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STATE OF WASHINGTON

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SUPREME COURT NO. 83660-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife,

Appellants.

v.

DAVID BORCHELT and ROBIN BORCHELT, husband and wife;
HAWKINS POE, INC., dba Coldwell Banker Hawkins-Poe Realtors;
HIMLIE REALTY, INC., VINCE HIMLIE, broker for Windermere
Himlie Real estate, real estate brokers, and ROBERT JOHNSON and
JEFF CONKLIN, real estate agents,

Respondents.

PETITIONERS HAWKINS POE, INC. AND JOHNSON'S
SUPPLEMENTAL BRIEF RE
EASTWOOD v. HORSE HARBOR FOUNDATION, INC.
AND
AFFILIATED FM INS. CO. v. LTK CONSULTING SERVICES, INC.

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I. INTRODUCTION

This Court accepted review in this matter on several issues, one of which was whether the economic-loss rule bars claims of professional negligence against real estate professionals. On November 4, 2010, this Court issued two decisions that addressed the economic-loss rule, now known as the independent-duty doctrine. *See, e.g., Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (Nov. 4, 2010); *Affiliated FM Ins. Co. v. LTK Consulting Serv.*, 170 Wn.2d 442, 243 P.3d 521 (Nov. 4, 2010). In light of these decisions, the Court now must determine whether the damage claim of plaintiffs Tim and Eri Jackowski “traces back to the breach of a tort duty arising independently of the terms of the contract.” *Eastwood*, 170 Wn.2d at 388. This Court in *Eastwood* held that if no duty exists between the parties, or if the duty arises out of the contractual relationship, a claim in tort is not actionable. *Id.* This Court has directed the parties to provide additional briefing that addresses *Eastwood* and *Affiliated FM*.

This Court should reverse the decision of the Court of Appeals, Division Two, and affirm the trial court’s dismissal of the negligence claims against Robert Johnson and Hawkins Poe, Inc. (collectively Hawkins Poe), for several reasons. First, the independent-duty doctrine applies to defeat all claims against Hawkins Poe, because they owed the Jackowskis no duty independent of their contractual relationship. Second, the new independent-duty doctrine should apply prospectively only, not retroactively, so that the prior economic-loss rule compels dismissal of all

claims against Hawkins Poe. Third, as Hawkins Poe's prior briefing fully set out, RCW 18.86 *et seq.* does not create any right of action, and that statute abrogated common-law fiduciary duties of real estate professionals.

II. STATEMENT OF THE CASE

A. Undisputed facts showed that Hawkins Poe owed the Jackowskis no independent duty.

The relevant facts are not in dispute. Division Two's opinion, *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009), sets forth the material terms of the parties' Residential Real Estate Purchase and Sale Agreement ("REPSA") and the Seller Disclosure Statement. Hawkins Poe represented the Jackowskis (collectively "Jackowskis") in their purchase of defendants Borchelt's property. In May 2004, the Jackowskis and the Borchelts entered into a REPSA. The REPSA contained several allocation of risk and disclaimer clauses, which placed the duty to inspect and approve the property squarely on the Jackowskis, and provided:

Property Condition Disclaimer. Real estate brokers and salespersons do not guarantee the value, quality or condition of the Property. ... [S]ome properties may have other defects arising after construction, such as drainage, leakage, pest, rot and mold problems. **Real estate licensees do not have the expertise to identify or assess defective products, materials or conditions.**

CP 532 (emphasis added). An inspection addendum to the REPSA provided:

Inspection Contingency. The above Agreement is conditioned on Buyer's personal approval of an inspection

of the Property and the improvements on the Property. Buyer's inspection may include, at Buyer's option, the structural, mechanical and general condition of the improvements to the Property, compliance with building and zoning codes, an inspection of the Property for hazardous materials, a pest inspection, **and a soils/stability inspection.**

CP 540 (emphasis added). The contingency allowed the Jackowskis 15 days to provide a notice of disapproval to the Borchelts. The Borchelts filled out, and the Jackowskis received, a completed Seller Disclosure Statement that expressly stated:

Buyer acknowledges that pursuant to RCW 64.06.050(2), **real estate licensees are not liable for any inaccurate information** provided by the seller except to the extent that the real estate licensees know of such inaccurate information.

