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Supreme Court No. 836604  
Court of Appeals No. 36944-3-II

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

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.

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BRIEF OF WASHINGTON REALTORS® AS AMICUS CURIAE IN  
SUPPORT OF HAWKINS POE, INC.

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## I. INTRODUCTION

On June 16, 2009, Division Two of the Washington Court of Appeals (“Division Two”) issued an opinion holding that the economic loss rule does not apply to statutory or tort claims against real estate licensees. *See Jackowski v. Borchelt*, 151 Wn. App. 1 (2009). The decision carves a new and ill-considered exception into Washington’s long-standing policy of maintaining separation between tort and contract remedies. It eliminates the incentive for parties to real estate transactions to allocate risk by contract, and it nullifies allocations that are made. Division Two’s interpretation and expansion of the duties imparted on real estate licensees is also contrary to statute. And, while the decision is not the first attempt by lower courts to chip away at the economic loss rule, its sweeping consequences for the real estate industry render it a particularly egregious departure from settled law. Because this holding, if affirmed, would represent a dramatic shift in the law of damages as applied to real estate professionals, pursuant to RAP 1.2(f), Washington REALTORS® files this brief as amicus curiae and urges reversal of Division Two.

## II. INTEREST OF AMICUS CURIAE

Amicus Washington REALTORS® is a statewide trade association of approximately 18,000 real estate licensees (“licensees”). Its members are involved in all aspects of the residential and commercial real estate industries. Licensees have an interest in the duties imposed on them by Washington law concerning the purchase and sale of real estate. Washington REALTORS® was the leading proponent for the

Legislature's adoption of RCW Chapter 18.86, the state's real estate agency relationship act, and the statutory scheme at issue in this appeal.

### III. STATEMENT OF THE CASE

This appeal arises out of the trial court's entry of summary judgment in favor of, among others, Petitioner Hawkins Poe, Inc. and Johnson ("Hawkins Poe"), and its dismissal of Respondents Jackowskis' tort claims for breach of statutory and common law duties. CP 835. The Jackowskis entered into an agreement to purchase the home of the Borchelts. Real estate licensees represented each party in the transaction. A year and a half after the sale closed, following months of severe rainfall, a landslide damaged the Jackowskis' home. App. Br. at 16. The Jackowskis sued both licensees involved for negligent misrepresentation and asserted claims against Hawkins Poe for breach of common law duties and duties codified by RCW Chapter 18.86.

The trial court entered summary judgment in favor of the licensees on both the negligent misrepresentation and breach of statutory duty claims. Division Two reversed. That court held that the duties enumerated in RCW Chapter 18.86 give rise to an independent statutory cause of action to which the economic loss rule does not apply. The court made a similar ruling with regard to a "common law claim" against Hawkins Poe for professional negligence.<sup>1</sup> *Jackowski, supra*, 151 Wn.

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<sup>1</sup> While not clearly stated, this "common law claim" appears to have been considered as a third cause of action, independent of the negligent misrepresentation claim that was properly dismissed as to Hawkins Poe.

App. at 14-15. Amicus Washington REALTORS® urges this Court to correct Division Two's erroneous interpretation of RCW Chapter 18.86 and to reject its attempt to create a new exception to the economic loss rule.

#### IV. ARGUMENT

By enforcing the economic loss rule, Washington courts protect against overlapping tort and contract remedies, thereby encouraging certainty and predictability in allocating risk in a transaction. *Alejandre v. Bull*, 159 Wn.2d 674, 683 (2007). Ironically, Division Two relies upon the concept of privity of contract to justify its creation of a new exception to the economic loss rule for common law professional negligence claims against real estate licensees. *Jackowski, supra*, 151 Wn. App. at 13-15. But this new exception is irreconcilable with *Berschauer/Phillips* and its progeny. *Berschauer/Phillips Constr. Co. v. Seattle School Dist.*, 124 Wn.2d 816 (1994) (seminal Washington case applying the economic loss rule outside of the product liability context, to “classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remedial only in contract” in a claim against professional architects, engineers, and inspectors). It swallows the economic loss rule in residential real estate transactions, virtually assuring that, in any lawsuit involving such a transaction, contract and tort claims will overlap, and contractual risk allocation will be nullified.

