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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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COURT OF APPEALS NO. 27201-0-III

ELCON CONSTRUCTION, INC.,

Appellant,

v.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

**BRIEF OF AMICUS CURIAE
WASHINGTON DEFENSE TRIAL LAWYERS**

Daniel J. Gunter, WSBA No. 27491
Shata L. Stucky, WSBA No. 39963
RIDDELL WILLIAMS P.S.
1001 Fourth Ave. Plaza,
Suite 4500
Seattle, WA 98154
(206) 624-3600

Attorneys for Washington Defense Trial Lawyers

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I. INTRODUCTION

Washington Defense Trial Lawyers (“WDTL”), an organization of lawyers representing defendants in civil litigation, appears on occasion as amicus curiae on a pro bono basis. It submits the following brief in support of Eastern Washington University and urges this Court to *affirm* the decision of the Court of Appeals.

II. SUMMARY OF ARGUMENT

Washington Defense Trial Lawyers joins Respondent Eastern Washington University (“EWU”) in its request that the Court *affirm* the decision of Division III of the Court of Appeals and hold that EWU had no independent duty in tort to plaintiff Elcon Construction, Inc., to undertake obligations that Elcon itself had already undertaken as a matter of contract.

In this case, the parties negotiated a contract that explicitly allocated to Elcon the duty to investigate the subsurface conditions and the associated risks at the proposed well site. Elcon agreed to that allocation of risk, and it obtained benefits flowing from that allocation. Having agreed to the contractual allocation of risk on the specific matter at issue, it should now be held to the terms of that contract.

The Court should decline Elcon’s implicit request that it overrule prior precedents, in particular *Alejandre v. Bull*, 159 Wn. 2d 674, 153 P.3d 864 (2007) and *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994).

In two recent cases, the Court reaffirmed that *Alejandre* and *Berschauer/Phillips Construction* remain good law. See *Eastwood v. Horse Harbor Foundation*, 170 Wn.2d 380, 241 P.3d 1256 (2010); *Affiliated FM Ins. Co. v. LTK Consulting Servs.*, 170 Wn.2d 442, 243 P.3d 521 (2010). The lead opinion in *Affiliated FM Insurance* explicitly confirmed the continued viability of these prior cases: “Our decisions in this case and in *Eastwood* leave intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances.” *Affiliated FM Ins.*, 170 Wn.2d at 450 n.3. Application of *Alejandre* and *Berschauer/Phillips Construction* requires that Elcon’s tort claim be rejected. The Court should reaffirm the specific holdings of *Alejandre* and *Berschauer/Phillips Construction* and hold that a party to a contract cannot assert a tort claim when the contract allocates the risk of loss to the claimant.

III. ANALYSIS

A. The Independent Duty Doctrine Holds Parties to the Terms of Their Agreements

The independent duty doctrine, formerly called the economic loss rule, “ensure[s] that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994).

Contract law is designed to enforce expectations created by an agreement between the parties. *Id.* at 821. It operates on the premise that

contracting parties, in the course of bargaining, are able to allocate risks and costs of any potential nonperformance. *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 615 (Mich. 1992) (cited with approval in *Alejandre v. Bull*, 159 Wn. 2d 674, 687, 153 P.3d 864 (2007)). In negotiating the terms of the agreement, a buyer may either insist on additional protections or assume a greater risk in exchange for a lower price. *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 240 (6th Cir. 1994) (cited with approval in *Alejandre*, Wn.2d at 682).

By contrast, “[t]ort obligations are in general obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others.” W. Page Keeton et al., *Prosser and Keeton on Torts* § 92, at 655 (5th ed. 1984).

