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Supreme Court No. 83660-4  
Court of Appeals No. 36944-3-II

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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TIMOTHY JACKOWSKI and ERI TAKASI,  
husband and wife,

Appellants.

v.

DAVID BORCHELT and ROBIN BORCHELT;  
HAWKINS POE, INC.; HIMLIE REALTY, INC.;  
VINCE HIMLIE; ROBERT JOHNSON  
and JEFF CONKLIN,

Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENTS HIMLIE  
REALTY, INC. DBA WINDERMERE REAL ESTATE/HIMLIE  
AND JEFF CONKLIN

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## I. INTRODUCTION

Some of the questions presented by this appeal appear to have been decided in *Eastwood v. Horse Harbor Foundation, Inc.*, \_\_\_ Wn.2d \_\_\_, 241 P.3d 1256, 1266 (2010) and *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.* \_\_\_ Wn.2d \_\_\_, 243 P.3d 521 (2010). However, the lack of a majority opinion in *Eastwood* and the uncertain treatment of *Alejandro v. Bull*, 159 Wn.2d 674, 687, 153 P.3d 864, 870 (2007) still leave many questions without clear answers. The Court should take this opportunity to clarify the independent duty doctrine.

## II. DISCUSSION

The question presented by this appeal more and more appears to be whether real estate sellers and brokers should be accountable for their conduct in transactions. Washington law has always sought to strike a balance between *caveat emptor* and making brokers or sellers guarantors. Nothing in *Eastwood*, *Affiliated FM* or *Alejandro* makes a persuasive argument to change that course.

Seller liability has evolved with the times, but carefully. Courts have acknowledges claims for innocent misrepresentation by a seller, but limits those claims to boundaries or quantities of land. *E.g.*, *Bloedel Timberlands Development, Inc. v. Timber Industries, Inc.*, 28 Wn.App. 669, 678, 626 P.2d 30, 35 (1981). Sellers can be liable for concealing

defects, but only if they are dangerous to the property or occupants. *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960). Even when implying a warranty of habitability, this Court limited the warranty to the first purchaser of a home from a commercial builder. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 519, 799 P.2d 250, 258 (1990).

The same has been true with respect to broker liability. When the Court of Appeals held that brokers could be liable for innocently repeating a seller's misrepresentation, this Court reversed, refusing to make brokers guarantors. *Hoffman v. Connall*, 108 Wn.2d 69, 77-78, 736 P.2d 242, 246 (1987). Courts held that brokers had a duty to "confirm or refute" information that was pivotal to a buyer (*Hoffman v. Connall*, 108 Wn.2d 69, 75, 736 P.2d 242, 245 (1987); *Tennant v. Lawton*, 26 Wn.App. 701, 706, 615 P.2d 1305, 1310 (1980)), but when the legislature codified the duties of brokers in 1996, it expressly rejected any duty for a broker to inspect or investigate a property. RCW 18.86.030(2).

These cases and statutes have created a stable and predictable set of requirements for sellers and brokers. Washington has seen neither a tidal wave of litigation nor a system that tolerates fraud. Unfortunately, lower courts interpreted *Alejandre* as rewriting the fundamental rules, all but leaving buyers without a remedy even for affirmative fraud.

Windermere respectfully submits that the law before *Alejandro* provided a level playing field, enforcing a reasonable set of rules for sellers and brokers without imposing unfair or unrealistic duties. For brokers, this balance was codified in RCW Chapter 18.86, which provided both certainty and fairness. Sellers and brokers plainly have duties independent of a purchase and sale agreement, and this Court should reaffirm those duties. At the same time, the Court should acknowledge and enforce the Legislature's decision to make the statutory duties exclusive.

**A. The Holding of *Eastwood*.**

Because neither *Eastwood* nor *Affiliated FM* has a majority opinion, those cases have limited precedential value.

