Eastwood*, two members of the Supreme Court argued that in determining the scope of tort liability, courts should continue to focus on whether plaintiffs’ losses are characterized as economic or noneconomic. 170 Wn.2d at 405 (Madsen, concurring) (“economic losses are distinguished from personal injury or injury to other property”); *see also Affiliated*, 170 Wn.2d at 535 (Madsen dissenting) (same). But the rest of the Court was united in rejecting the rule that the Port advocates: **both** Justice Fairhurst’s lead opinion in *Eastwood* (signed by three justices) and Justice Chambers’s plurality concurrence (signed by four justices) instead adopt an analysis based on whether defendant owed plaintiff an “independent” tort duty.⁶

As the Supreme Court concluded, “The term ‘economic loss rule’ has proved to be a misnomer. It gives the impression that this is a rule of

⁵ As the Court observed in *Eastwood*, careful examination of prior cases actually “shows that ordinary tort principles have always resolved” the question of “how a court can distinguish between claims where a plaintiff is limited to contract remedies and cases where recovery in tort may be available.” 170 Wn.2d at 389. *See, e.g., Alejandre*, 159 Wn.2d at 682 (Washington law “prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows **only** from contract because tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed **only** by agreement”) (emphasis added) (citations and quotation marks omitted).

⁶ The primary distinction between Justice Fairhurst’s and Justice Chambers’s opinions, which is not relevant to the present appeal, is that Justice Chambers did not “find the lead opinion’s discussion of proximate cause particularly enlightening.” *Eastwood*, 170 Wn.2d at 417 (Chambers concurring).

general application and any time there is an economic loss, there can never be recovery in tort.” *Eastwood*, 170 Wn.2d at 387-88. *See also id.* at 408 (Chambers concurring) (“The words “economic loss rule” unfortunately gave the impression of a rule of general application; that anytime there is an economic loss, there would not be recovery in tort”). Instead of focusing on the nature of the loss, courts now must determine whether defendant had an independent legal duty to avoid plaintiff’s alleged injury. *Eastwood*, 170 Wn.2d at 389-90.

3. A Defendant May Have An Independent Tort Duty To Avoid Causing Economic Harm Even When The Plaintiff’s Claims Arise In The Context Of Contractual Relationships.

The Port erroneously argues that Trinity’s three tort claims are barred because they “emanate solely from a contractual relationship between Key and the Port.” App. Br. at 11.⁷ *See also id.* at 12 (“when parties’ difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract”). However, the Supreme Court has held that “economic losses are sometimes recoverable in tort, *even if* they arise from contractual relationships.” *Eastwood*, 170 Wn.2d at 388 (emphasis added) (citing examples of independent tort causes of actions, including “intentional and wrongful interference with another contractual relationship or business

⁷ Although Plaintiffs dispute the Port’s characterization of the parties’ contractual relationships, that issue is not before the Court in this appeal. *See supra* at n.2.

expectancies,” “fraudulent misrepresentation,” and “negligent misrepresentation”). As Justice Chambers observed,

The law often imposes *greater* duties on persons in relationships with each other because the harm is more foreseeable. In every business or contractual relationship, parties will have duties imposed by law in addition to any duties they have assumed by agreement. It is possible that parties will assume greater duties by agreement than imposed by law, and it is possible that parties may alter duties imposed by law with respect to one another.⁸ However, *where society has imposed a duty by law, that duty is not abrogated merely because parties also have a business or contractual relationship.*

Id. at 407-08 (Chambers concurring) (emphasis added). Each of Trinity’s and Key’s alleged injuries “is remediable in tort if it traces back to the breach of a tort duty arising independently of the *terms of the contract.*”

Id. at 389 (emphasis added).

C. Trinity May Assert Each Of Its Three Tort Causes Of Action Against The Port.

1. The Port’s Alleged Agreement With Key Does Not Divest Trinity Of Its Tort Remedies.

The trial court granted Trinity’s motion for reconsideration of its order entering summary judgment on Trinity’s tort claims because it is undisputed that Trinity – unlike Key – was not a party to *any* agreement with the Port. *See* CP 1088. Under the Supreme Court’s subsequent

⁸ Parties may enter into contracts that “limit liability for damages resulting from negligence,” but such exculpatory clauses are strictly construed and must be conspicuous. *Eastwood*, 170 Wn.2d at 394 n.3. No such limitation appears in the Letter of Intent.

decision in *Eastwood*, however, *even if* parties “have a contractual relationship,” a plaintiff may obtain “recovery in tort when the defendant’s alleged misconduct implicates a tort duty that arises independently of the terms of the contract.” *Eastwood*, 170 Wn.2d at 393.

