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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
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No. _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
No. 34995-7-II

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STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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AUG 11 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
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Linda Eastwood, d/b/a Double KK Farm, *Respondent*,

v.

Horse Harbor Foundation, Inc.,
a Washington Corporation, and Maurice Allen Warren, a single person;
Katherine Daling and Michael Daling, a husband and wife and the marital
community composed thereof, *Appellants*.

Kitsap County Superior Court
Cause No. 04-2-01561-0

PETITION FOR REVIEW

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ORIGINAL

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IDENTITY OF PETITIONER

Linda Eastwood, respondent below, seeks review by this Court.

CITATION TO COURT OF APPEALS DECISION

Petitioner requests this court review *Eastwood v. Horse Harbor Foundation, Inc.*, 144 Wash.App. 1009 (2008); (Docket No. 34995-7-II, filed April 22, 2008). The Court of Appeals filed an Order Denying Motion for Reconsideration on July 9, 2008. (Copies attached).

INTRODUCTION

Horse Harbor leased a horse farm from Ms. Eastwood. The trial court found that Horse Harbor, its officers and directors, had committed waste by engaging in conduct that was grossly negligent. Specifically, the trial court found:

- Horse Harbor committed waste.¹
- The degree of neglect, its persistence and visibility, supports a finding that the degree of care exercised by Kay Daling (Horse Harbor's President) was substantially and appreciably greater than ordinary negligence. This gross negligence resulted in waste and damage to plaintiff's farm.²

¹ CP 127-131.

² Id.

No error was assigned to these findings and conclusions. Nevertheless, the Court of Appeals held that the economic loss rule bars Ms. Eastwood's claim because the risk of loss was allocated by contract – the lease. This holding effectively abolishes a claim for permissive waste because a waste claim will always arise from a lease. And a permissive waste claims will always be premised on negligence. These issues were not raised in the trial court or appellate court. The first time the economic loss rule was raised was in the appellate court's decision. That decision fails to even mention Ms. Eastwood's waste claim. And because the appellate court denied Ms. Eastwood's motion for reconsideration without comment, there has never been a reasoned judicial determination regarding Ms. Eastwood's waste claim.

ISSUES PRESENTED FOR REVIEW

1. Does the economic loss rule bar a claim for waste against a tenant?
2. May a court hold a non-profit corporation's directors liable for their gross negligence?

STATEMENT OF THE CASE

The Double KK Farm

Linda Eastwood owned a horse farm called the Double KK farm in Poulsbo for over 20 years. It was approximately 14 acres.³ Over the years she developed it into a well-kept horse farm with a large barn, many paddocks, outbuildings, horse shelters, turnout pastures, and a large covered riding arena with stalls, an office, bathrooms, and a kitchen.

The facility was designed and large enough to contain at least twenty horses easily with proper maintenance and management programs.⁴ The facility was “pristine” and “beautiful”⁵ prior to Horse Harbor's tenancy. By all accounts, it was superbly maintained.⁶

Horse Harbor Foundation

Horse Harbor Foundation is a Washington nonprofit organization.⁷ Allen Warren was the paid manager for Horse Harbor and responsible for its day-to-day operations.⁸ Katherine Daling and Michael

³ CP 123-124. Except where noted, this factual statement is taken from the trial court's Findings of Fact, to which no error was assigned.

⁴ Id.

⁵ VRP 184:3-4, 256:14, CP125.

⁶ VRP 184-187, 256:14.

⁷ CP 124.

⁸ Id.

Daling were directors and officers.⁹ Ms. Daling, the president, was at the facility once or twice a week. She was charged with supervising the maintenance program.¹⁰

The Lease

Ms. Eastwood leased a portion¹¹ of her property to Horse Harbor by written lease. On October 1, 2003, Horse Harbor took occupancy and moved about 16 horses to the property.¹² The trial court found that the facility was “pristine” when their tenancy began.¹³

Despite repeated warnings about their substandard maintenance, the defendants failed to take action.

Three weeks later, Ms. Eastwood gave Horse Harbor notice that their maintenance program was lacking.¹⁴

Other than these items, things look pretty good. Just want to keep up on things before they snow ball. With this many horses, it can be really labor intensive.¹⁵

⁹ Id.

¹⁰ VRP at 163:24-164:4.

¹¹ The portion of the property leased included the barn, arena, outbuildings, paddocks and pastures. It excluded Ms. Eastwood’s residence and equestrian store.

¹² CP 126.