Because tort obligations are duties imposed by law rather than by agreement, permitting a tort claim between contracting parties “interferes with the parties’ freedom to contract.” *Alejandre*, 159 Wn.2d at 688. When a court permits a party “to sue in tort when the deal goes awry,” it “rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.” *Id.* (quotation omitted); 3 Dan B. Dobbs et al., *The Law of Torts* § 608, at 464 (2d ed. 2011) (“When the plaintiff and defendant have a contract that can be treated as allocating the relevant economic risks, tort liability for those risks would undermine the parties’ contractual ordering of responsibilities.”).

Courts have recognized that allowing tort remedies to parties dissatisfied with their contractual remedies would eviscerate important aspects of contract law. *Maersk Line Ltd. v. Care*, 271 F. Supp. 2d 818, 822 (E.D. Va. 2003) (“[T]o permit a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of the parties to allocate the risks of their own transactions.” (internal quotation marks omitted)) (quoted in *Alejandre*, 159 Wn.2d at 688); *Snyder v. Lovercheck*, 992 P.2d 1079, 1087 (Wyo. 1999) (“The effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for—limited liability.” (internal quotation marks omitted)) (quoted in *Alejandre*, 159 Wn.2d at 688).

In light of these concerns, this Court has explained that “[w]e hold parties to their contracts.” *Berschauer/Phillips*, 124 Wn.2d at 826 (emphasis added). The independent duty doctrine protects the parties’ contractual allocation of risks. *Id.* at 822. When parties allocate risk by contract, the doctrine ensures that their rights and liabilities are no greater and no less than those for which they bargained. *See id.* at 826–27.

B. A Claim of Fraudulent Concealment or Fraudulent Inducement Cannot Survive When the Contract at Issue Allocates the Risk at Issue to the Claimant

In *Alejandre v. Bull*, this Court declined to address the question “whether any or all fraudulent representation claims should be foreclosed by

the [independent duty doctrine].” 159 Wn.2d at 690 n.6. This Court acknowledged that “some courts recognize a broad exception to the [independent duty doctrine] that applies to intentional fraud” and that other courts recognize a limited exception to the independent duty doctrine “for fraudulent misrepresentation claims that are independent of the underlying contract . . . but only where the misrepresentations are extraneous to the contract itself and do not concern the quality or characteristics of the subject matter of the contract or relate to the offending party’s expected performance of the contract.” *Id.*

Commentators have assessed the benefits and drawbacks of these two approaches. On one hand, commentators note that a broad exception to the independent duty doctrine for fraud is supported by the fact that fraud “has been recognized for centuries as a ground for recovery.” 3 Dobbs, *Law of Torts* § 686, at 723.

On the other hand, commentators have noted that applying the more limited exception to the independent duty doctrine is “largely consistent with a view that applies the parol evidence rule to exclude evidence of fraud where the written contract deals with the same matter.” *Id.* § 686, at 721. “So far as the parties have implicitly or explicitly agreed that contract shall control the resolution of a particular risk or default, application of [the independent duty doctrine] is also consistent with the strong rationale that honors the parties’ reasonable expectations under the contract.” *Id.* § 686, at 721.

Taking into account these various considerations, commentators have suggested that the “long legal traditions” surrounding the economic tort of fraud may be best accommodated by an independent duty doctrine “that looks very much like the parol evidence rule and asks whether the later, formal contract explicitly or implicitly spells out the risk allocations in the particular case—a rule that should require some adjudication of the facts rather than a blanket answer for all cases.” *Id.* § 686, at 723.

The approach suggested by these commentators strongly resembles the approach that this Court applied to the negligent misrepresentation claim in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864. In *Alejandre*, this Court determined that, because the sale of the house was controlled by a purchase and sale agreement that placed the burden on the buyer to perform an inspection, the seller did not have an independent tort duty to make disclosures. *See Eastwood*, 170 Wn.2d at 415–16 (Chambers, J., concurring) (discussing *Alejandre*). Because the contract at issue in *Alejandre* allocated to the plaintiff the obligation to investigate, this Court declined to impose a tort duty that would effectively rewrite the parties’ agreement. In his concurrence in *Eastwood*, Justice Chambers concluded that the parties had contractually modified any independent duty to disclose:

In *Alejandre*, the parties had, in essence, by agreement, modified the duty to disclose imposed by law. This court relied upon the independent duty doctrine as an analytical tool to support its conclusion that given the detailed contractual terms covering the sale of

the house and the duties of the buyer to inspect, the seller did not have an independent duty to the buyer under the tort theory of negligent misrepresentation.

