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No. 86590-6

THE SUPREME COURT
STATE OF WASHINGTON

D.R. STRONG CONSULTING ENGINEERS, INC., *Petitioner,*

v.

STEVEN AND KAREN DONATELLI, *Respondents.*

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT.....	5
A. NO CONFLICT EXISTS BETWEEN THE DECISION AT HAND AND <i>BERSCHAUER</i>	5
1. <u>The economic loss rule historically has not abrogated claims for professional negligence.....</u>	6
a. Professional Engineers have legally established duties to their clients.....	7
b. When a “special relationship” and duty co- exist, professionals are potentially liable in tort for their actions, notwithstanding the economic loss rule.....	9
2. <u>The Supreme Court decisions in <i>Eastwood</i> and <i>Affiliated FM</i> clarified the boundary between the independent duty doctrine and the economic loss rule.....</u>	10
a. <i>Eastwood</i>	10
b. <i>Affiliated FM</i>	13
3. <u>The line between the independent duty doctrine and the economic loss rule is clear.....</u>	15
B. PETITIONER’S BRIEF MISCONSTRUES THE NATURE OF RAP 13.4(b)(2).....	16

C. PUBLIC INTEREST DOES NOT DEMAND REPEATED
REVIEW OF A DECIDED ISSUE.....18

IV. CONCLUSION.....19

TABLE OF AUTHORITIES

Cases

<i>Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.</i> , 170 Wn.2d 442, 243 P.3d 521 (2010).....	passim
<i>Alejandro v. Bull</i> , 159 Wn.2d 674, 681, 153 P.3d 864 (2007).....	9, 13
<i>Berschauer/Phillips Construction Co. v. Seattle School District no. 1</i> , 124 Wn.2d 816, 881 p.2d 986 (1994)	passim
<i>Boguch v. Landover Corp.</i> , 153 Wn.App 595, 224 P.3d 795 (2009)	9
<i>Burg v. Shannon & Wilson, Inc.</i> , 110 Wn.App. 798, 806, 43 P.3d 526 (2002).....	10, 11, 12, 18
<i>Carlson v. Sharp</i> , 99 Wn.App. 324, 994 P.2d 851 (Div. III 1999).....	20
<i>Cox v. O'Brien</i> , 150 Wn.App. 24, 206 p.3d 682 (2009).....	20
<i>Eastwood v. Horse Harbor Foundation, Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	passim
<i>Griffith v. Centex</i> , 93 Wn.App. 202, 969 P.2d 486 (1998).....	20, 21
<i>Jackowski v. Borchelt</i> , 151 Wn.App. 1, 14, 209 P.3d 514 (2009).....	9, 12
<i>Jarrard v. Seifert</i> , 22 Wn.App. 476, 479, 591 P.2d 809 (1979)	10

Statutes

RCW Chap. 18.43	10
-----------------------	----

Rules

RAP 13.4(b)(2)	19, 21
----------------------	--------

Regulations

WAC 197-27A-020.....	10, 11
WAC 197-27A-030.....	10

I. INTRODUCTION.

D.R. Strong wants the broadest possible interpretation of the “bright line distinction” set by the Court in the *Berschauer*¹ case. Therefore they argue that the Court of Appeals decision in this matter is in conflict with *Berschauer*. However, an examination of the *Berschauer* decision, together with the subsequent analysis provided by the appellate courts in Washington, shows that *Berschauer* survives in a limited set of circumstances, just as indicated in by the recent Supreme Court decision in *Affiliated FM*.² Under the “independent duty doctrine”, the focus of the analysis is on the relationship between the parties, and whether a duty exists protecting the particular party involved. This analysis does not eliminate the holding of *Berschauer*, and is not in conflict with other cases. There is no basis for review of this decision by the Supreme Court.

II. STATEMENT OF THE CASE.

Petitioner’s Statement of the Case is generally accurate, however, it leaves out significant facts that do provide perspective on the Court of Appeals’ decision.