¹³ CP 125.

¹⁴ Id; CP 232. (Exhibit 103).

¹⁵ Id.

More written complaints followed. These written complaints continued for months. There was no evidence that Kay Daling, who was most involved, took any steps to question or correct the problems. She was on the farm and had ample opportunity to observe the lack of maintenance programs and deterioration of the farm.¹⁶

Horse Harbor's board held a meeting on February 22, 2004. Kay Daling was present at the meeting.¹⁷ The only item on the agenda was Ms. Eastwood's complaints. The minutes state that Ms. Eastwood's complaints were discussed but no action was taken.¹⁸

On April 20, 2004, Ms. Eastwood's attorney sent a Notice of Default.¹⁹ The defaults were not cured and this action commenced.²⁰

Horse Harbor vacated in June 2005. Before they left they made some repairs. But they admitted that they did not make all the repairs they thought were necessary.²¹ The trial court found that there was a broad, persistent, and systemic failure in the care of the facility and its horses.²²

¹⁶ CP 126, 232. (Exhibits 105, 106, 109).

¹⁷ CP 126.

¹⁸ Id.

¹⁹ CP 127, 232. (Exhibit 102).

²⁰ CP 172.

²¹ VRP at 65:20-23; 1125:17-19.

²² CP 131.

Horse Harbor did not take good care of their horses or the property – this led to significant damages to the property.

Horse Harbor did not take simple, easy, steps to maintain the property – such as cleaning up after the horses and properly feeding and caring for them. The trial court found that “Horse Harbor Foundation had very poor horse care, maintenance, and manure programs.”²³ Horse Harbor’s lack of care was widespread and touched on all aspects of its operations. One of the reasons the maintenance was inadequate was that Horse Harbor relied on teenage or pre-teenage children to provide mucking and maintenance services.²⁴ But they were not adequately trained or supervised for the task.²⁵

Horse Harbor only budgeted one-hundred dollars per month for maintenance.²⁶ To trained eyes, the facility did not appear properly taken care of, or even that *any* maintenance program existed.²⁷ This amounted to gross negligence.

The details of their “broad persistent failure” can be found in the trial court’s detailed findings of fact, which were not contested on

²³ CP127.

²⁴ CP 127-128.

²⁵ Id.

²⁶ VRP 176:5-8.

²⁷ VRP 233:5-6, 194:7. CP 232. (Exhibit 110).

appeal.²⁸ In summary, the horse stalls were not cleaned of manure and urine to the extent that structural damage to the buildings resulted. Ms. Daling admitted that there were one to two inches of water and urine up against the buildings and that she was warned about this condition.²⁹ She testified there was *nothing* they could do to prevent the damage.³⁰

They did not take good care of the horses or the damage they caused. Horse Harbor's horses were not fed regularly. The fences were not maintained. They did not care for, and hence destroyed, the drainage system. The arena was not maintained. Manure management, brush, and weed control were inadequate. Horse gates were damaged and had not been repaired. They needed replacement.³¹

Upon moving out – in the face of all this damage – they spent only eight-hundred dollars to make repairs.³² The trial court found that the damage caused by Horse Harbor resulted in a diminution in value of over three hundred and fifty thousand dollars.³³ Fortunately, to repair the

²⁸ CP 127-131; VRP 151:9-10; 155:20-156:3; 566.

²⁹ VRP 155:20-156:3.

³⁰ VRP 151:9-10.

³¹ Id.

³² VRP 177:17-21.

³³ CP 132.

damages did not cost this much. Ms. Eastwood spent only \$46,790.89 in material and labor to rebuild, repair, and clean.³⁴

The Litigation

After Horse Harbor vacated, plaintiff amended her complaint alleging claims against the individual defendants for the damages caused to the property.³⁵

The case was tried to the bench.³⁶ At the close of the evidence the trial court found that the defendants' lack of care led to waste and damages. The court found that the neglect was substantial and appreciably greater than ordinary negligence. The neglect was persistent and visible. The court divided the damages into three categories. First, there was normal wear and tear for which none of the defendants were liable. Second, there was damage caused by gross negligence for which all the defendants were liable – under RCW 4.24.264. And third, there were damages that were the result of simple negligence – for which only the Horse Harbor was responsible.³⁷

³⁴ CP 232. (Exhibit 121).

³⁵ CP 1-6.

³⁶ CP 122-123.

³⁷ CP 132-135.