Id.

The same logic applies to claims of fraudulent misrepresentation. *See Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 205, 194 P.3d 280, 286 (2008) (“[T]here is no reason here to exempt an intentional misrepresentation claim from the general exclusion of tort-based claims under the rationale of the economic loss rule.”), *review granted in part*, 166 Wn.2d 1015, 210 P.3d 1019 (2009); *cf. Cooper Power Sys., Inc. v. Union Carbide Chems. & Plastics Co.*, 123 F.3d 675, 682 (7th Cir. 1997) (“This court, however, has already predicted that Wisconsin would not allow a negligence or strict liability misrepresentation claim seeking to recover economic damages. . . . We perceive no basis for treating Cooper’s intentional misrepresentation claim any differently.” (citation omitted)); *Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 979 (E.D. Wis. 1999) (“Regardless of whether the representations induced the plaintiff to enter a contract, . . . they are not actionable in tort if they relate to the quality or properties of the subject matter of the contract.”); *Huron Tool and Eng’g Co. v. Precision Consulting Servs., Inc.*, 532 N.W.2d 541, 546 (Mich. App. 1995) (holding that fraud claims were barred by economic loss doctrine because the alleged fraudulent representations were “indistinguishable from the terms of the contract and warranty that plaintiff allege[d] were breached”).

When a party specifically accepts a risk as part of its contractual obligations, the Court should hold that party to the consequences of its agreement. Further, the Court should confirm that, once a party has allocated risk through contract, it cannot maintain a tort claim concerning the same issue. To hold otherwise would require courts to ignore parties' contractual allocations of risks and thereby prohibit them from modifying duties to suit their interests.

C. Application of the Independent Duty Doctrine in This Instance Requires That Elcon Be Held to the Terms of the Contract That It Negotiated

When Elcon entered into the contract at issue in this case, it specifically agreed that it had the duty to investigate all matters that might affect its performance of the contract. CP 1096. Indeed, Elcon specifically agreed that it had investigated the subsurface conditions at the site:

Contractor makes the following representations to the Owner:

...

2. **Contractor** has carefully reviewed the Contract Documents, visited the site, become familiar with the local conditions in which the Work is to be performed, and **satisfied itself as to the nature, location, character, quality and quantity of the Work**, the labor, materials, equipment, goods, supplies, work, services and other items to be furnished and all other requirements of the Contract Documents, **as well as the surface and subsurface conditions and other matters**

that may be encountered at the Project site or affect performance of the Work or the cost or difficulty thereof.

CP 1096 (emphasis added).

EWU did not represent that it had investigated the site and determined that the wells should be drilled to 750 feet. CP 1095. Rather the bid specifications *estimated* the depths of the wells to be 750 feet¹ and warned bidders that the contractor may need to increase the well depth to obtain sufficient water:

Depth of each well is estimated to be 750 feet. Should water of sufficient quantity and quality be encountered at lesser depths, drilling may be stopped by the Owner. *Likewise, the Owner may direct the depth to be increased in order to obtain sufficient water.* The objective is to drill two wells, each capable of producing 900 gpm at maximum drawdown.

CP 357 (emphasis added).