CP 923 (emphasis added). The Seller Disclosure Statement further advised the Jackowskis to obtain professional inspections of the property. At some point prior to closing, Hawkins Poe provided the Jackowskis with a document prepared by the Mason County Department of Community Development Planning Commission. That document indicated, in clear language that was circled, that the property was located in an Aquatic Management and Landslide Hazard Area. CP 549.

There is no dispute that the Jackowskis received the report and did not conduct any investigation regarding soil stability before the sale closed. The Jackowskis alleged that after the sale, they learned that the property was located on unstable soil and was prone to slippage as a result.

III. LEGAL AUTHORITY AND ARGUMENT

A. The independent-duty doctrine defeats all claims against Hawkins Poe.

Under previous Washington case law, the economic-loss rule “prevent[ed] recovery in tort” by parties to a contract when the parties “had an opportunity to allocate the risks of loss.” *Alejandre v. Bull*, 159 Wn.2d 674, 687, 153 P.3d 864 (2007). In *Eastwood and Affiliated FM*, this Court modified this long standing precedent as follows:

An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent duty of care, and the existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.

Eastwood, 170 Wn.2d at 389.

This Court held that the defendants in both *Eastwood* and *Affiliated FM*, owed legal independent of the contract. In *Eastwood*, it was the statutory duty to not commit waste, *Eastwood*, 170 Wn.2d at 386; in *Affiliated FM*, the common-law duty of care for engineers because of the “significant” public interest in safety. *Affiliated FM*, 470 Wn.2d at 453. While narrowing the class of claims precluded by the economic-loss rule (reconfigured as the “independent duty doctrine”), this Court reaffirmed that the fundamental policy behind the economic-loss rule, protecting contractual expectations, remains a principal policy consideration. *Id.* at 452.

As well-stated by this Court in *Stuart v. Coldwell Banker*:

Plaintiff homeowners faced with losses that are not of their own making present a sympathetic case, and we understand the desire of the trial court to fashion a remedy. **We must exercise caution, however, that we do not unduly upset the law upon which expectations are built and business is conducted.**

Stuart v. Coldwell Banker, 109 Wn.2d 406, 417-18, 745 P.2d 1284 (1987)
(emphasis added).

This policy that parties must be able to confidently allocate their risks and costs in a bargaining situation supports dismissal of the Jackowskis' claims against Hawkins Poe. A consumer should not be able to sue a real estate agent in tort when the property does not meet a buyer's expectations. This is especially true, as in here, where the parties had meaningful opportunity to allocate their risk in contract.

B. *Eastwood* is not dispositive in this case.

The Jackowskis may argue that *Eastwood* alone disposes of Hawkins Poe's argument that claims of professional negligence are barred even when the claim arises from the contract. To the contrary, *Eastwood* holds that notwithstanding the existence of a written lease agreement allocating loss for waste, recovery for economic losses is permitted where the harm alleged is the result of the defendant simultaneously breaching both a contractual and "an independent and concurrent tort duty." *Eastwood*, 170 Wn.2d at 394. The Jackowskis may assert that because real estate agents have duties defined by statute, the independent-duty doctrine allows for recovery in both contract and tort. However, any blanket rule permitting a plaintiff to sue in both tort and contract where

contractual and statutory duties co-exist would construe the cases far too broadly, and well beyond what this Court intended.