The individual defendants appealed (the judgment against the Horse Harbor was not appealed). The court of appeals held that the economic loss rule barred Ms. Eastwood's claims because they sound in negligence and the parties allocated the risk of loss in a contract (the lease).

The appellants had not made any argument based on the economic loss rule to the trial or appellate court. And the appellate court's opinion does not address, at all, the waste claim or how this statutory cause of action is barred by the economic loss rule. (The term "waste" is not found at all in the opinion, even though the waste claim was the basis for the trial court's findings, conclusions, and judgment).³⁸

Because these issues had not been briefed, argued, or addressed in any way, Ms. Eastwood moved for reconsideration. Finding substantial issues in the motion, the court called for a response. After receiving a response, the appellate court denied the motion without comment.

Ms. Eastwood is left with an opinion that holds that judge made law – the economic loss rule – bars her statutory claim for waste. Because permissive waste claims are almost always based on a lease, this would

³⁸ The word "waste" only occurs in a case citation in the opinion.

effectively repeal a permissive waste cause of action. The court should accept review in order to uphold this statutory cause of action.

**ARGUMENT WHY THE COURT SHOULD
ACCEPT REVIEW**

The appellate court held the economic loss rule bars Ms. Eastwood's claims. But the economic loss rule does not apply to claims for waste – a point not addressed in the appellate court's opinion.

If, as the opinion indicates, a landlord is barred by the economic loss rule from bringing a waste claim premised on negligence, then a claim for permissive waste – a well established cause of action – is impossible. Because a lease is a conveyance as well as a contract, a tenant has a statutory obligation, not imposed by the lease, to not commit waste. Our courts have long held that a tenant can commit waste by negligent acts. The trial court found that defendants' actions amounted to gross negligence and constituted waste. If Washington adopts a rule whereby the economic loss rule bars landlords from asserting waste claims based on negligent acts (for example if a tenant burns down a structure) the cause of action will be eviscerated. The appellate court's holding fails to recognize a lease's dual nature (a contract *and* a conveyance) and runs contrary to the way our courts have imposed liability for negligent acts

that cause waste.

As such, the opinion is in conflict with Supreme Court decisions permitting permissive waste claims where the defendant is a tenant pursuant to a lease.

Additionally, because the appellate court held that the economic loss rule (judge made law) bars a statutory claim (waste) the decision implicates separation of powers issues – a significant issue under the Washington State Constitution.

Finally, because liability against the individual defendants as directors and officers of Horse Harbor, the decision implicates the application of RCW 4.24.264. Because there is not a single published case regarding this statute, its application is an issue of substantial public interest that should be determined by this Court.

A. THIS COURT HAS LONG RECOGNIZED A CLAIM FOR WASTE AGAINST A TENANT UNDER A LEASE – REGARDLESS OF THE ECONOMIC LOSS RULE.

The appellate court's decision is in conflict with this Court's holdings that permissive waste – waste caused by negligence – is a well established cause of action against a tenant under a lease.

A lease is not only a contract, as stated in the appellate court's opinion, but it is also a conveyance. "Generally, a lease is a conveyance

of a limited estate for a limited term with conditions attached.” *Resident Action Council v. Seattle Housing Authority*, 162 Wash.2d 773, 778, 174 P.3d 84, 87 (2008). Independent of any contractual obligations under a written lease, a tenant has an obligation incident to the leasehold to not commit waste.

Waste is a statutory cause of action. See RCW 64.12.010-020; See also *McLeod v. Ellis*, 2 Wash. 177, 26 P. 76 (1891); *Delano v. Tennant*, 138 Wash. 39, 244 P. 273 (1926); *Graffell v. Honeysuckle*, 30 Wash.2d 390, 392, 191 P.2d 858, 859 (1948).

It has long been recognized by our courts:

Waste is an unreasonable and improper use and abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in substantial injury thereto. It is a violation of the obligation of the tenant to treat the premises in such a manner that no harm be done to them, and that the estate may revert to those having the reversionary interest, without material deterioration. Jones, *Landlord & Tenant*, § 625; *Davenport v. Magoon*, 13 Or. 3, 4 Pac. 299, 57 Am. Rep. 1; *Delano v. Smith*, 206 Mass. 365, 92 N. E. 500, 30 L. R. A. (N. S.).

Moore v. Twin City Ice & Cold Storage Co., 92 Wash. 608, 611, 159 P. 79, 780 (1916).