Steve Donatelli is not a land developer. However, Mr. Donatelli has attempted to develop some properties he and his wife owned, with

¹ *Berschauer/Phillips Construction Co. v. Seattle School District no. 1*, 124 Wn.2d 816, 881 p.2d 986 (1994).

² *Affiliated FM Ins. Co. v. LTK Cons. Serv., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010).

significant professional help. Beginning in 2002, Steve and Karen Donatelli (the "Donatellis") began a short plat project (the "Project") near 9th Court SW and SW 122nd Street in unincorporated King County. CP64. Although Mr. Donatelli had before attempted a short plat project at another location, he did not pursue it very far because he felt it was more than he could handle. CP64.

Mr. Donatelli, looking for professional help in his development efforts, met with Rick Olson, Luay Joudeh and others with D.R. Strong Consulting Engineers ("DR Strong"). CP65. Following that meeting, the Donatellis hired DR Strong. Mr. Donatelli knew he needed help to get the Project through all of the County procedures and permit processes. CP65. He felt it was going to take a professional to handle all the moving parts involved in such an undertaking, including coordinating the efforts to meet the requirements of all the public and private entities to be involved. CP65. DR Strong, especially Rick Olson, knew that Mr. Donatelli lacked the knowledge and experience to oversee the Project successfully and also knew that Mr. Donatelli was relying on DR Strong's assurances that it could handle the Project. CP65. Mr. Donatelli relied on Rick Olson and the rest of the DR Strong staff to manage the entire Project including coordinating contractors, the county, and other public agencies as changes, requirements, and problems arose among those groups. CP66-67. No

major decision was made on any aspect of the Project without DR Strong's approval. CP66-67.

Contractors on the Project viewed and relied on DR Strong as the Project's manager, seeking answers to questions and interpretation of County requirements from DR Strong and not Mr. Donatelli because Mr. Donatelli did not have the experience or knowledge to deal with the day-to-day issues that arose on the Project. CP79-80; CP83-84. Even when a builder's portion of the Project was designed by someone other than DR Strong, such builders would go to DR Strong, and not the designer, when problems or questions arose. CP80.

At some point in 2002, in response to DR Strong's request to sign and return some documents, which was a usual practice between the parties, Mr. Donatelli signed DR Strong's standard contract. CP65. There was never a conversation about the contract or what it contained. While Mr. Donatelli acknowledged his signature on the document produced in the course of this litigation, he does not remember signing it and states that it does not reflect the deal that he had with DR Strong. CP65-66. Moreover, while the contract states a price of approximately \$33,000 for their services, the total paid to DR Strong by the Donatellis totaled over \$100,000. CP2-3.

Under King County requirements for short plat applications such as

that of Mr. Donatelli, the applicant has a five-year time period to move the application from Preliminary Approval (granted on October 4, 2002 (CP28)) to final approval. CP67. Mr. Donatelli had no idea about the five-year time limit until the day he received a call from the County explaining that his approval had expired. CP67. He was shocked and immediately called Rick Olson at DR Strong to learn what was going on. Olson already knew about the expiration, apologized for “screwing up” and told Mr. Donatelli that DR Strong would fix the situation. CP67.

It was not until after the expiration of the pre-approval that Mr. Donatelli began to see that DR Strong, although it had provided project management services for more than five (5) years (inclusive of the pre-approval process), was attempting to minimize its role on the Project by virtue of the contract Mr. Donatelli unknowingly signed years before. CP68. If he had known this was how DR Strong would characterize its involvement and responsibilities on the Project, he never would have hired, relied, or had his other agents rely, on DR Strong to provide the services it did provide. CP68.

DR Strong scrambled for additional time, but the efforts simply took too long. CP3, 93. When the real estate market crashed along with the world wide lending crisis, Mr. Donatelli was unable to complete the development, and eventually lost the property to foreclosure. CP3.

The Donatellis acknowledge that the Procedural History of this case as stated by DR Strong is factually accurate, aside from some embellishment about the Commissioner’s decision to allow discretionary review of the Superior Court’s Order Denying Summary Judgment that is not relevant to this appeal.