Even under Washington courts’ former characterization of the “economic loss rule,” the trial court correctly determined that the rule did not bar Trinity from asserting claims in tort. According to the Port, 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.” App. Br. at 34. But the rule limiting contract parties to their contractual remedies does not apply to nonparties to the contract. *See Alejandre*, 159 Wn.2d at 681 (former economic loss rule applied to the “parties to [the] contract”); *Borish v. Russell*, 155 Wn.App. 892, 230 P.3d 646 (2010) (“In order for the economic loss rule to apply and preclude damages for negligent misrepresentation, there must be a contract between the parties”). As this Court recently observed, a “third party beneficiary” may have legal rights, but it is “not a party to the contract.” *Kim v. Moffett*, 156 Wn. App. 689, 699, 234 P.3d 279 (2010).

In the hearing on Plaintiffs’ motion for reconsideration, the trial court observed that “a contractual relationship among the parties, by definition, implies that those parties that had an opportunity to allocate risk,” and “If you’re a third-party beneficiary, you do not, by definition, have an opportunity to allocate risk.” Petition for Review at A153-54.

For example, in *Borish v. Russell*, plaintiffs' lender hired the defendant to appraise a piece of property that was being sold to plaintiffs by another defendant. Plaintiffs presented evidence that they received and relied on representations made by the appraiser. 155 Wn.App. at 905. This Court reversed the trial court's grant of summary judgment in favor of the appraiser, concluding that because "no contractual relationship existed between" them, the plaintiffs could pursue their tort claim against the appraiser. *Id.*⁹

Like the plaintiffs in *Borish*, Trinity was originally brought together with the Port because of a transaction that Trinity itself was not a party to. And as in *Borish*, the economic loss rule (now the independent duty doctrine) does not bar Trinity from asserting tort claims against the Port arising from their interactions. The trial court's decision to reconsider its original summary judgment order regarding Trinity was not "manifestly unreasonable or based upon untenable grounds or untenable reasons." *Salas*, 168 Wn.2d at 674.

⁹ In contrast with the contractual arrangement in *Borish*, in *Berschauer/Phillips* the Supreme Court declined to permit a general contractor to bring either a negligence or negligent misrepresentation claim against a design professional because of the construction industry's "precise allocation of risk as secured by contract" among "architects, engineers, contractors, developers, vendors, and so on." 124 Wn.2d at 827. As in *Borish*, the bilateral agreement at issue in the present case merely involves the proposed sale of the Property from Key to the Port, not the precise allocation of risk among parties to multiple interlocking agreements. CP 1701, ¶ 47.

interference with a business relationship. *F.D. Hill & Co. v. Wallerich*, 67 Wn.2d 409, 412-13, 407 P.2d 956 (1965) (citing *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 589, 277 P.2d 708 (1954)). “All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectancy of fruition.” *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1972). “A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value.” *Newton Ins. Agency & Brokerage, Inc.*, 114 Wn. App. at 158 (citing RESTATEMENT § 766B, cmt. c.)

The Port argues that Trinity had no business expectancy because Trinity “had neither a relationship with the Port, nor a relationship with any prospective tenants of the property owner, Key.” App. Br. at 39. However, the business expectancies actually at issue in this case are the opportunities Trinity had to terminate its existing financial obligations under its lease *with Key* – either as part of Key’s proposed sale of the Property to Widman in December 2007, CP 1697 ¶¶ 36, or as part of the proposed re-lease of the Property to MetalTech or mkConstructs in March and April 2008. CP 1702 ¶¶ 49-50. Like the “exercise by a third party of an option to renew or extend a contract with plaintiff,” Key’s agreement to alter the terms of Trinity’s lease would have been a “potential contract ... of pecuniary value to the plaintiff.” App. Br. at 38 (citing RESTATEMENT § 766B, cmt c). All three of these transactions would have required Key to release Trinity from its lease obligations – and required Trinity to