Usually, a tenant has possession under a lease. And that lease generally controls the relationship between the parties. This Court's oft-cited case on waste, *Graffell v. Honeysuckle* was a case involving a written lease.

Permissive waste is caused by negligence. As stated in *Moore*, waste is "the violation of an obligation to treat the premises in such manner that no harm be done to them, and that the estate may revert to those having an underlying interest, undeteriorated by any willful *or negligent act.*" *Id.* (Emphasis added).

In *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 726 P.2d 8 (1986) the court discusses the difference between commissive waste (a destructive or voluntary act) and permissive waste (implying negligence or omission to do that which would prevent injury). Waste is not simply causing damage to a leasehold, it is causing substantial injury (*see Moore*).

If the appellate court's opinion is the law in Washington it would make it impossible to bring a permissive waste claim. For example, if a tenant negligently burns down a leasehold structure the economic loss rule would apply. The landlord would be limited to contract remedies. If the lease did not address this eventuality, a landlord would be without the

statutory remedy provided by the legislature. This would constitute a significant change in Washington law and render RCW 64.12.010-020 superfluous.

After stating the economic loss rule, the appellate court's opinion states:

...[T]he parties had a contractual relationship in the form of a lease agreement. Further, Eastwood based her claims against Warren and the Dalings on a contractual theory of recovery: she sought economic losses (in the form of the cost to repair her property) resulting from HHF's actions that led to damages and breach of the lease agreement. Thus the economic loss rule applies in this case.

Opinion at 4.

This ignores several key facts and their application to established precedent. First, the parties also had a landlord-tenant relationship which carries with it a statutory obligation to not commit waste. The appellate court's opinion ignores the fact that Ms. Eastwood asserted and proved that the defendants committed waste. The opinion also ignores the fact that the trial court found that waste had been committed as a result of gross negligence.

The opinion also ignores the policy, recognized by this Court, that the economic loss rule does not bar statutory cause of action:

There are protections for homebuyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects.

Alejandre v. Bull, 159 Wash.2d 674, 685, 153 P.3d 864, 870 (2007).

Just as the economic loss rule does not bar statutory warranties, it does not bar a statutory claim for waste. To do so would implicate separation of powers concerns.

B. THE APPELLATE COURT'S DECISION VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Most, if not all, permissive waste claims arise out of a tenancy governed by a lease. If the appellate court's decision is a correct statement of the law, no one could ever bring a statutory claim for permissive waste. This would mean that the economic loss rule effectively repeals statutory permissive waste claims. This should not be permitted. This amounts to an encroachment upon the legislative branch of the government. *Windust v. Department of Labor and Industries*, 52 Wash.2d 33, 323 P.2d 241 (1958).

When faced with a similar issue Florida's Supreme Court held that the economic rule does not bar statutory causes of action. Recognizing that the economic loss rule is a court-created doctrine, that court stated:

If courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the legislature's right to act in this area.

Comptech Intern., Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219 (Fla. 1999).

The legislature established waste as a cause of action that arises in a landlord-tenant relationship. This relationship arises from a contract (lease) – whether written or not. The economic loss rule cannot act to repeal permissive waste as a statutory cause of action.

C. THE ECONOMIC LOSS RULE'S APPLICATION – AND THE APPLICATION OF RCW 4.24.264 ARE ISSUES OF SUBSTANTIAL PUBLIC INTEREST.

The economic loss rule limits remedies available outside the contract when the parties' relationship was governed by a contract. But, as cited above, the *Alejandre* decision states that statutory remedies remain regardless of the economic loss rule. But the appellate court's reasoning, based on *Alejandre*, if followed by other courts, would act to bar valid statutory claims that should not be affected by the economic loss rule.

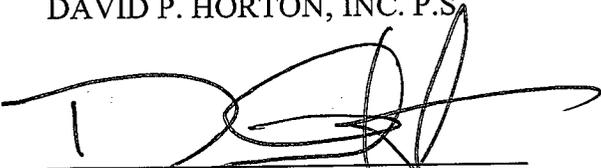
Second, there are no published decisions interpreting RCW 4.24.264. The limitations on nonprofit liability should be of great interest to these entities, persons interacting with them, and trial courts asked to impose liability on officers of nonprofits.

CONCLUSION

By treating a lease simply as a contract, the appellate court's opinion ignores the fact that the respondents were found to have committed waste as a result of gross negligence. Waste being a special cause of action related to the conveyance of real property; (specifically provided for by the legislature) the economic loss rule does not apply. The Court should accept review and restore the correct judgment of the trial court.