III. ARGUMENT

A. NO CONFLICT EXISTS BETWEEN THE DECISION AT HAND AND *BERSCHAUER*.

In seeking dismissal of the Donatellis’ negligence claim, DR Strong proffered only the economic loss rule as the basis for its motion—it did not produce, attempt to produce, argue, or attempt to argue any factual issues relating to the Donatellis’ claim of negligence against the professionals they hired. CP44-53. Therefore, in regard to the Donatellis’ negligence claim, the only issue before the Court of Appeals was whether the economic loss rule wholly insulates professional engineers from negligence claims in light of their established common law and statutory duties.

The *Berschauer* Court, in applying the economic loss rule, was answering a very specific question: “The primary issue is whether the economic loss rule prevents a general contractor from recovering purely economic damages in tort from an architect, an engineer and an inspector,

none of whom were in privity of contract with the general contractor.”

Berschauer, supra, at 820 (emphasis added). It was in this narrow context that the economic loss rule was applied. There is no statement in the *Berschauer* case that demands that all tort liability for professional negligence be eliminated.

1. The economic loss rule historically has not abrogated claims for professional negligence.

DR Strong’s recitation of the economic loss rule is generally correct: “The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief.” *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007). However, courts in Washington have not expanded the *Alejandre* holding to “preclude all recovery for economic loss against professional agents, as to do so would be to abrogate professional malpractice claims for all cases not involving physical harm.” *Jackowski v. Borchelt*, 151 Wn.App. 1, 14, 209 P.3d 514 (2009). Further, the court in *Jackowski* held that the economic loss rule described in *Alejandre* does not “abrogate[] all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional.” *Id.* See also *Boguch v. Landover Corp.*, 153 Wn.App 595, 224 P.3d 795 (2009) (citing both *Alejandre* and *Jackowski* holdings in

stating that a client's claim against its hired professional for a breach of professional duties sounds in tort unless the complained of action involves a specific provision of the contract).

Simply put, these cases established that when there is "special relationship" between the parties, including but not limited to privity of contract, it is possible for claims of professional negligence to survive the economic loss rule.

- a. Professional Engineers have legally established duties to their clients.

Like other professional agents, professional engineers like DR Strong owe clients common law and statutory duties to perform the tasks they undertake with reasonable care, diligence, and skill. For at least thirty (30) years, courts have held that professional engineers like DR Strong owe a common law duty to perform their professional obligations with reasonable diligence, skill, and ability. *See Jarrard v. Seifert*, 22 Wn.App. 476, 479, 591 P.2d 809 (1979) (holding that clients are able to rely and defer to the professional expertise and judgment of their hired engineers and that engineers must perform their "professional duty with reasonable diligence, skill, and ability").

More recently, courts have addressed whether Washington statutes and regulations impose cognizable duties in a negligence action against

professional engineers. *See Burg v. Shannon & Wilson, Inc.*, 110 Wn.App. 798, 806, 43 P.3d 526 (2002). In that case, the court noted that RCW Chap. 18.43 and the regulations flowing therefrom—currently codified at WAC 197-27A-020, and 030—“indicate that professional engineers owe duties to the public, to their clients, and to their employers.” *Id.* at 807 (affirming ultimately because the injured parties in that case were not clients).³ Under WAC 197-27A-020(2), professional engineers like DR Strong owe specific duties to their clients, such as to: “strive with the skill, diligence and judgment exercised by the prudent practitioner, to achieve the goals and objectives agreed upon with the client;” to be “competent in the technology and knowledgeable of the codes and regulations applicable to the services performed;” and to “advise their . . . clients in a timely manner when, as a result of their studies and their professional judgment, they believe a project will not be successful.” *Id.* While the *Burg* Court ultimately did determine that the economic loss rule applied to the injured parties in that case, it did so expressly because there was no evidence of a special relationship between them and the professional engineers. *See Burg* at 807. In other words, the *Burg* defendants were relying on a general duty to the public itself, rather than the special relationship that