We thank the parties and the Washington State Legislature for their excellent briefing on *City of Fircrest v. Jensen*, 158 Wash.2d 384, 143 P.3d 776 (2006), *cert. denied*, 549 U.S. 1254, 127 S.Ct. 1382, 167 L.Ed.2d 162 (2007). Given our disposition of this case on statutory grounds, we will simply note that the holding of this court is the holding joined by a majority of the justices on a case. *See, e.g., Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wash.2d 413, 428, 780 P.2d 1282 (1989) (examining the various opinions in *Alderwood Associates v. Washington Environmental Council*, 96 Wash.2d 230, 635 P.2d 108 (1981)). A holding of a plurality of the court may be persuasive to some but has little precedential value. *See, e.g., All-Pure Chem. Co. v. White*, 127 Wash.2d 1, 8, 896 P.2d 697 (1995) (analyzing a split opinion).

*Spain v. Employment Sec. Dept.* 164 Wn.2d 252, 260, 185 P.3d 1188,

1192 (2008). In such cases, “When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed.” *In re Francis*, \_\_\_ Wn.2d \_\_\_, 242 P.3d 866, 873 n.7 (2010). Otherwise stated, if a rationale is supported by a majority of the justices, it is the holding of the Court. *State v. Hickman*, 157 Wn.App. 767, 774-775, 238 P.3d 1240, 1243-44 (2010); *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

It appears that a majority of justices in *Eastwood* did join in several rationales relevant to the economic loss rule. Justice Fairhurst’s lead opinion and Justice Chambers’ concurrence were joined by a combined total of seven justices (Justices Fairhurst, Owens, James Johnson, Chambers, Charles Johnson, Sanders and Stephens), constituting a clear majority.

**1. The Economic Loss Rule Has Been Replaced With the Independent Duty Doctrine.**

Justice Fairhurst’s lead opinion states that the economic loss rule “has proven to be a misnomer” (*Eastwood*, 241 P.3d at 1261), that “broad application of the economic loss rule does not accord with our cases” (*Id.*), that it “now will call the independent duty doctrine” what was called the economic loss rule.” *Id.* at 1266.

Justice Chambers expressly concurred with the lead opinion's decision to "rename what has heretofore been referred to by this court as the economic loss rule and will hereafter be referred to as the independent duty rule." *Id.* at 1270. Both his concurrent and the lead opinion reject the notion that the economic loss rule is a rule of "general application." *Id.* at 1261, 1271.

**2. The Independent Duty Doctrine Does Not Bar Tort Claims Simply Because the Parties Have a Contractual Relationship.**

Under the independent duty doctrine, tort claims based on a legal duty can be asserted "even if they arise from contractual relationships." *Id.* at 1261, 1275 ("To summarize, duties imposed by law and duties assumed by agreement often apply to the same events."); *see id.* at 1274. Whether a tort claim can be asserted instead is based on traditional standards for identifying legal duties. *Id.* at 1261, 1272.

**3. A Tort Claim Can Be Maintained For Breach of an Independent Legal Duty.**

If an independent legal duty does exist, it can be the basis for a tort claim.

A review of our cases on the economic loss rule shows that ordinary tort principles have always resolved this question. 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.

*Id.* at 1261 (lead opinion).

If our jurisprudence has recognized a tort in the past, lower courts should recognize those torts unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise. It is my reading of the lead opinion that the role of the trial court is to determine if the duty sought to be enforced is one essentially assumed by agreement or imposed by law. If it is a duty solely assumed by agreement, contract remedies apply, and if it is a duty based upon a standard of care imposed by established law, unless clearly waived or modified by agreement, tort remedies apply.

*Id.* at 1276 (Chambers, concurring). Under these opinions, the existence of a contract should be irrelevant to the question of duty, except to the extent that a party may have contractually waived or modified a legal duty.

**B. Continuing Uncertainty.**

Although a majority of justices supported those rationales in *Eastwood*, identifying the support for those rationales requires time, effort and, to a degree, exercise of judgment. The absence of clear guidance will only cause further confusion in lower courts.