In short, the contract specifically allocates to Elcon the duty to investigate the subsurface conditions, and it specifically warns Elcon that it may have to drill the well to a depth greater than 750 feet. Elcon's fraud claim—based on EWU's failure to disclose information concerning the well depth—is an attempt to renegotiate the contract and thereby “recoup a benefit that was not part of the bargain.” *Alejandre*, 159 Wn.2d at 688, 153 P.3d 864; *cf. Rich Prods. Corp.*, 66 F.Supp.2d at 979 (“Regardless of whether the

¹ The estimate appears to have been based on well logs, which were disclosed to Elcon. (CP 1095.)

representations induced the plaintiff to enter a contract, . . . they are not actionable in tort if they relate to the quality or properties of the subject matter of the contract.”); 3 Dobbs, *Law of Torts* § 686, at 723 (the independent duty doctrine should be applied to fraudulent inducement claims when the contract “explicitly or implicitly spells out the risk allocations”).

In asking that it be permitted to pursue a claim of fraud, Elcon is asking that it be allowed to rewrite the parties’ contract, deleting Elcon’s duty to investigate and inserting a duty of disclosure for EWU. Had Elcon wanted these terms in the agreement, it could have and should have negotiated them at the time of contracting. And, had the parties done so, EWU would have had the opportunity to insist on other terms, the most obvious being a lower price for Elcon’s services. After all, had the contract obligated EWU to perform some of Elcon’s work, then EWU presumably would not have paid for the work that Elcon avoided doing.

Instead, Elcon negotiated and agreed to a contract that imposed on it the duties that it now insists should be imposed on EWU. Having obtained the benefit of *not* negotiating these terms (i.e., by receiving a higher price for its services), Elcon should not be permitted to renegotiate the contract through a tort action and thereby obtain a new benefit that EWU never had an opportunity to negotiate.

The Court should decline to allow Elcon to renegotiate the contract to which it agreed. Instead, it should conclude that EWU did not have an independent duty to advise Elcon of conditions that Elcon itself was

contractually obligated to identify. The Court should instead conclude that both parties will enjoy only the rights and liabilities that they negotiated. *Berschauer/Phillips*, 124 Wn.2d at 826-27.

D. Elcon's Allegations of Fraudulent Concealment Do Not Require a Different Analysis

Elcon suggests that its fraud claim is not barred by the independent duty doctrine because it is a claim for fraudulent concealment and this Court has held that fraudulent concealment claims are not precluded by the independent duty doctrine.

In *Atherton Condo. Apartment-Owners Association Board of Directors v. Blume*, 115 Wn.2d 506, 799 P.2d 250 (1990), this Court ruled implicitly that the independent duty doctrine does not bar a fraudulent concealment claim that is based on *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960). See *Alejandre*, 159 Wn.2d at 689-90 (discussing *Atherton*). *Obde* involved a specific type of fraudulent concealment claim: a claim that a vendor fraudulently concealed a defect in a residential dwelling. *Obde*, 56 Wn.2d at 452. Thus *Atherton* and *Alejandre* stand for the proposition that a fraudulent concealment claim involving a vendor's concealment of a defect in a residential dwelling is not barred by the independent duty doctrine. See *Alejandre*, 159 Wn.2d at 689-90 (addressing claim based on concealed defects in a residential dwelling); *Atherton*, 115 Wn.2d 523-26 (same).

Elcon's fraud claim does not involve a defect in a residential dwelling. The *Obde* elements, addressing a vendor's duty to speak to the purchaser of a

residential dwelling, are inapplicable to the instant case. *See Alejandre*, 159 Wn.2d at 689–90. Rather, to prevail on its fraud claim, Elcon must establish the nine elements of common law fraud or prove that EWU breached an *affirmative* duty to disclose a material fact. *See Crisman v. Crisman*, 85 Wn. App. 15, 21, 931 P.2d 163 (1997).

At its heart, Elcon’s claim is a common-law fraud claim. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 211-21 (Wis. 2005) (explaining that intentional misrepresentation claims are referred to as fraudulent misrepresentation or common-law fraud and suggesting that fraud-in-the-inducement claims fall within the same common-law fraud category); 3 Dobbs, *Law of Torts* § 682, at 700–06 (discussing non-disclosure or concealment as a type of misrepresentation).