³ One appellant in *Burg* was a client of the professional engineers, but the court determined that the professional engineers in that case specifically did not breach any duty owed to that client-appellant, citing directly to the engineers’ undisputed conduct.

exists between a professional and its client, the exact relationship existing between the Donatellis and DR Strong in this case. *Id.*

Here there is no doubt as to a special relationship between the Donatellis and DR Strong. DR Strong alleges as much, essentially arguing that the special relationship lacking in *Burg* shields professional engineers from the consequences of failing to adhere to their common law and statutory obligations/duties to their clients. *Id.*; *see also* CP45. While the parties here may not agree on the nature of DR Strong's role on the Project—a factual dispute that is not pertinent to this appeal—DR Strong's allegation means that it cannot now dispute that a special relationship existed.

- b. When a “special relationship” and duty co-exist, professionals are potentially liable in tort for their actions, notwithstanding the economic loss rule.

Having established that a special relationship exists, and that engineers have common law and statutory duties to their clients, the *Jackowski* case clarified that the economic loss rule does not prevent tort claims against such professionals. While the relationship between the Donatellis and DR Strong may have arisen out of contractual privity, the duty that DR Strong owes to the Donatellis arises, like other professionals such as doctors, lawyers, and real estate agents, out of the common law and statutory duties professionals owe to their clients to act with the

reasonable diligence of a prudent professional in the field, in this case engineering and project management for short plat development. The economic loss rule does not vitiate professional negligence claims such as those brought by the Donatellis.

2. The Supreme Court decisions in *Eastwood* and *Affiliated FM* clarified the boundary between the independent duty doctrine and the economic loss rule.

Before the Court of Appeals, DR Strong attacked the foregoing reasoning by ignoring any case that did not deal specifically with professional engineers, but offered no competing logic for why these principles should not apply to engineers. It then called essentially the entire analysis made above merely “dicta” in an attempt to reinforce its reliance on a “bright-line” rule it claimed was embodied in the *Berschauer* case. Fortunately, the Washington State Supreme Court weighed in on these issues and produced two (2) opinions that support the Donatellis’ analysis, and were properly relied upon by the Court of Appeals.

a. *Eastwood*.

The first of these cases is *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010). The lead opinion in *Eastwood* deconstructed the economic loss rule:

Seeing both a contractual relationship and an economic loss, the Court of Appeals believed that *Alejandre [v. Bull, supra]*

therefore compelled a holding that Eastwood's only remedy was a recovery for breach of lease. [citation omitted] The Court of Appeals' broad reading of this court's jurisprudence on the economic loss rule, while perhaps understandable, is not correct.

Eastwood, supra, at 387.

The *Eastwood* lead opinion struck down overly broad application of the economic loss rule for two reasons: (1) because such a broad reading of the economic loss rule “pulls too many types of injuries into its orbit” (*Id.* at 388); and (2) because economic losses are often recoverable in tort, as the *Eastwood* court exhibited through a series of cases showing tort recovery in contract situations. *Id.* at 388. The lead concluded that “[t]hus, the fact that an injury is an economic loss or the parties also have a contractual relationship is not an adequate ground, by itself, for holding that a plaintiff is limited to contract remedies.” *Id.* at 388-9.

The *Eastwood* Court then created a methodology for determining whether or not a matter may sound in tort when a contract exists. “The test is not simply whether an injury is an economic loss arising from a breach of contract, but whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract.” *Id.* at 393.

This test is now known as the “independent duty doctrine.” As discussed above, pre-existing cases in Washington have already

determined that there is a duty that runs to professional engineers and other professionals. Under the holding of *Eastwood*, the denial of DR Strong's Summary Judgment motion would be affirmed.