Division Two's decision is based on an expansive and erroneous

interpretation of RCW Chapter 18.86. That statute enumerates the duties owed by real estate licensees in a transaction, but does not establish a new cause of action or otherwise disturb common law remedies. RCW Chapter 18.86 provides no express or implied basis to separate residential real estate transactions from other types of commerce or to expose real estate licensees to greater liability than other professionals where purely economic loss is alleged.

**A. DIVISION TWO IMPROPERLY IMPOSES LIABILITY ON REAL ESTATE LICENSEES PARAMOUNT TO ALL OTHERS INVOLVED IN THE TRANSACTION.**

Division Two's decision places real estate licensees alone in a special class of professionals, with a heightened degree of liability distinct from that of anyone else involved in commercial activity. It renders licensees *de facto* guarantors of real estate transactions. For example, the Jackowskis' allege that Hawkins Poe is liable in tort for its agent's failure to recommend that the buyers seek an engineer's advice regarding the stability of their property, pursuant to RCW 18.86.050(1)(c). But any engineer referred by Hawkins Poe would have been immune as a matter of law from negligence claims for economic loss arising from their professional work. *Berschauer/Phillips, supra; Carlson v. Sharp*, 99 Wn. App. 324 (1999). If an actual referral pursuant to RCW 18.86.050(1)(c) would not have resulted in recovery from the expert for failing to avoid the plaintiff's loss, it is unreasonable to assign liability to the real estate licensee for that same loss. This does not mean, of course, that a plaintiff has no recourse. Rather, as in all commercial transactions, they are free to

bargain to allocate the transaction's potential risks to the extent the parties can agree. See section B.2., *infra*.

The decision also puts real estate licensees uniquely at risk in transactions involving malicious sellers. For example, at least two courts of appeal have held that the economic loss rule prevents a buyer from raising claims against the seller for intentional misrepresentation or fraud. *Cox v. O'Brien*, 150 Wn. App. 24 (Div. II 2009), *rev. denied* 167 Wn.2d 1006 (2009); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193 (Div. I 2008), *rev. granted in part* 166 Wn.2d 1015 (2009) (appeal dismissed by parties' stipulation). But under Division Two's ruling in this case, that same buyer could assert a tort claim against its real estate agent for failing to satisfy some statutory or "professional" duty that the buyer contends would have revealed the seller's intentional misrepresentations. RCW 18.86.030(1)(a). This would be so even though real estate licensees are entitled by statute to rely on a seller's statements. RCW 18.86.030(2). It is patently inequitable to allow recovery in tort from the licensee for negligently failing to discover the seller's fraud, where only contract claims may be brought against the fraudulent seller.

In other contexts, this Court has refused to hold parties liable in tort for economic damages when doing so results in the *de facto* guarantor effect of Division Two's decision. See, e.g., *Alejandre v. Bull*, *supra*, 159 Wn.2d at 674, *Berschauer/Phillips*, *supra*, 124 Wn.2d at 816; *Stuart v. Coldwell Banker Comm. Group*, 109 Wn.2d 406 (1987). In *Stuart*, for example, the lower court fashioned a new tort—"negligent

construction”—to award economic damages to the subsequent purchasers of a defective home, even though the original construction contract allocated the risk of defects to the homeowners. This Court reversed and correctly determined that subsequent purchasers are not entitled to enjoy benefits for which the original homeowners did not bargain. “Imposition of tort liability upon the builder-vendors would require them to become the guarantors of the complete satisfaction of future purchasers.” *Id.*, at 421. The *Stuart* Court, like others since, recognized the danger of permitting contractual damages and tort remedies to overlap.

By recognizing tort claims for economic loss in real estate transactions, Division Two’s decision condones the very overlap and “guarantee effect” eschewed for decades by this Court. The decision will have far-reaching adverse consequences if affirmed. Licensees, relegated as sureties in all real estate transactions, will face increased litigation—not only as to the unique statutory claims Division Two created, but also as add-on defendants to breach of contract suits. This risks “unduly upset[ing] the law upon which expectations are built and business is conducted,” and will lead to unnecessary transactional costs that licensees will have to pass on to Washington consumers. *Id.*, at 417-18.