Elcon cannot avoid the independent duty doctrine merely by referring to its tort claim as fraudulent concealment as opposed to common-law fraud or fraudulent inducement. *See Alejandre*, 159 Wn.2d at 690 & n.6 (withholding judgment on whether common-law fraud claims, as opposed to *Obde* fraudulent concealment claims, may be barred by the independent duty doctrine); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 674-81 (3d Cir. 2002) (addressing fraudulent concealment claim with reference to fraud-in-the-inducement case law). The critical point is that Elcon agreed through contract to the allocation of risk of which it now complains.

Because the *Obde* elements are inapplicable to Elcon’s fraud claim, the claim does not come within the *Atherton* exception to the independent duty

doctrine. Instead, the Court should conclude that Elcon agreed through contract to shoulder the allegedly independent duty that it now wants to transfer to EWU.

E. **Sound Policy Principles Support Dismissal of Elcon's Tort Claim**

As set out above, the contract between Elcon and EWU allocated to Elcon the obligation to conduct its own due diligence regarding the conditions of the work. It also allocated to Elcon the risk that it would have to drill a well in excess of 750 feet deep. Despite having agreed to those risks before undertaking to perform its contractual obligations, Elcon now asks the Court to ignore the terms of the contract and look to an allegedly independent duty that existed in the scope of the agreement. The Court should reject that argument for the reasons stated above. Moreover, the Court should decline to adopt a rule that could render a wide range of contracts subject to tort claims.

Virtually any contract between two parties will involve some reordering of what might otherwise be framed as independent duties. For example, in sales of goods under the Uniform Commercial Code, parties routinely negotiate terms that would otherwise be supplied by the "gap fillers" provisions of the UCC. *See, e.g., Hartwig Farms v. Pac. Gamble Robinson Co.*, 28 Wn. App. 539, 544 (1981) (a contract for the sale of goods contains "the terms agreed to by both parties and . . . other terms as the [UCC] dictates"). For example, parties routinely disclaim warranties of merchantability and of fitness for a particular purpose. *See* RCW 62A.2-316

(2). They routinely limit the remedies otherwise available to them—for example, disclaiming incidental and consequential damages. Further, they routinely limit warranty periods. Likewise, parties to service contracts routinely limit the warranties and remedies available to them. And they routinely disclaim liability in tort.

If Elcon's argument prevails, then a disappointed party to a contract may attack virtually any private ordering of risk. After all, a disappointed buyer of a product may argue that, regardless of the agreement that it signed, the seller had an independent duty under the UCC to provide certain warranties or remedies. A disappointed recipient of services under a service contract may argue that, regardless of the terms of the agreement itself, the service provider had an independent duty relating to the same issues allocated under the terms of the contract to the complaining party.

The Court should decline to allow disappointed parties to contracts to escape the terms that they negotiated. In this case, Elcon failed to satisfy its own contractual obligations to determine the subsurface conditions at the site. The Court should not rescue Elcon from its own failure to fulfill its contractual obligations.

IV. CONCLUSION

The Washington Supreme Court should *affirm* the decision of the Court of Appeals and hold that the independent duty doctrine bars Elcon's fraud claim. In this case, the contract specifically allocated the allegedly independent duty at issue—that is, the duty to determine the quality of the

subsurface conditions and the corresponding risk that the well would need to be drilled deeper than 750 feet to Elcon. Having agreed to take on that duty as a matter of contract, Elcon should be held to the terms of that contract. It should not be permitted to renegotiate its contract through a tort action and thereby be permitted to recoup a benefit that was not part of the bargain.

DATED this 27th day of September, 2011.

RIDDELL WILLIAMS P.S.

By *Daniel J. Gunter*
Daniel J. Gunter, WSBA No. 27491
Shata L. Stucky, WSBA No. 39963
Attorneys for Amicus Curiae
Washington Defense Trial Lawyers