release its lease rights – in order to make the Property available for use by the new owner or tenant. It is undisputed that there was a “relationship between parties contemplating a contract” that would alter Trinity’s lease rights and obligations, and substantial evidence that there was “at least a reasonable expectancy of fruition.” *Scymanski*, 80 Wn.2d at 84-85. *See, e.g.*, Supp. CP ___ (3/26/2010 Hall Baetz declaration at p. 95 of Ki Ham deposition) (Trinity expected that any of the contemplated transfers of the Property would relieve it of substantial lease expenses). The Port’s *tort* duty not to interfere with each of these business expectancies “aris[es] independently” of the Port’s separate *contractual* duty to Trinity if it was a third-party beneficiary under the “terms of the contract” allegedly entered in March 2008 between the Port and Key. *Eastwood*, 170 Wn.2d at 394.

Second, the Port knew about each of Trinity’s opportunities to terminate its lease obligations with Key. *See* CP 1696-97 ¶¶ 39-40 (Widman sales proposal); CP 1702-03 ¶ 53 (MetalTech re-lease proposal); *id.* (mkConstructs re-lease proposal). Although the Port suggests it did not have knowledge of the potential effects of its conduct, such specific knowledge is not required for Trinity to maintain its cause of action for interference. *Topline Equipment, Inc. v. Stan Witty Land, Inc.*, 31 Wn. App. 86, 639 P.2d 825 (citing *Calbom v. Knudtson*, 65 Wn.2d 157, 396 P.2d 148 (1964)). Instead, Trinity need only show that the Port knew that the sale or re-lease of the Property would have give Trinity the opportunity

to terminate its existing lease obligations. “It is not necessary that the interferor understand the legal significance of such facts.” *Calbom*, 65 Wn.2d at 165.

Third, the Port’s intentional interference caused the termination of Trinity’s expectancies. Relying on the Port’s false representations, Key and Trinity failed to avail themselves of the Widman, MetalTech, and mkConstructs opportunities. CP 1699-70 ¶¶ 41-42; 1703 ¶¶ 54, 56-57; CP 1704 ¶ 64.

Fourth, evidence in the record demonstrates that the Port’s interference was based on an improper purpose or improper means. *See, e.g.*, CP 1713-14 ¶ 117 (Port’s real estate director testified that he withheld material information because he was “concerned that if Trinity knew what was going on, Trinity might sell the property to someone else”).

Finally, the Port has failed to establish the absence of any factual disputes regarding the element of damages. To the contrary, the Port acknowledges that Trinity “would have benefited financially from termination of its lease with Key.” App. Br. at 39; *see also* CP 100-01 (Trinity lost an estimated \$4.4 million from the lost opportunities to terminate its lease obligations before the real estate market soured). Because the Port had an independent legal duty not to interfere with Trinity’s business expectancies, this Court should affirm the trial courts’ reconsideration order denying the Port’s motion for partial summary judgment on Trinity’s tortious interference cause of action.

b. The Port Owed Trinity An Independent Legal Duty Not To Intentionally Defraud It.

Washington law imposes an independent legal duty not to commit fraud, regardless of whether plaintiff's "injury is an economic loss or the parties also have a contractual relationship." *Eastwood*, 170 Wn.2d at 788-89 (citing *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969)). *See also Alejandre*, 159 Wn.2d at 699 (Chambers concurring) ("Whether we see this as an exception to the economic loss rule or simply that we recognize that in this state being defrauded is a dignitary injury, not a commercial one, we reach the same result"); *Steineke v. Russi*, 145 Wn.App. 544, 190 P.3d 60 (2008) (holding that even when plaintiff was barred from seeking damages in negligence for purely economic losses, he could nevertheless assert a separate claim for common law fraud).

An intentional misrepresentation claim has 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.

Adams v. King County, 164 Wn.2d 640, 662, 192 P.3d 891 (2008). The Port failed to establish the absence of a genuine issue of fact on either of the two elements of Trinity's fraud claim that the Port disputes on appeal.