As noted in *Eastwood*, waste has long been a statutory cause of action. See *Eastwood*, 170 Wn.2d at 386; *McLeod v. Ellis*, 2 Wash. 177, 26 P. 76 (1891). Although a lease generally controls the relationship between a landlord and tenant, the Legislature specifically provided a statutory remedy, separate from the lease, for a tenant who commits waste. RCW 64.12.010-020. If the economic loss rule had been applied to defeat *Eastwood*'s claim of waste, the Court would have essentially been repealing permissive waste as a statutory cause of action and thereby legislating from the bench.

This is not the case here. As set forth in Hawkins Poe's first Supplemental Brief, RCW 18.86 *et seq.* does not create a private right of action, nor did the Legislature intend to create one. Therefore, this Court must engage in the entire analysis as set forth in both *Eastwood* and *Affiliated FM* to determine whether parties to a real estate transaction should be limited to their contractual remedies when the property fails to meet the buyer's expectations.

C. Hawkins Poe owed no duty independent of the contracts to inspect or to warn about an undiscovered defect, when the REPSA and statute specifically disclaim that duty.

1. RCW 18.86 does not create the allegedly breached independent duty of care.

"The determination that a duty does or does not exist is an expression of the sum total of those considerations of policy which lead

the law to say that the plaintiff is [or is not] entitled to protection.” Prosser and Keeton on the Law of Torts § 53 (5th ed. 1984) (internal quotations and citations omitted). Our courts have often emphasized that the legislative body is the proper forum for weighing the risks and debating issues of public policy, and have deferred to legislative judgment for these matters. Part of the deference of courts to the Legislature stems from the ability of the Legislature to make adjustments to the statutes and to conduct independent findings of fact on various issues before drafting legislation, and the failure of the Washington Legislature to extend the liability of real estate professionals since the enactment of RCW 18.86 *et seq.* is compelling.

The legislative enactments codified in RCW 18.86 recognize and accept that real estate agents do not have an independent duty to conduct an inspection of the property. This Court should also recognize that a real estate agent’s duty is limited to disclosing all existing material facts known by the licensee and not apparent or readily ascertainable to a party. The enactments should not be interpreted to create a duty to guarantee the condition of a property — this risk should be left as allocated between the buyer and seller who are in the best position to allocate this risk.

RCW 18.86 clearly indicates that the Washington Legislature already balanced many factors of public policy in coming to its rationale of where to draw the line on the duty of real estate professionals. Consequently, the framework created by statute places responsibility on the buyer to conduct their investigations of the property. *See* RCW

64.06.020 (advising buyers to obtain and pay for the services of qualified experts to inspect the property). There is no further duty of a real estate agent with respect to the condition of the property.

2. Hawkins Poe did not owe a duty independent of the REPSA.

This Court's analysis of *Alejandre*, 159 Wn.2d 674, in *Eastwood* is dispositive of the question of whether Hawkins Poe owed an independent duty of care to the Jackowskis. In *Eastwood*, this Court reconciled its ruling in *Alejandre*, that claims of negligent misrepresentation are barred by the economic-loss rule, with the adoption of the independent-duty doctrine by stating that the "core issue" in *Alejandre* was whether the seller of a home owed a duty to the buyer that was independent of its duty under the purchase and sale agreement. *Eastwood*, 170 Wn.2d at 389-90.

The sale of real property is a purely commercial transaction in which the buyer and seller have certain contract-based duties. The seller has the duty to disclose certain information about the condition of the property, and the buyer has the duty to use diligence in inspecting the property. These duties are properly delegated in a REPSA. The purchase price of the property reflects this negotiated risk should the property not meet a buyer's expectations.

A seller's duty to disclose, and the required disclosures to meet this duty, is set forth by statute at RCW 64.06.020. This statutory duty is independent of "any written agreement between buyer and seller." RCW 64.06.020. Despite the independent duty of disclosure created by statute,

and the independent duty of care under the Restatement (Second) of Torts § 522 (1977), this Court noted in *Eastwood* that the seller had “no independent tort duty to obtain or communicate even more information during a transaction” given that the purchase and sale agreement in *Alejandre* contained an inspection clause, the buyers agreed that all inspections must be satisfactory to the buyer, in the buyer’s sole discretion, and that the buyers acknowledged their duty to pay diligent attention to any material defects which are known to the buyer or can be known to a buyer by utilizing diligent attention and observation. *Id.* (citing *Alejandre*, 159 Wn.2d at 679).