1. THE ECONOMIC LOSS RULE APPLIES TO RESIDENTIAL REAL ESTATE TRANSACTIONS.

Division Two’s decision conflicts with this Court’s ruling that the economic loss rule applies to real estate transactions generally. The *Alejandre v. Bull* decision involved, among other issues, a claim by the

buyer that the economic loss rule does not apply to the sale of a residence. This Court readily disposed of that contention, focusing on the “key inquiry” of the nature of loss and the manner in which it occurs—*i.e.*, purely economic losses arising out of a contractual transaction. *Alejandre, supra*, 159 Wn.2d at 684-85. In such a context, the Court stated that parties would be limited to their contract remedies, absent some “recognized exception” to the economic loss rule. *Id.*, at 685. The Court found that residential real estate transactions are not a recognized exception to the rule. *Id.*, at 686. In fact, this Court has not yet acknowledged *any* exceptions to the economic loss rule, a nod to the restraint typically used by courts when modifying common law principles.

The exception to the economic loss rule proposed by Division Two’s decision creates a paradox for real estate transactions. Real estate licensees are professionals who assist with transactions of a specialized type, and Division Two determined this supports excepting licensees from the rule. But other professionals working in the same area are not subject to such an exception. *Berschauer/Phillips, supra*, 124 Wn.2d at 827-28. If there is nothing distinctive about the nature of the sale of real property to carve an exception for all professionals involved, or for the transactions generally, it is difficult to justify creating an exception that applies to only one participant in the sale. Courts create exceptions to the common law where significant public policy interests exist—for example, when a traditional choice of law analysis will yield a result abhorrent to Washington policy—but this is not such a case. It cannot be abhorrent to

uphold the overriding policy served by the economic loss rule, which is to preserve parties' bargained-for expectations. *See, e.g., id.* at 823 (In Washington, "[w]e hold parties to their contracts.>").

Here, Division Two acknowledged that the Jackowskis' purchase was subject to the economic loss rule and rejected their contention that the case implicated the policies underlying tort law designed to protect against personal harm and property damage. *Jackowski, supra*, 151 Wn. App. at 13. Because this was a non-exempt commercial transaction involving purely economic loss, Division Two correctly upheld the trial court's dismissal of the negligent misrepresentation claims. *Id.* To be consistent, it also should have done so with regard to the Jackowskis' statutory and "common law" claims against their licensee. Nothing about the purchase giving rise to the Jackowskis' underlying claim, or the role played by their real estate licensee, warrants creating a new exception to the economic loss rule.

2. THERE IS NO BASIS TO DISTINGUISH REAL ESTATE AGENTS FROM OTHER PROFESSIONALS TO WHOM THE ECONOMIC LOSS RULE APPLIES.

Despite recognizing that all the Jackowskis' claims "stem from their [purchase agreements]" governing the transaction, Division Two held that the statutory duties in RCW 18.86, as well as "common law" professional obligations, trump application of the economic loss rule to real estate licensees. *Jackowski, supra*, 151 Wn. App. at 13. This decision differentiates licensees from other professionals, whom this Court has previously ruled are not subjected to the same tort liability in

performing their professional duties. *Berschauer/Phillips, supra*, 124 Wn.2d at 827-28. Division Two's conclusion ignores the prior the decisions of this Court, and its analysis fails to find support in any compelling public policy.<sup>2</sup>

The economic loss rule bars claims against architects, engineers and inspectors, notwithstanding that they each have duties and obligations that are independent of the common law. *Id.*, at 823 (recovery for purely economic damages from "design professionals" limited to contractual terms). The duties of these professionals are substantially similar—and in some cases identical—to those owed by a real estate licensee under RCW 18.86. For example, an engineer's duties to clients include the obligation to: (1) be honest, fair, and timely; (2) not knowingly falsify, misrepresent, or conceal a material fact; (3) strive with the skill, diligence, and judgment exercised by the prudent practitioner; and (4) avoid conflicts of interest. WAC 196-27A-020. Similarly, architects owe duties to: (1) act with reasonable care and competence; (2) fully disclose in writing to the client any substantial conflicts of interest; and (3) accurately represent their qualifications and scope of responsibility. WAC 308-12-330.

Both architects and engineers are also held to the same disciplinary standards as real estate licensees under RCW 18.235, and they may be disciplined for failing to exercise reasonable care, making

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<sup>2</sup> Inexplicably, in creating a new exception to the economic loss rule based upon a licensee's status as a "professional," Division Two does not even mention this Court's unanimous decision in *Berschauer/Phillips*.

misrepresentations, failing to disclose material facts, or acting incompetently. RCW 18.235.130. But the potential consequences of architectural and engineering malpractice are even greater than that of licensees because those professions are regulated “in order to safeguard life, health, and property, and to promote the public welfare [.]” No analogous expression applies to licensees. RCW 18.08.235; 18.43.010. Division Two advances no policy justifying why the licensees who sell homes should be held to a standard higher than that of the professionals who design them. Indeed, there is none. There is no legal or policy basis to expose real estate licensees to greater tort liability than may be imposed on architects and engineers under *Berschauer/Phillips*.