Respectfully submitted this 6th day of August, 2008.

LAW OFFICE OF
DAVID P. HORTON, INC. P.S.



By: ~~David P. Horton~~, WSBA 27123
Attorney for Linda Eastwood

APPENDIX

- A. Unpublished Opinion -- Eastwood v. Horse Harbor Foundation, Inc., 144 Wash.App. 1009 (2008); (Docket No. 34995-7-II, filed April 22, 2008).
- B. Order Denying Motion for Reconsideration (Docket No. 34995-8-II, filed July 9, 2008).
- C. RCW 4.24.264
RCW 64.12.010
RCW 64.12.020

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LINDA EASTWOOD, dba DOUBLE KK
FARM,

Respondent,

v.

HORSE HARBOR FOUNDATION, INC., a
Washington Corporation and MAURICE
ALLEN WARREN, a single man;
KATHERINE DALING and MICHAEL
DALING, husband and wife and the martial
Community composed thereof,

Appellants.

No. 34995-7-II

UNPUBLISHED OPINION

HOUGHTON, C.J. -- Horse Harbor Foundation, Inc. (HHF); Katherine and Michael Daling, HHF board members; and Maurice Allen Warren, HHF's manager, appeal the trial court's award of damages to Linda Eastwood based on their joint and several liability for damages arising from their gross negligence. We reverse.

FACTS

Eastwood has owned the Double KK Farm for more than 20 years. Double KK comprises approximately 14 acres and includes a large barn, many paddocks, outbuildings, horse shelters, turnout pastures, and a covered riding arena that includes stalls, an office, bathrooms,

and a kitchen. The facility has been used as a breeding farm and commercial boarding facility and can house 20 horses if proper maintenance and management programs are used.

HHF, a nonprofit corporation, provides public education on horse care, cares for several abandoned and mistreated horses, and offers riding lessons, among other things. During the relevant period, Warren was the paid manager responsible for HHF's day-to-day affairs. Experienced in horse farm operations, he helped organize HHF and was responsible for the daily operations of HHF during the lease at issue here. The Dalings were HHF directors and officers during the relevant period. Under article III, section I of HHF's bylaws, the board of directors was responsible for managing HHF's affairs.

On October 1, 2003, HHF and Eastwood entered into a lease allowing HHF to occupy 10 acres of Double KK. HHF drafted the lease, which stated that HHF would "keep and maintain the leased premises and appurtenances in good and sanitary condition and repair" during the term of the lease. Ex. 101. Warren and the board of directors, including Katherine and Michael Daling, discussed the lease and "reviewed it together item by item" before entering into it. I Report of Proceedings (RP) at 43. Katherine Daling signed the lease, and she and Michael Daling participated in two meetings with Eastwood before the parties executed the lease. Eastwood set the rent below fair market value at \$1,666.67 per month in exchange for HHF's agreement to maintain and repair the facility at its expense.

On June 25, 2004, Eastwood filed a complaint against HHF for unlawful detainer and alleging lease defaults due to lack of care of the premises. Almost a year later, HHF vacated the premises. After retaking possession and reviewing the premises, Eastwood shortly thereafter filed an amended complaint seeking, among other things, damages based on the Dalings' and Warren's individual liability.

After a bench trial, the trial court found “broad, persistent, and systemic failure” both in HHF’s care of the Double KK facility and its horses. CP at 131 (FF 4). In turn, the trial court concluded that HHF breached its lease agreement by failing to properly maintain the leasehold.

The trial court decided that HHF employee Warren and HHF directors Michael and Katherine Daling committed gross negligence and were all individually liable for damages. The trial court allocated damages based on ordinary or gross negligence. With respect to damages caused by gross negligence, the trial court found all defendants jointly and severally liable for \$32,850.66 in damages. The trial court also imposed joint and several liability against HHF, Warren, and the Dalings for \$44,762.75 in attorney fees and \$1,568.00 in costs.

The trial court denied their motion for reconsideration. They appeal.

ANALYSIS

Warren and the Dalings argue that the trial court erred in concluding that they committed gross negligence. The trial court imposed individual liability against Warren as an HHF agent or employee and imposed individual liability on the Dalings as directors under RCW 4.24.264.¹ That statute only allows individual liability for discretionary decisionmaking of nonprofit directors and officers if the decision or lack thereof constitutes gross negligence. We reverse the trial court’s imposition of individual liability on Warren and the Dalings because the statute does not apply here and the economic loss rule bars recovery.