As in *Alejandre*, the Jackowskis and the Borchelts properly allocated risk within the REPSA. The REPSA contained ample disclosures about the home and the Jackowskis agreed that “all inspection(s) must be satisfactory to the Buyer, in the Buyer’s sole discretion.” The Jackowskis acknowledged their duty to pay diligent attention to any material defects which are known to a Buyer or can be known to the Buyer by utilizing diligent attention and observation. The Jackowskis further acknowledged that the real estate agents were not guaranteeing the condition of the property and were advised to seek professional inspections and opinions.

Hawkins Poe had no independent tort duty to obtain or communicate even more information than it had during the transaction. *See Eastwood*, 170 Wn.2d at 390 (citing *Alejandre*, 159 Wn.2d at 679, 688-90). In fact, the duties enumerated by statute and as set forth above,

confirm this principle.

3. Because the parties' REPSA allocated duties, there cannot be an independent duty.

If the duty is specified in a contract, it follows that a plaintiff cannot show any duty independent of those contracts that establish and clarify the scope of those duties. In other words, a duty written into a contract is no longer an "independent" duty in tort and, therefore, cannot support an action in tort based on the independent duty doctrine. As noted in the concurrence in *Eastwood*:

In determining whether or not to recognize a duty in tort, we have recognized policy considerations such as assessing risks of harm, reducing hazards, affixing responsibility, protecting the reasonable business expectations of product manufacturers and others engaged in business, and fostering the ability to insure against and apportion risk.

Eastwood, 170 Wn.2d at 410 (Chambers, J. concurring) (citing *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994)).

Allowing a party to impose additional tort duties not set forth in the contract, but within the bargained-for subject matter of the contract, would circumvent the allocation of losses set forth in, and impair the integrity of, the governing contract. This is exactly what would happen if buyers were allowed to bring tort claims against real estate agents because they were unsatisfied with the condition of the property.

4. To the extent there was a duty, the contract not only addressed it, but allocated the duty to the Jackowskis.

The Jackowskis have maintained that “all of the remedies sought by the Jackowskis against both the Borchelts and Hawkins Poe can be understood as contractual.” See Supplemental Brief of Appellant Jackowski, p. 2. “[A] for breach of [the terms of the professional contract] (malpractice) can be understood to be a contractual, not a tort, cause of action.” *Id.* “This review is sought by Johnson and Hawkins Poe, the Jackowskis’ agent, with whom the Jackowskis had a contract.” *Id.* at p. 8.

The Jackowskis assert that professional duties are not subject to contract negotiation or risk allocation. *Id.* at 9. This assertion is false. As this Court noted in *Affiliated FM*, “[t]his view conflicts directly with the long standing rule that a contract can limit a party’s liability for breaching a tort duty only if the contract includes a conspicuous exculpatory clause that does not violate public policy.” *Affiliated FM*, 170 Wn.2d at 450, fn.3. (citing *Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 490, 492, 834 P.2d 6 (1992)).

The Jackowskis specifically claim that Hawkins Poe violated RCW 18.86.050(1)(c), the duty to advise the buyer to seek expert advice on matter relating to the transaction that are beyond the agent’s expertise. This duty can best be understood, in the context of a real estate transaction, as a duty to refer a client to an attorney should legal questions arise in a transaction, to an accountant should tax questions arise, or to a mortgage advisor should there be questions involving lending. It should

not be construed as a duty to advise a client to seek additional inspections when the contract not only addressed the duty, but allocated that duty to the buyer. CP 540.