By applying that the economic loss rule to licensed professionals, the *Berschauer/Phillips* Court “align[ed] the common law rule on ‘economic loss’ with the Legislature’s decision to limit purely economic damages under the WPLA [Washington Product Liability Act] to contract claims under the Uniform Commercial Code.” *Berschauer/Phillips, supra*, 124 Wn.2d at 827. Division Two’s decision turns around that logic completely and infers from RCW Chapter 18.86 an unstated legislative intention to treat real estate licensees differently from manufacturers as well as other professionals. But the adoption of RCW 18.86 did not expand the scope of licensees’ duties; rather it clarified and limited them. *See, e.g.*, 18 Stoebuck and Weaver, *Washington Practice Series, Real Estate: Property Law*, § 15.10 (2d ed., 2004) (Legislature’s specifying that licensee owes no duty to investigate or verify “appears to alter, if not

nullify” preexisting case law) and § 15.5 (Chapter 18.86 clarifies and modifies a number of aspects of brokerage agency relationships); RCW 18.86.040, -.050, and -.060 (stating that an agent’s duties are “limited to” those enumerated in the statute). There is nothing in the statute to suggest that, by codifying the *duties* owed by a real estate licensee, RCW Chapter 18.86 changed common law on the *remedies* available for breach of those duties, or put real estate licensees at greater risk for economic loss claims than product manufacturers, or other professionals.<sup>3</sup>

Division Two’s assumption that RCW Chapter 18.86 eviscerates the economic loss rule as applied to real estate licensees lacks any real statutory analysis. A statute in derogation of the common law “must be strictly construed and no intent to change that law will be found, unless it appears with clarity.” *McNeal v. Allen*, 95 Wn.2d 265, 269 (1980). Nothing in RCW Chapter 18.86 states or suggests that it is intended to alter that aspect of the common law. Moreover, an unstated legislative intent to abrogate common law may be inferred only where a statute is so repugnant to and inconsistent with existing common law that the two cannot coexist. *See State ex rel. Madden*, 83 Wn.2d 219, 222 (1974).

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<sup>3</sup> The economic loss rule would have limited the damages available in pre-statute tort claims against licensees, just as it limits the damages for tort claims against other professionals. Although there are pre-1996 reported decisions that include tort claims against real estate licensees, those cases never addressed application of the economic loss rule. *See, e.g., Hoffman v. Connall*, 108 Wn.2d 69 (1987). Since the economic loss rule is essentially a defense of failure to state a claim, it is waived if not raised at or before trial. CR 12(h)(2); *see, e.g., Bloor v. Fritz*, 143 Wn. App. 718 (2008) (refusing to hear the seller’s clearly meritorious position on the economic loss rule on the procedural ground that it had not been properly raised before the trial court).

Applying the economic loss rule to claims for alleged breaches of licensees' statutory duties is easily reconcilable with RCW Chapter 18.86, just as it is with breaches of the duties and obligations of non-real estate licensees.<sup>4</sup> The fact that real estate licensees owe statutory duties does not displace the notion that parties to real estate transactions should structure their relationships by allocating the risks of loss, or that contract remedies must be applied to claims of purely economic harm.

**B. DIVISION TWO'S DECISION ADVERSELY AFFECTS ALL RESIDENTIAL REAL ESTATE TRANSACTIONS, BY RENDERING RISK ALLOCATION IN SUCH TRANSACTIONS ILLUSORY.**

In Washington, tort law carries out a “safety-insurance policy” against acts that “unreasonably endanger the safety and health of the public.” *Alejandre, supra*, 159 Wn.2d at 682 (citations omitted). This is contrasted with contract law, which carries out an “expectation-bargain protection policy” and provides an “appropriate set of rules when an individual bargains for a product of particular quality or for a particular use.” *Id.* In order to maintain the fundamental boundary between these two areas of law, the economic loss rule is a well-established and “consistently follow[ed]” tenet of Washington law. *Jackowski, supra*, 151 Wn. App. at 13. Where economic losses occur, the economic loss rule

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<sup>4</sup> The legislature is presumed to have been aware of the economic loss rule—and the *Berschauer/Phillips* decision—at the time it adopted RCW Chapter 18.86. *Kelso v. City of Tacoma*, 63 Wn.2d 913, 917 (1964). If the Legislature intended to have real estate licensees' duties interpreted differently than those of other professionals, it would have said so.

ensures “that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in contract.” *Berschauer/Phillips, supra*, 124 Wn.2d at 822.