In the companion case to *Eastwood*, six justices agreed that the economic loss rule had been replaced by the independent duty doctrine (*Affiliated FM*, 243 Wn.2d at ¶ 2 (referring to a doctrine of Washington law that we have previously termed the ‘economic loss rule’) (lead opinion), ¶39 (“This case does not implicate in any way the independent

duty doctrine, formerly known as the economic loss rule.”) (Chambers, concurring). However, three justices (Madsen, Alexander and James Johnson) joined in a concurrence/dissent that appears to refer to the economic loss rule as a continuing rule. *Id.* at ¶ 67 (“The economic loss rule is premised on the principle that if the risk of loss can be allocated in a negotiated contract, then a party to that contract will be held to the contract remedies if breach of the contract results in economic losses.”); ¶ 68 (“I would hold that the answer to the Ninth Circuit's certified question is that the economic loss rule does not bar tort claims in this case because there was no contract between LTK Consulting and SMS and no basis under the facts of this case for applying the economic loss rule in the absence of contractual privity.”).

Other courts already are demonstrating a lack of certainty about the fate of the economic loss rule. A few weeks after *Eastwood* and *Affiliated FM* were decided, Division One of the Court of Appeals issued a published decision analyzing a claim under the economic loss rule as announced in prior cases.

Trenchless and QPS insist that the economic loss rule bars Jackson's negligence action. “The economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others.” *Berschauer/Phillips Const. Co.*

*v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 821, 881 P.2d 986 (1994). “If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.” *Alejandre v. Bull*, 159 Wash.2d 674, 683, 153 P.3d 864 (2007).

*Jackson v. City of Seattle*, 2010 WL 4706251, 6 (2010). This cannot be attributed to oversight because the court asserted that *Eastwood* and *Affiliated FM* support its decision.

See also *Eastwood v. Horse Harbor Foundation, Inc.*, No. 81977-7, 2010 WL 4351986 (Wash. Nov.4, 2010); *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, No. 82738-9, 2010 WL 4350338 (Wash. Nov.4, 2010). These two decisions, issued after oral argument in this case and cited by Jackson as supplemental authority, confirm our decision and our rationale.

*Id.* at 7, n. 1.

A number of federal judges in the Western District of Washington have made rulings based on *Eastwood* and *Affiliated FM* as well. In *Putz v. Golden*, 2010 WL 5071270 (W.D.Wash.,2010), Judge Robart acknowledged that the independent duty doctrine has replaced the economic loss rule, but then opined that these cases “reaffirmed that the fundamental policy behind the economic loss rule protecting contractual expectations remains a principal policy consideration.” *Id.* at 14. In *Wells v. Chase Home Finance, LLC*, 2010 WL 4858252, 6 (W.D.Wash.,2010), Judge Bryan considered older economic loss rule cases before stating that: “At this point, it is not clear that the tort claims

alleged in this case are barred by the economic loss rule, particularly in light of recent Washington Supreme Court cases.” Most recently, Judge Bryan dismissed a claim under the economic loss rule in *Trinity Glass Intern., Inc. v. LG Chem, Ltd.*, 2010 WL 5071295, 9 (W.D. Wash.,2010).

C. **The Court Should Revisit *Alejandre*.**

All of the opinions in both *Eastwood* and *Affiliated FM* take as a given that *Alejandre* should remain good law, but provide a variety of justifications for the decision.

The lead opinion in *Eastwood* stated that *Alejandre* was decided on the basis of whether the seller of a home owed the buyer a duty to obtain or communicate the relevant information.

Although we couched our analysis in terms of looking for an “exception” to the economic loss rule, the core issue was whether Bull, as the home seller, was under a tort duty independent of the contract's terms. The contract between Bull and the Alejandres contained ample disclosures about the home, the Alejandres agreed that “ ‘[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion,’ ” id. at 678, 153 P.3d 864 (alteration in original) (quoting ex. 4), the Alejandres acknowledged “their duty to ‘pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation,’ ” id. at 679, 153 P.3d 864 (quoting ex. 5), and the Alejandres had their own inspection done. With significant information communicated about the home in the course of contractual negotiations, Bull had no independent tort duty to obtain or communicate even more information during a transaction. The contract sufficed, and the Alejandres' negligent misrepresentation claim did not survive. We recognized,

however, that Bull's independent duty to not commit fraud persisted, and we would have allowed the Alejandres to sue for fraudulent concealment if they had offered enough evidence to support that tort claim. *Id.* at 689-90, 153 P.3d 864.