5. Tort law is an inapt tool for resolving commercial disputes such as real estate transaction.

This Court should not impose a duty of care upon real estate agents that would make them guarantors of the condition of a property. As this Court stated in *Affiliated FM*:

An initial policy consideration is the usefulness of private ordering. We assume private parties can best order their own relationship by contract. The law of contracts is designed to protect contracting parties' expectation interests and to provide incentives for parties to negotiate toward risk distribution that is desired or customary. In contrast, tort law is a superfluous and inapt tool for resolving purely commercial disputes. If aggrieved parties to a contract could bring tort claims whenever a contract dispute arose, certainty and predictability in allocating risk would decrease and impede future business activity.

Affiliated FM, 170 Wn.2d at 451-52. (citing *Berschauer/Phillips*, 124 Wn.2d 816 (1994)). The Jackowskis' claim that Hawkins Poe breached its duty owing to them is exactly the type of "purely commercial dispute" over which this Court in *Affiliated FM* recognized tort law is "superfluous" and an "inapt tool."

In *Affiliated FM*, the Court recognized that overriding concerns for protecting all of the parties' contractual expectancies and giving an incentive to negotiate risk. *Affiliated FM* at 451. The Court went on to consider these concerns in complex multiparty transactions and how the

preference for private ordering suggests that an engineer does not operate under extracontractual tort obligations. *Id.* 451-52. The difference in *Affiliated FM*, however, was the safety of persons and property from physical injury which tort law seeks to protect, and the potential of a fire igniting as a result of an engineer's work, imperiling people and property. *Id.* at 452-53. The Court decided that imposing a duty of care on engineers could be an effective way to guard against "unreasonable curtailments of the safety interest in freedom from physical injuries." *Id.* at 453. This is true, because of the degree of control occupied by engineers, and because of an engineer's training, education, and experience. *Id.*

The opposite is true in a real estate transaction. Generally, transactions between real estate professionals and property buyers are private disputes only. See, e.g., *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702, 754 P.2d 1262 (1988). A real estate agent does not exercise a heightened degree of control over the subject matter of the transaction. There is no public-interest impact and no risk of "imperiling people and property" that would dictate a heightened degree of care. The reality is that real estate transactions are purely commercial in nature. There are two contracting parties, and these parties are the ones who are in the best position to allocate risk regarding the subject matter of the transaction – the property. This is evidenced by the delegation of the duties within the REPSA, which is central to this case. In most residential real estate transactions, and the one at issue here, under the terms of the

REPSA the buyer has a certain time period in which to conduct his or her due diligence and investigation into the condition of the property. During this time period, the buyer is entitled to cancel the transaction and have their deposit returned to them if they are unsatisfied as a result of these investigations. In addition, statutory disclosures during this time period require the seller to provide additional disclosures. The real estate agent has no obligation to perform a visual inspection of the property and is not an expert on the condition of the house. It is for exactly these reasons that the buyers are cautioned, both by statute and in the typical REPSA, to hire inspectors and other professionals to conduct investigations on the condition of the property.

Imposing an independent duty upon real estate agents, when the duty has already been allocated between the contracting parties, would expose real estate brokers to potential liability far out of proportion to its fault. It would also create liability for real estate agents beyond those expressly owed by statute and would essentially make real estate agents guarantors of a property's condition for an indefinite time to an indefinite class of person. This would create unlimited liability where the potential persons affected would include future tenants of the property, all subsequent purchasers, a guest who comes to the property, or even trespassers who are hurt while on the property. Such extension of liability is not justified by *Eastwood* or *Affiliated FM*, nor is it supported by existing statutory law.