First, the Port argues that “Trinity was not a third party whom the Port had reason to expect would be influenced in the transaction between the Port and Key.” App. Br. at 44. But the Port admits it was “aware that Trinity was a lessee of Key,” and that “Trinity knew the terms of the negotiations between Key and the Port.” *Id.* The Port nevertheless argues that “Trinity had no role to play in the ‘the transaction’ between the Port and Key, nor did Trinity have any role to play in any sale or lease of Key’s property.” *Id.* To the contrary, evidence in the record and reasonable inferences therefrom establish that Port knew exactly how Trinity would have benefited from each of the missed opportunities to sell or re-lease the Property – because the Port’s own March 2008 agreement with Key explicitly stated that as part of any transfer of the Property, “Trinity Glass” would “vacate the warehouse and office space.” CP 91, 93.

Moreover, throughout the parties’ interactions the Port knew that it was communicating with individuals who were working on behalf of both Trinity and Key. CP 1694 ¶¶ 21, 22; CP 1399-1400; CP 1345-46. Trinity is entitled to the inference that Port expected Trinity to be influenced by the Port’s misrepresentations and omissions. *See, e.g., Korslund, Inc.*, 156 Wn.2d at 177 (evidence to be construed and inferences drawn in favor of nonmoving party); *see also* CP 1713-14 ¶ 117 (Port real estate director testified that he was “concerned that if *Trinity* knew what was going on, Trinity might sell the property to someone else”) (emphasis added).

Second, the Port conclusorily argues that “the statements upon which Trinity bases in its fraudulent misrepresentation claim were merely statements regarding future events.” App. Br. at 46. However, Trinity’s claim is not limited to a “promise of future performance.” *Id.* To the contrary, Port employees repeatedly represented to Trinity and Key that Superlon’s property had to be taken for the Port’s terminal redevelopment project, that Superlon had to be relocated, that there was no possible way the Port could proceed without taking down the Superlon property, that taking of the Superlon property was a certainty, that Key’s Property was the only available property that would accommodate Superlon’s physical needs and the Port’s timing requirements, that Key’s \$35 million purchase price was not a problem because of the Port’s critical need, and the Port therefore intended to purchase Key’s property for \$35 million. CP 1697 ¶ 40 (a) – (d). In any event, an “an existing fact” also includes anything of a present nature indicated in a statement, even if that statement concerns a future event:

[A] statement is one of existing fact if a quality is asserted which inheres in the article or thing about which the representation is made so that, at the time the representation is made, the quality may be said to exist independently of future acts or performance of the one making the representation, independently of other particular occurrences in the future, and independently of particular future uses or future requirements of the buyer.

Shook, 56 Wn.2d at 356 (citing *Nyquist v. Foster*, 44 Wn.2d 465, 268 P.2d 442 (1954)) (emphasis added). Moreover, even “promises of future

performance” are actionable if such “promise[s] [are] made for the purpose of deceiving.” *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 762, 709 P.2d 1200 (1985); *see also Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 32-33, 111 P.3d 1192 (2005) (promises “made ‘for the purpose of deceiving and with no intention of performing’” supported a claim of misrepresentation). The Port has failed to demonstrate the absence of genuine issues of fact regarding either disputed element of Trinity’s fraud claim.

c. The Port Owed Trinity An Independent Legal Duty Not To Negligently Misrepresent Material Facts.

Washington recognizes an independent tort claim for purely economic losses resulting from negligent misrepresentations. *Eastwood*, 170 Wn.2d at 388 (citing *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820 (1998)). The elements of a negligent misrepresentation claim are as follows:

One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

West Coast, Inc. v. Snohomish County, 112 Wn.App. 200, 209 (2002) (citing RESTATEMENT § 552). Rather than authorize tort claims by “every person who ultimately becomes aware of the misstatement,” 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.’ 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) (citing RESTATEMENT § 552, cmt a).