We review questions of law, including statutory construction, de novo. *City of Pasco v. Pub. Employment Relations Comm’n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). Our obligation

¹ According to RCW 4.24.264, “a member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence.”

is to give effect to legislative intent and where a statute uses plain language, the statute is not ambiguous. *Regence Blueshield v. Office of Ins. Comm'r*, 131 Wn. App 639, 646, 128 P.3d 640 (2006). When faced with an unambiguous statute, we derive the legislature's intent from the plain language alone. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). Additionally, where the legislature prefaces an enactment with a statement of purpose, that declaration serves as an important guide in understanding legislative intent. *Hartman v. Wash. State Game Comm'n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975).

"[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims." *Alejandro v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007). Here, the parties had a contractual relationship in the form of a lease agreement. Further, Eastwood based her claims against Warren and the Dalings on a contractual theory of recovery: she sought economic losses (in the form of the cost to repair her property) resulting from HHF's actions that led to damages and breach of the lease agreement. Thus, the economic loss rule applies in this case.

The trial court interpreted RCW 4.24.264 such that a nonprofit director or officer would be individually liable where a breach of contract rose to gross negligence. The trial court misconstrued the applicable law. In 1986, the legislature enacted RCW 4.24.264 as part of a larger purpose to make "general liability insurance" more affordable for, among others, nonprofit organizations, in the hope that the legislative reforms would "increase the availability and affordability of insurance." Laws of 1986, ch. 305, § 100. The legislature acted with an "intent . . . to reduce costs associated with the *tort* system." Laws of 1986, ch. 305, § 100 (emphasis

added). Section 903 of the act created RCW 4.24.264.² Thus, the legislature intended RCW 4.24.264 to address tort liability of nonprofit directors and officers, not contract liability. Because no exception to the economic loss rule applies here,³ the Dalings are not individually liable for damages to Eastwood under RCW 4.24.264 resulting from breach of contract.

As for Warren, the trial court found that agents and employees of nonprofit corporations may be liable for “misconduct which causes damage to persons or property.” However true that may be for agents or employees under tort law, the economic loss rule also applies in these circumstances to bar individual liability for agents who may cause a principal’s breach of contract. Nothing in the record indicates that Eastwood was unaware she was bargaining the terms of the lease with a nonprofit corporation; in fact the record clearly shows otherwise. “[W]hen an agent makes a contract on behalf of a disclosed or partially disclosed principal whom he has power to bind, he does not thereby become liable for his principal’s nonperformance.” *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 686, 430 P.2d 600 (1967). Eastwood cannot claim Warren is individually liable as an agent of HHF under these circumstances.

² Pertinent to this matter, in 1987, the legislature amended RCW 4.24.264 the next year to replace “civilly” with “individually” and replace the phrase “act or omission in the course and scope of” with “discretionary decision or failure to make a discretionary decision.” Laws of 1987, ch. 212, § 1101.

³ Currently, Washington courts recognize only one possible exception to the economic loss rule. In *Alejandre*, 159 Wn.2d at 690 n.6, our Supreme Court noted that other jurisdictions “recognize a broad exception to the economic loss rule that applies to intentional fraud.” But the *Alejandre* court did not address whether the economic loss rule forecloses “fraudulent representation claims” because it resolved the issue before it on lack of substantial evidence of fraud. 159 Wn.2d at 690 n.6.

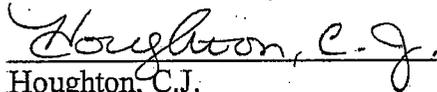
We reverse that portion of the trial court's ruling concluding Warren and the Dalings were jointly and severally liable as individuals for damages and attorney fees resulting from HHF's breach of the lease agreement.

ATTORNEY FEES

Eastwood seeks attorney fees on appeal. As she does not prevail under the contract on appeal, we decline to award attorney fees.

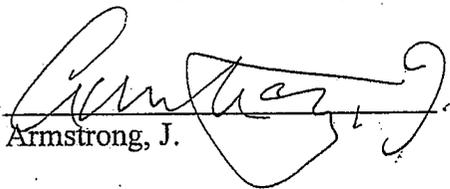
Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

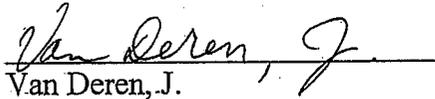


Houghton, C.J.

We concur:



Armstrong, J.



Van Deren, J.