*Eastwood*, 241 P.3d at 1262.

Justice Madsen's concurrence explains the *Alejandre* decision purely in terms of the economic loss rule.

The lead opinion incorrectly disposes of the plaintiff's argument that the damage to her property does not fall within the economic loss rule. Under our case law, economic losses are distinguished from personal injury or injury to other property. *Alejandre v. Bull*, 159 Wash.2d 674, 684, 153 P.3d 864 (2007); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 420-21, 745 P.2d 1284 (1987). In these cases and *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wash.2d 506, 799 P.2d 250 (1990), the damages sought were economic—consisting of the costs of repairs to correct the defects and to compensate for \*1270 additional injury to the property itself caused by the defective conditions. Thus, the purchaser of the property in each case did not obtain the benefit of the bargain—the purchased item failed to meet the buyer's economic expectations because of the defects. In *Stuart*, the allegations were that decks, walkways, and railings did not meet uniform building code water-tightness requirements, which resulted in rotting and substantial impairment of the decks, walkways, and railings. In *Atherton*, the alleged “defects [were] latent structural deficiencies primarily pertaining to the inner construction of the floors and ceilings.” *Atherton*, 115 Wash.2d at 521, 799 P.2d 250. In *Alejandre*, the septic system of a residence was defective. In each case, the property contracted for purchase was defective and not what the contracting party expected to receive as the benefit of the bargain made.

*Id.* at 1269-70.

In his concurrence, Justice Chambers explained *Alejandro* as a contractual modification of the seller's duty to disclose material facts.

Similarly, in *Alejandro*, 159 Wash.2d 674, 153 P.3d 864, the plaintiff sued to recover damages arising from the purchase of a house. *Id.* at 677, 153 P.3d 864. The buyer claimed that the house was not as he believed because the septic system needed repair. *Id.* 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 sale was specifically conditioned upon the buyer's inspection of the septic system and " '[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion.' " *Id.* at 678, 153 P.3d 864 (quoting earnest money agreement) (alterations in *Alejandro*). In *Alejandro*, 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. Importantly, in *Alejandro*, we made no meaningful analysis of the nature of the damages and only said, "Here, the injury complained of is a failed septic system. Purely economic damages are at issue." *Id.* at 685, 153 P.3d 864. We cited *Stuart*, 109 Wash.2d at 420, 745 P.2d 1284, and *Griffith*, 93 Wash.App. at 213, 969 P.2d 486, for support of that statement that the claim was for purely economic damages. See *Alejandro*, 159 Wash.2d at 684-85, 153 P.3d 864.

*Id.* at 1275 (footnote omitted).

All of these explanations are plausible, but they do not reflect the arguments that were made in *Alejandro* by the parties. One cannot suggest that *Alejandro* was decided on the basis of the independent duty doctrine

because the briefs to this Court in that case contain no reference to independent duties at all. The term "independent duty" is not found in any of the *Alejandre* briefs. Nor did any of the parties brief or argue that the seller's duty to disclose material facts was waived by contract. The question raised and decided was whether the economic loss rule, as it then existed, barred the claim.

For this reason, it is no surprise that *Alejandre* never even considered the independent duty question in relation to the economic loss rule. The term "independent" was only used once in a footnote, and then to state that the issue would not be decided.

Other courts recognize a limited exception to the economic loss rule for fraudulent misrepresentation claims that are independent of the underlying contract (sometimes referred to as fraud in the inducement) 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. We need not address the question whether any or all fraudulent representation claims should be foreclosed by the economic loss rule because we resolve the *Alejandres'* fraudulent representation claims on other grounds.

*Alejandre*, 159 Wn.2d at 690 n. 6 (citations omitted). Similarly, *Alejandre* contains no discussion whether the agreement waived or modified the seller's duty to disclose. Those issues were not before the Court, were not argued, and were not decided in the case.