The Port suggests that including both Trinity and Key within the group of parties entitled to rely on the Port’s representations would expand liability “far beyond any recognized boundaries.” App. Br. at 40. But Trinity was one of the very limited number of parties who were intimately involved in the interactions regarding the Property. *See, e.g.*, CP 1694 ¶¶ 21, 22; Supp. CP ___ (3/26/2010 Hall Baetz at p. 55 of 12/16/2009 Alex Lee deposition). Moreover, Trinity disputes the Port’s contention that Trinity’s employees “were *only* acting in their capacity as agents for Key.” App. Br. at 40 (emphasis added). To the contrary, evidence in the record supports the inference that the Port made its representations to *both* Trinity and Key. *See, e.g.*, Supp. CP ___, ___, ___ (3/26/2010 Hall Baetz at p. 42 of 12/16/2009 Ki Ham deposition; p. 37 of Bauder deposition; p. 12 of 12/29/2009 Hacker deposition).

The Port also argues that it did not “have any need to influence Key’s tenant in order to achieve a purchase from Key.” App. Br. 41. But Trinity’s releasing its lease rights was essential to relocating Superlon to

the Property. The Port admits that it “was aware that Trinity was a lessee of Key,” that “Trinity knew the terms of the negotiations between Key and the Port,” and that the Port intended that the information it communicated be used “for the purpose of arriving at an agreement with Key regarding the potential sale of Key’s property.” App. Br. 42, 45. Any such agreement necessarily involved Trinity’s business decisions. CP 1694 ¶¶ 21, 22; Supp. CP ___ (3/26/2010 Hall Baetz at p. 55 of Alex Lee deposition). Because the Port had an independent legal duty under Section 552, this Court should affirm the trial courts’ reconsideration order denying the Port’s motion for partial summary judgment on Trinity’s negligent misrepresentation cause of action.

D. Because the Port Also Owed Independent Legal Duties To Key, The Trial Court Erred By Dismissing Key’s Tort Claims.

Plaintiffs have cross-appealed from the trial Court’s May 28, 2010 Order granting the Port’s motion for summary judgment on Key’s tort claims. CP 1040–89. In its Order, the trial court determined that the March 2008 Letter of Intent between Key and the Port was a contract. *Id.* Based solely on this “contractual relationship” and its understanding of the “economic loss rule,” the court dismissed all three of Key’s tort claims. CP 1040–89 (citing *Alejandre*, 159 Wn.2d at 684). The Port apparently takes the same position in this appeal. *See, e.g.*, App. Br. at 12 (“when parties’ difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract”); *id.* at

22 (the Letter of Intent between Key and the Port “was the core basis of the litigation”); *id.* at 47 (quoting May 28, 2010 Order).

As the Supreme Court subsequently observed in *Eastwood*, the trial court’s characterization of the “economic loss rule, while perhaps understandable, is not correct.” 170 Wn.2d at 387. Like the Court of Appeals in *Eastwood*, “[s]eeing both a contractual relationship and an economic loss,” the trial court “believed that *Alejandro* therefore compelled a holding” that Key’s “only remedy was a recovery for breach” of its agreement with the Port. *Id.* As the Supreme Court has now clarified, however, “the economic loss rule does *not* bar recovery in tort when a tort duty arises independently of the *terms of the contract.*” *Id.* at 393 (emphasis added). Because Washington tort law imposed an independent legal duty on the Port to avoid harming Key by tortiously interfering with its business expectancies or by intentionally and negligently misrepresenting and omitting material facts, this Court should reverse the trial court’s order granting summary judgment in favor of the Port on each of Key’s three tort causes of action.

1. The Port Owed Key An Independent Legal Duty Not To Interfere With Its Business Expectancies.

As the Port correctly points out, it “owed **Trinity** no duty not to interfere with **Key’s** business opportunities.” App. Br. at 39-40 (emphasis in original). But under long-standing Washington law, the Port owed **Key** an independent legal duty not to interfere with its business opportunities.

See, e.g., Eastwood, 170 Wn.2d at 388 (citing *Commodore*, 120 Wn.2d at 137).

As set forth above in connection with Trinity's tort claim against the Port, tortious interference requires proof of five elements. *See supra* at 32 (citing *Sintra, Inc.*, 119 Wn.2d at 28). Key has identified evidence supporting each element:

First, Key had valid business expectancies as a result of the sale and re-lease opportunities with Widman, CP 1696 ¶ 39.