D. This Court should apply *Eastwood and Affiliated FM* prospectively only.

This Court has long possessed the discretion to decide the extent to which its decisions announcing new rules will apply retroactively or prospectively. This Court has adopted the three-part test from *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), in making this determination. See *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn2d 264, 272, 208 P.3d 1092 (2009).¹ When the court believes this test has been adequately met, a court may apply the new rule purely prospectively. *Id.* The court weighs the following factors: “(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed; (2) retroactive application would tend to impede the policy objectives of the new rule; and (3) retroactive application would produce a substantially inequitable result” to determine whether the new rule should apply prospectively or retroactively. *Id.*

1. The independent duty doctrine is a new rule and was not clearly foreshadowed.

The requirement that a party relied in good faith to its detriment on a past rule or statute is the primary focus of the *Chevron Oil* test. As *Lunsford* illustrates by citing three other decisions of this Court, “[i]n areas such as **property, contracts,** and taxation where parties had vested

¹ In *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992), this followed a more expansive test of retroactivity. However, since *Robinson*, Washington courts have followed the *Chevron Oil* test to determine whether a new rule should be given prospective application. See *In re Detention of Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006).

interests, we continued to look to whether the parties justifiably and reasonably relied on our prior decisions when entering the transaction. *Lunsford*, 166 Wn2d at 273 (citations omitted; emphasis added); *see generally* S.R. Shapiro, “Prospective or Retroactive Operation of Overruling Decision”, 10 A.L.R.3d 1371 (2008) (“Although the courts have given attention to various factors in determining whether or not to apply an overruling decision retroactively, it appears that the factor of reliance has received the most attention”).

a. ***Eastwood and Affiliated FM created a new rule of law.***

As Chief Justice Madsen noted in her concurring and dissenting opinion in *Affiliated FM*, *Affiliated FM* “is more than a course correction. It is, in effect, a wholesale rejection of our prior cases.” *Affiliated FM*, 170 Wn.2d at 463-64. (Madsen, J., concurring and dissenting). This Court’s decisions in *Eastwood* and *Affiliated FM* conflict with prior precedent concerning the economic-loss rule and effectively overrule *Berschauer/Phillips* without expressly saying so.

In *Berschauer/Phillips*, this Court followed a line of cases that maintained “the fundamental boundaries of tort and contract law by limiting the recovery of economic loss ... to the remedies provided by contract.” *Berschauer/Phillips*, 124 Wn.2d at 821. The Court so held “to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold the parties to their contracts.” *Id.* at 826.

Until *Eastwood* and *Affiliated FM*, the economic-loss rule encouraged the desirable result that the parties could allocate risk where they had the opportunity to do so. *Id.* at 827. This was true with risks, and impliedly duties, even if not expressly established within the contract. See *Alejandre*, 159 Wn.2d at 687. All that was required for the economic-loss rule to apply was that “the party had an opportunity to allocate the risk of loss.” *Id.* at 687 (citations omitted). In neither of these cases was there a mention of an “independent duty” outside of the contract. In fact, this Court refused to blur the lines between contract and tort and instead held that when parties have contracted to protect against potential economic liabilities, contract principles override tort principles and purely economic damages are not recoverable. See *Berschauer/Phillips*, 124 Wn.2d at 828.

b. Rejection of the economic-loss rule was not foreshadowed, and parties relied on this bright-line distinction when entering into contractual relationships.

The rule of *Eastwood* and *Affiliated FM* is not only is new but also was not “clearly foreshadowed” given our Court’s long precedent to hold contracting parties within the bounds of the terms they agreed to, and to prohibit a party to sue in tort for purely economic losses. See e.g. *Borish v. Russell*, 155 Wn. App. 892, 230 P.3d 646 (2010); *Alejandre v. Bull*, 159 Wn.2d 674 (2007); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998). Many contracting parties, especially in the sale

of real estate, relied on the continued adherence to the economic-loss rule.

In the majority of real estate transactions, real estate agents use purchase and sale agreements pre-printed by the multiple listing service. These forms have been carefully drafted by attorneys who understand and appreciate the commercial nature of the transaction and the importance of allocation of risk in the contract. Consumers of real estate, and real estate agents, have relied on these forms to properly protect their respective interests in a transaction. However, under *Eastwood* and *Affiliated FM*, existing contracts may no longer properly reflect the parties' intention and retroactive application of these cases could have an overreaching result.