Recent decisions should not be abandoned lightly, but should be when they are “incorrect and harmful.” *State v. Berlin*, 133 Wn.2d 541, 547-48, 947 P.2d 700, 703 (1997). *Alejandre* was decided without the benefit of the independent duty doctrine, and cannot be squared with *Eastwood*. *Alejandre* itself acknowledged that Washington recognizes a duty of reasonable care under Section 552 of the Restatement of Torts.

*Alejandre*, 159 Wn.2d at 686). *Alejandre* never considered whether the duty under Section 552 of the Restatement is an independent duty; that question was not presented to the Court.

This Court has repeatedly recognized a duty of care for obtaining or communicating information for the guidance of others in transactions. *E.g.*, *Van Dinter v. Orr*, 157 Wn.2d 329, 332, 138 P.3d 608, 609 (2006); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651, 654 (1998); *Schaaf v. Highfield*, 127 Wn.2d 17, 22, 896 P.2d 665, 668 (1995). Moreover, this Court has expressly recognized that duty in real estate transactions in a case decided after *Alejandre*. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701, 704 (2007).

If *Alejandre* was decided correctly under the independent duty doctrine, then a large number of cases would arguably be reversed *sub silentio*. The lead opinion in *Eastwood* explained *Alejandre* by noting that the Disclosure Statement was “significant information communicated

about the home in the course of contractual negotiations.” *Eastwood*, 241 P.3d at 1262. The Chambers concurrence agreed with *Alejandro* because “the sale was specifically conditioned upon the buyer's inspection of the septic system and ‘[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion.’” *Id.* at 1275.

Inspection contingencies are a matter of course in real estate transactions and litigation, but typically do not include a waiver of claims. For example, inspection contingencies are referenced in *Borish v. Russell*, 155 Wn.App. 892, 896, 230 P.3d 646, 648 (2010); *Jackowski v. Borchelt*, 151 Wn.App. 1, 8, 209 P.3d 514, 517 (2009); *Stieneke v. Russi*, 145 Wn.App. 544, 552, 190 P.3d 60, 64 (2008); and *Ramos v. Arnold*, 141 Wn.App. 11, 15, 169 P.3d 482, 484 (2007). No Washington case has ever suggested that a buyer who has an inspection contingency thereby waives any claim for negligent misrepresentation.

Similarly, the notion that provision of a Disclosure Statement by a seller somehow absolves the seller of the duty of reasonable care in providing information is contrary to the very statute requiring the disclosure:

Except as provided in RCW 64.06.050, nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate against the seller or against any agent acting for the seller otherwise existing pursuant to common law, statute, or contract; nor shall anything in this chapter

create any new right or remedy for a buyer of real property other than the right of rescission exercised on the basis and within the time limits provided in this chapter.

RCW 64.06.070.

The difficulty presented by *Alejandre* is that it appears to stand for the proposition that negligent misrepresentation claims are generally barred in real estate transactions. This idea is buttressed by the statement in Justice Chambers' concurrence in *Eastwood*:

In sum, a careful examination of our case law reveals that this court has applied the independent duty rule to limit tort remedies in the context of product liability where the damage is to the product sold and in the contexts of construction on real property and real property sales. We have done so in each case based upon policy considerations unique to those industries. We have never applied the doctrine as a rule of general application outside of these limited circumstances.

*Eastwood*, 241 P.3d at 1275. This statement suggests that tort duties are precluded in real property sales as a rule of general application, but that determination is made without the benefit of applying the independent duty doctrine to real estate transactions. Nothing in *Alejandre* or any other Washington decision suggests a reason to treat real estate transactions differently from other contracts.

The Court of Appeals in this case held that the buyer's negligent misrepresentation claim was barred by the economic loss rule and *Alejandre*. That issue is squarely before this Court. Instead of relying on

*Alejandre*, this Court should apply the independent duty doctrine to determine whether sellers owe buyers of real property a duty of reasonable care in obtaining and communicating information about the property.