Second, the Port admits that it knew about each opportunity. *See* CP 1696-97 ¶¶ 39-40 (Widman sales proposal); CP 1702-03 ¶ 53 (MetalTech re-lease proposal); *id.* (mkConstructs re-lease proposal).

Third, both before and after the parties entered into their agreement, the Port induced Key to forego these opportunities. CP 1696-97 ¶¶ 39, 40.

Fourth, the Port acted based on an improper purpose or improper means. *See* CP 1713-14 ¶ 117.

Fifth, Key suffered damages as are result of the Port's conduct.

This Court must consider all facts and reasonable inferences in the light most favorable to Key as the nonmoving party. *Korslund*, 156 Wn.2d at 177. Because the Port failed to establish the absence of a genuine issue of fact on each of these elements, the trial court erred in granting summary judgment on Key's tortious interference claim.

2. The Port Owed Key An Independent Legal Duty Not To Intentionally Defraud It.

The Port had an independent legal duty not to make fraudulent representations to Key or to withhold material facts from Key, regardless of any contractual relationship between the parties. *See supra* at 36 (citing *Eastwood*, 170 Wn.2d at 388).

The Port acknowledges that it made each of the statements challenged by Plaintiffs to individuals representing Key. App. Br. at 44. For the reasons set forth above in connection with Trinity's fraud claim, the Port has failed to establish the absence of material facts regarding Key's claim for intentional misrepresentation.

Moreover, fraud can be proved in *two* ways. "A plaintiff may plead and prove all nine elements of fraud, or *in the alternative*, may show that the defendant breached an affirmative duty to disclose a material fact." *Baddeley*, 138 Wn. App. at 338, 156 P.3d 959 (emphasis added) (citing *Stiley*, 130 Wn.2d at 515-16, 925 P.2d 194 (Talmadge, J., concurring)). Under the Restatement (2d) of Torts §§ 551 and 552, both of which have been adopted by the Washington Supreme Court, a party to a business transaction must disclose matters known to it that it knows to be necessary to prevent its partial or ambiguous statement of the facts from being misleading. *Colonial Imports*, 121 Wn.2d at 731. As the Port acknowledges, "the duty of reasonable care to disclose as set out in Section 551 runs from 'one party to a business transaction to the other,'" and Key was a party to the transaction with the Port. App. Br. at 45.

Both the Port's intentional misrepresentations to Key and its omission of material information establish that regardless of the contractual relationship between the parties, the Port breached its independent legal duty not to defraud Key. *See, e.g., Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 457 P.2d 535 (1969). In *Markov*, a partnership leased two warehouse buildings to ABC Transfer for a term of three years. *Id.* at 389, 457 P.2d 535. The lease did not contain a renewal option for ABC. *Id.* After the partnership commenced an action for unpaid rent, ABC counterclaimed for damages caused by the partnership's misrepresentation and deception in promising to renew the term of the lease for three years. *Id.* at 394, 457 P.2d 535. The trial court found that the partnership had made representations during the term of the lease that it would renew the lease, although it was then *secretly negotiating a sale of the building to another*. *Id.* When the new owner acquired title, it demanded that ABC vacate the property after expiration of the original term of the lease. The trial court awarded substantial damages to ABC based on the misrepresentations. As the Court observed:

There are times when the law demands of one an honest declaration of future intentions. If, instead of merely predicting future events, he promises to pursue a course of action, the law in all probability will oblige the promisor to keep his word. Even the failure to keep a promise one did not have to make may be as actionable as overt deceit and misrepresentation and in legal effect the equivalent of both.

Id. at 388-89, 457 P.2d 535. Similarly, Key has identified substantial evidence regarding the Port's fraudulent statements and omissions. This Court should reverse the trial court's order granting summary judgment on Key's intentional misrepresentation claim.