1. REAL ESTATE TRANSACTIONS ARE NEGOTIATED AROUND CONTRACTS AND DEPEND ON BARGAINED-FOR RISK ALLOCATION.

This Court has recognized the “importance of the precise allocation of risk as secured by contract.” *Id.*, at 827. Nowhere is this more important than in real estate transactions, where multiple offers and counteroffers are commonplace. This back-and-forth between the parties is more than needless posturing. Rather, it is how parties to the sale allocate risk, and it affects the price to which the parties are willing to agree. The success of this bargaining process relies on the parties’ expectations that the terms of their contract will be enforced. As this Court described:

If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. . . . The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

*Id.* at 826-27.<sup>5</sup> In negotiation-intensive transactions such as the sale of real estate, meaningful risk allocation is vital.

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<sup>5</sup> The same applies to real estate licensees who charge fees commensurate to the exposure they expect based on the terms of their contract. Licensees, to protect themselves from the far-reaching consequences of Division Two’s decision, could be compelled to raise the amounts they charge for their services, purchase substantially more (and more expensive) professional liability insurance coverage, and significantly complicate transactions with unnecessary and confusing disclosures, disclaimers, releases, and contractual limitations of liability.

Division Two's decision uproots the sanctity of negotiations in real estate transactions. For example, suppose a buyer requests that the seller include a warranty covering any defects in the on-site septic system (the type of risk allocation encouraged by the *Alejandre* court), but the seller is unwilling to bear that particular risk and therefore counters by rejecting the request. If the buyer then accepts the counteroffer, the parties have consciously allocated the risk of septic system defects to the buyer. After the transaction closes, suppose the buyer discovers that the system is indeed defective and they suffer economic loss as a result. Even though the parties contractually allocated the risk, under Division Two's ruling, the buyer may sue their agent for alleged negligence in rendering one or more of the buyer's agency duties as defined in RCW 18.86.050 (e.g., failing to advise the buyer to have an expert inspect the septic system). Such a claim rewrites the terms of the contract and awards the buyer a benefit that it failed to obtain—and pay for—in the contract.

The risk allocation described above results from exactly the type of prospective bargaining that *Alejandre* encourages, and the law should enforce. Division Two's decision eviscerates the legal effect of that behavior, allowing any party that is dissatisfied with the bargain it strikes to simply circumvent its deal by suing a real estate agent for "professional negligence." Such a result violates the fundamental purpose of the economic loss rule to "prevent[] a party to a contract from obtaining through a tort claim benefits that were not part of the bargain." *Alejandre*, *supra*, 159 Wn.2d at 683.

To preserve the inviolability of contract, this Court has declined to expand liability past that established by contractual terms, “particularly in [areas] of the law so vitally enmeshed in our economy and dependent on settled expectations.” *Stuart, supra*, 109 Wn.2d at 422. The law governing real estate transactions is such an area. Buyers and sellers of real property are entitled to rely on settled expectations concerning the investments that are generally the largest of their lifetimes.

2. THE DECISION DESTORYS THE INCENTIVE TO  
CREATE ORDERLY RISK DISTRIBUTION IN REAL  
ESTATE TRANSACTIONS.

One of the benefits of the economic loss rule is that it “encourages parties to negotiate toward the risk distribution that is desired and customary.” *Berschauer/Phillips, supra*, 124 Wn.2d at 827. Consistent with that principle, if parties to real estate transactions deem it beneficial to impose heightened liability on licensees, they can bargain for that risk allocation. RCW Chapter 18.86 is replete with examples of the important role contracts play in real estate transactions. *See* RCW 18.86.020 (defining agency relations in terms of contracts); RCW 18.86.030(2) (parties may contract to require agents to independently investigate property); RCW 18.86.040(1) (contract may expand duties of seller’s agent past those prescribed by statute); RCW 18.86.050(1); .060(2) (same regarding buyer’s agent and dual agents); RCW 18.86.080 (parties may contractually allocate compensation); RCW 18.86.100 (knowledge of agents/sub-agents not imputed to principle/agent unless agreed). These are acknowledgements of the parties’ opportunity to contract and allocate

a variety of risks if they wish to do so. If they do not, Washington law treats this as a conscious and affirmative choice. *Alejandre, supra*, 159 Wn.2d at 686.