2. Retroactive application of the independent-duty doctrine would not further its purpose.

The second *Chevron Oil* factor supports prospective application of *Eastwood* and *Affiliated FM* because retroactive application of the independent-duty doctrine would retard, not further, the purposes of the rule. In considering this second factor, a court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect." *Chevron Oil*, 404 U.S. at 107-08.

The history and purpose of the economic-loss rule (now independent duty doctrine) was to maintain the bright-line distinction between tort and contract remedies. The policy behind the rule was to maintain certainty and predictability in allocating risk and avoiding "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Berschauer/Phillips*, 124 Wn.2d at 684. Although

the Court was clear in *Eastwood* and *Affiliated FM* that it was trying to maintain this fundamental distinction, retroactive application of *Eastwood* and *Affiliated FM* would defeat the purpose of the new doctrine of “assessing risks of harm, reducing hazards, affixing responsibility, protecting reasonable business expectations of product manufacturers and others engaged in business, and fostering the ability to insure against and apportion risk.” *Eastwood*, 241 P.3d at 410 (Chambers, J. concurring).

Prior to *Eastwood* and *Affiliated FM*, parties knew, through contract, how to assess risks of harm, allocate responsibility and risk, and protect business expectancies. Now, parties will not know until after the fact whether a tort cause of action exists and whether the parties’ contractual risk allocation will be enforced. Retroactive application of *Eastwood* and *Affiliated FM* will not further the purpose of the new rule.

3. Retroactive application would be inequitable.

Retroactive application of the independent duty doctrine would be inequitable. Contracting parties have relied on our court’s history of maintaining the boundaries of contract and tort and barring tort claims when losses are economic and the parties are in a contractual relationship and could or should have negotiated allocation of risks associated with the subject matter of their agreement. Parties who have established contracts based on this premise now face unlimited liability in tort.

E. This Court should order dismissal of the Jackowskis’ claims against Hawkins Poe for violations of RCW 18.86 and of fiduciary duties.

Hawkins Poe previously fully briefed its contentions that (1) the

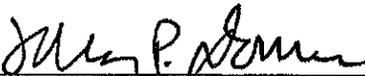
Jackowskis have no right of action under RCW 18.86 *et seq.* and (2) RCW 18.86 abrogated previous common-law duties of real estate professionals. *See* Defendants Hawkins Poe, Inc. and Johnson's Petition for Review; Supplemental Brief of Petitioners Hawkins Poe, Inc. and Johnson. For the reasons set forth in those briefs, this Court should reverse Division Two's decision, affirm the trial court's summary judgment order, CP 104, and direct dismissal of all claims against Hawkins Poe.

IV. CONCLUSION

The independent-duty doctrine requires dismissal of all claims against Hawkins Poe. Hawkins Poe owed no legal duty outside of those set forth in the REPSA. Furthermore, the new independent-duty doctrine should apply prospectively only, so that under the previous economic-loss rule, all claims against Hawkins Poe must be dismissed. The parties to a commercial transaction, such as the sale of realty, should be free to allocate risk regarding the subject matter of the contract. Allowing buyers to sue in tort because they are dissatisfied with the condition of the property would contravene a long-standing policy to protect parties' contractual expectancies and give an incentive to negotiate risk.

Respectfully submitted this 6th day of January, 2011.

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BY RONALD R. CARPENTER **CERTIFICATE OF SERVICE**

I, the undersigned, certify under penalty of perjury and the laws of
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the State of Washington that on January 6, 2011, I caused service of
Petitioners Hawkins Poe, Inc. and Johnson's Supplemental Brief Re
Eastwood v. Horse Harbor Foundation, Inc. and Affiliated Fm Ins. Co. v.
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