3. The Port Owed Key An Independent Legal Duty Not To Negligently Misrepresent Or Omit Material Facts.

Key's causes of action for tortious interference and fraud, discussed above, involved *intentional* conduct, which courts generally recognize is outside the scope of the economic loss rule. *See, e.g., In re Chicago Flood Litigation*, 680 N.E.2d at 274. Under longstanding Washington common law, damages for purely economic losses are also available in the case of losses resulting from the specific category of *negligent* misrepresentations and omissions set forth in RESTATEMENT § 552. *See ESCA Corp.*, 135 Wn.2d at 825. Other jurisdictions likewise allow damages for purely economic losses caused by negligent misrepresentations. *See, e.g., McCarthy, Lebit, Crystal & Haiman Co. v. First Union Mgt.*, 87 Ohio App. 3d 613, 630-31, 622 N.E.2d 1093 (Ohio App. 1993) (economic loss rule does not preclude recovery on claims for negligent misrepresentation); *Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 580-82 (2004) (adopting section 552 of restatement to create negligent misrepresentation exception to the economic loss rule). As in the present case, Section 552 negligent misrepresentation claims may involve parties to a particular contract. *See,*

e.g., *Flower*, 127 Wn.App. at 26; *see also Chapman v. Rideout*, 568 A.2d 829 (Me. 1990) (applying RESTATEMENT § 552)

Because Section 552 misrepresentation claims involve negligent rather than intentional conduct, courts have been particularly concerned that tort principles not be permitted to interfere with the parties' contractual expectations. "Recovery of damages for the benefit of the plaintiff's contract with the defendant is specifically not allowed under the Restatement." *Janda v. Brier Realty*, 97 Wn.App. 45, 50 (1999) (citing RESTATEMENT § 552B); *see also Berschauer/Phillips*, 124 Wn.2d at 827 (rejecting plaintiff's alternative negligent misrepresentation claim seeking only delay damages representing benefit of bargain). But Key's tort claim for negligent misrepresentation does *not* seek damages for the benefit of bargain of the Port's unconsummated purchase of the Property. "Rather, under Section 552, Key is entitled to damages for its "pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation," *id.*, namely Key's failure to obtain the benefit of the other opportunities for selling or re-leasing the Property. In contrast, the damages available for claims of *intentional* misrepresentation may include both the benefit of the bargain as well as all other pecuniary losses. *See, e.g.*, RESTATEMENT § 549.

In response to the Port's motion for summary judgment, Key presented evidence that the Port had misrepresented material facts. Key also pointed to evidence that the Port had omitted providing Key with

material information regarding the proposed sale of the Property. Nevertheless, the trial court dismissed Key's negligent misrepresentation claim along with Key's other two tort claims against the Port – based solely on its understanding of the economic loss rule. CP 1040–89. That understanding was erroneous. See *Eastwood*, 170 Wn.2d at 388 (citing *ESCA Corp.*, 135 Wn.2d at 825). This Court should reverse the trial court's order granting summary judgment on each of Key's tort causes of action.

VII. CONCLUSION

The Port had independent legal duties to avoid harming both Trinity and Key by tortiously interfering with their business expectancies, defrauding them, and by negligently misrepresenting and omitting material facts. As Justice Chambers observed in *Eastwood*, “Unfortunately, the imprecise use of the term ‘economic loss rule’ by this court led many to erroneously conclude that it was a rule of general application that precluded recovery in tort of virtually any harm that could be measured in dollars if a business relationship also existed between the parties.” 170 Wn.2d at 409 (Chambers concurring). To the contrary, the law in Washington is that “availability of a tort remedy depends on the existence of a tort duty arising independently of a contract's privately negotiated terms, not on whether an injury can be labeled an economic loss.” 170 Wn.2d at 383. This Court should affirm the trial court's determination that the economic loss rule did not bar Trinity's three tort

causes of action, reverse the dismissal of Key's tort claims, and remand Plaintiffs' tort claims for trial together with the parties' other claims.

RESPECTFULLY SUBMITTED this 6th day of June, 2011.

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CERTIFICATE OF SERVICE

I, Susan Allan, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct. I am over the age of 18 years and not a party to the within cause. I am employed by the law firm of Davis Wright Tremaine LLP And my business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045.

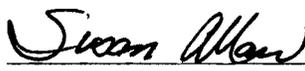
On June 6, 2011, I caused to be served via First Class U.S. mail and electronic mail, the attached **ANSWERING BRIEF AND OPENING CROSS PETITION BRIEF OF**

PLAINTIFFS on the Port of Tacoma's attorneys at the following address:

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

Executed this 6th day of June, 2011, at Seattle, Washington.



Susan Allan

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