Thus, application of the economic loss rule does not shield real estate licensees from potential claims where the parties have agreed to a desired allocation of risks. But Division Two's decision renders this right to contract meaningless to licensees. Buyers and sellers of real estate no longer have incentive to negotiate with licensees for the added protections contracts provide. Here, the Jackoswkis were free to bargain with their agent to allocate the duty to investigate land stability, or the risk of any other hazard or contingency. They did not do so, but Division Two's holding protects them from the risk anyway. The decision essentially allows parties the benefit of an insurance policy without the expense of paying the premiums, and it leaves real estate licensees (and, ultimately, consumers) to foot the bill. This is precisely the result against which the economic loss rule defends. Division Two fails to "preserve the incentive to adequately self-protect during the bargaining process" in real estate transactions. *Berschauer/Phillips, supra*, 124 Wn.2d at 827.

**C. THE ECONOMIC LOSS RULE FAILS IN ITS INTENDED PURPOSE IF NOT CONSISTENTLY APPLIED.**

Washington law recognizes the "beneficial effect to society when contractual agreements are enforced." *Id.*, at 828. The economic loss rule promotes these benefits. It is not uncommon for litigants and lower courts to resist the economic loss rule by attempting to distinguish it or by

creating new exceptions to the doctrine. This Court has uniformly rejected those attempts. *See, e.g., Alejandre, supra* (reversing Court of Appeals), *Berschauer/Phillips, supra* (direct appeal, reversing trial court); *Stuart, supra*, (direct appeal, reversing trial court). Efforts to thwart the economic loss rule have been rejected precisely because “[t]he dangers in creating such unreasoned precedent are manifest.” *Stuart, supra*, 109 Wn.2d at 420. The policy of providing tort remedies for wrongful acts must yield where purely economic loss occurs in a commercial context. Otherwise, tort claims will become a tool to undermine the sanctity of contract.

The economic loss rule means nothing if not consistently applied. Its salutary purpose cannot be fulfilled if lower courts are continually permitted to circumvent the rule. Division Two defends its exception here by misconstruing the rule to bar all professional negligence claims. It exalts the ends to justify its means. But this Court has refused to “sanction such result-orientated jurisprudence” before. *Stuart, supra*, 109 Wn.2d at 422. For example, in *Alejandre*, Division Three tried to evade the economic loss rule by refusing to acknowledge that an absence of explicit risk allocation actually can be the parties’ bargained-for result. This Court reversed, holding wisely that the “economic loss rule prevents recovery in tort for risks that should have been allocated in a contract.” *Alejandre, supra*, 159 Wn.2d at 688 (emphasis in original). It determined that giving effect to the parties’ contract is paramount, and that this policy is undermined when courts create consequence-driven, ad hoc exceptions to the law.

Thousands of residential real estate transactions occur each year in Washington. Application of the economic loss rule to these transactions should be reliable and consistent, not subject to being circumvented or reworked any time a court dislikes the rule's outcome. To be effective in encouraging meaningful risk allocation, the economic loss must apply in the same way to all commercial activity. "This [C]ourt cannot allow sympathy for the plaintiffs to lead to the creation of a logically inconsistent and vague theory of recovery that fails to provide useful precedent." *Stuart, supra*, 109 Wn.2d at 407. Division Two's decision contains the very inconsistencies of which the *Stuart* Court warns, and its approach creates an unwieldy rule not susceptible to uniform application. It destroys the certainty of dealing that contracts provide to buyers and sellers of real estate. As has so often been required in the past, this Court should maintain the integrity of the economic loss rule.

## V. CONCLUSION

Affirming the decision of Division Two requires this Court to disregard decades of its own precedent and to uproot long-standing Washington policy. The decision puts real estate licenses at unique risk not faced by other professionals involved in commercial activity. It allows parties to recover economic losses arising from risks that are inherent in their transaction, but for which they do not negotiate a contract right or remedy. Division Two's new exception to the economic loss rule eviscerates the power of parties to allocate the risk of their transactions in

all residential real estate transactions. In order to encourage orderly commercial activity and protect against the creation of ad hoc exceptions to the economic loss rule, the decision of Division Two must be reversed.

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