**D. RCW Chapter 18.86 Imposes Independent Duties.**

The legislature can create a statutory duty that gives rise to a cause of action. *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258, 1261 (1990). A majority of justices in *Eastwood* appear to agree that the independent duty doctrine cannot override a statutory cause of action. *Eastwood*, 241 P.3d at 1267 n.5 (lead opinion); 1268 (Madsen, concurring). The question appears to be whether RCW Chapter 18.86 imposes an individual duty.

The intent of the legislature is abundantly clear from its use of language expressly imposing specific duties on real estate brokers.

(1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:

RCW 18.86.030.

(1) Unless additional duties are agreed to in writing signed by a seller's agent, the duties of a seller's agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) of this subsection:

RCW 18.86.040. The duties imposed on brokers would be meaningless if they could not be enforced, particularly since the statute largely supersedes the common law. RCW 18.86.110.

As a fundamental rule of law, a statute that imposes a duty from one person to another gives rise to a cause of action for breach of that duty.

This court will imply a statutory cause of action under a three-prong test:

[F]irst, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

*Bennett v. Hardy*, 113 Wash.2d 912, 920-21, 784 P.2d 1258 (1990). In *Bennett*, this court recognized that the implied cause of action is premised on the assumption that the legislature would not specifically grant rights to a class of persons “without enabling members of that class to enforce those rights.” *Id.* at 921, 784 P.2d 1258.

*Adams v. King County*, 164 Wn.2d 640, 653, 192 P.3d 891, 898 (2008).

The Court therefore should hold that RCW Chapter 18.86 does create enforceable legal duties for purposes of the independent duty doctrine.

**E. RCW Chapter 18.86 Is Exclusive.**

Just as the legislature has the power to create individual duties, so too has it the duty to limit or abrogate common law duties. *Potter v.*

*Washington State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691, 695 (2008) (“The legislature has the power to supersede, abrogate, or modify the common law.”). The Court of Appeals erred when it held that the common law duties of real estate brokers continue alongside the statutory duties.

RCW 18.86.110 contains specific language superseding inconsistent common law, including fiduciary duties. RCW 18.86.040, .050 and .060 impose agency duties on brokers, but also provides that the duties of a broker are “limited to” those set forth in the statute. If duties are limited to those in the statute, then imposing additional common law duties would be inconsistent with the statute for purposes of RCW 18.86.110. RCW Chapter 18.86 replaced the common law with a statutory scheme.

This statutory scheme was readily evident to this Court in *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 32 n.3, 948 P.2d 816, 820 (1997), in which it remarked:

In 1996, the Legislature enacted **comprehensive legislation which redefined the duties of real estate brokers**. RCW 18.86. The statute provides that where different agents, affiliated with the same broker, represent different parties to the transaction, the broker is a dual agent, whereas each agent solely represents the party with whom they have the relationship. RCW 18.86.020(2). As a dual agent, the broker owes a duty of confidentiality to both the seller and the prospective purchaser, RCW

18.86.060(2)(d), and may take no action “adverse or detrimental to either party's interest in a transaction.” RCW 18.86.060(2)(a). This legislation, however, was not in effect at the time of this transaction and is only prospective in application. RCW 18.86.900 (“[t]his chapter does not apply to an agency relationship entered into before January 1, 1997”).

(emphasis added). Comprehensive legislation redefining the duties of a broker necessarily replaces prior common law duties even if the common law remains relevant to define the scope of similar or identical statutory duties.

### **III. CONCLUSION**

The scope and effect of the independent duty doctrine are unclear after *Eastwood* and *Affiliated FM*, particularly because *Alejandre* appears to remain good law. This Court should reaffirm that the independent duty doctrine has replaced the economic loss rule in all respects and apply the independent duty doctrine to the claims in this case, including negligent misrepresentation. The Court should further hold that RCW Chapter 18.86

imposes independent and enforceable duties on real estate brokers to the exclusion of prior common law duties.

DATED this 7<sup>th</sup> day of January, 2011.

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