The *Eastwood* lead opinion was careful to be sure to demonstrate how the Independent Duty Doctrine interplayed with the economic loss rule, going so far as to analyze *Berschauer* itself :

In *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 819–20, 881 P.2d 986 (1994), the general contractor for a school construction project sued the architect, structural engineering company, and construction inspector for negligence. As a result of the defendants' inadequate design plans and faulty inspection work, the contractor claimed that it spent more money than expected and also endured delays in construction, with \$3.8 million in losses. *Id.* at 819, 881 P.2d 986. The contractor conceded these were economic losses. *Id.* But we did not automatically dismiss the contractor's claims. Rather, we carefully weighed the public policy considerations to decide whether the defendants owed an independent tort duty to avoid the contractor's risk of economic loss. *See id.* at 826–28, 881 P.2d 986. We held that the general contractor could not sue in tort to recover damages for lost profits. *Id.* at 826, 881 P.2d 986. The contractor's losses were the increased costs of doing business. We reasoned, as a policy matter, that if design professionals were under a tort duty to avoid a risk of increased business costs, the construction industry could not rely on the risk allocations in their contracts and would have an insufficient incentive to

negotiate risk. The case might have been different if a structure had collapsed.

Eastwood, supra, at 390-91.

Petitioner attacks the plurality nature of the *Eastwood* decision as somehow casting doubt on its applicability. However, the Court of Appeals in this case demonstrated an understanding that reading the lead and plurality opinions together in *Eastwood*, a majority of the Court supports the independent duty doctrine. The plurality nature of this opinion has no effect on its applicability.

b. *Affiliated FM.*

Taking the applicability of *Eastwood* one step further towards being on point in the case at hand, the Court addressed the applicability of the independent duty doctrine to professional engineers in *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.3d 521 2010. In this case, the Supreme Court took application of the economic loss rule to professional engineers head on, after first confirming the holdings of *Eastwood*.

Once again a plurality case, the *Affiliated FM* lead opinion first deals with *Berschauer* in the context of the new “independent duty” doctrine. Essentially, the lead identifies the specific situation in which the economic loss rule as stated in *Berschauer* may continue to apply, or in

other words, whether an independent duty for engineers exists in that situation.

In the context of complex multiparty transactions, at least, the preference for private ordering suggests that an engineer does not operate under extracontractual tort obligations.

Affiliated FM, supra, at 452.

But the case at hand is simply not a “complex multiparty transaction.”

The relationship between the Donatellis and DR Strong is a client relationship based, according to DR Strong, on a contract. CP20-26.

In *Affiliated FM*, the lead makes the distinction and limitation of the *Berschauer* case very clear: “Although *Berschauer* makes engineers not liable in tort for some classes of harm, extending that case to all classes of harm and all classes of people would be unjust.” *Id.* at 453. It is simply not the law that *Berschauer* eliminates tort liability for engineers.

Moreover, *Affiliated FM* makes it clear that there is a duty of professional engineers.

We therefore hold the measure of reasonable care for an engineer undertaking engineering services is the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances.

Affiliated FM Ins. Co. at 455.

DR Strong has argued that *Affiliated FM* only establishes a duty to prevent bodily injury, not injury like that alleged in the Donatelli case. However, that is an issue of the scope of the duty, not whether or not the duty exists. DR Strong's underlying motion did not deal with whether the scope of the duty encompassed the harm done to the Donatellis and as such that issue is not before this Court. But if any scope of the duty argument were entertained by the Court, the cases cited above, such as *Burg v. Shannon & Wilson, Inc.*, *supra* demonstrate that the duty of an engineer is not just to avoid bodily harm to persons, but to act with reasonable competence in completing the tasks they took on for their client.

3. The line between the independent duty doctrine and the economic loss rule is clear.

Petitioner argues that the independent duty doctrine as established in *Eastwood* and *Affiliated FM* is somehow in conflict with *Berschauer*. But this Court has already performed that analysis, as seen above, determining that the line is clear, and there is no conflict.

Even prior to *Eastwood* and *Affiliated FM*, the case law showed an established legal duty of professional engineers and allowed claims for negligence against professionals, notwithstanding the existence of a contract. Now, with the Court's decisions in *Eastwood* and *Affiliated FM*,

the Supreme Court has cleared up any remaining questions. The existing Court of Appeals decision does not conflict with *Berschauer*.

B. PETITIONER'S BRIEF MISCONSTRUES THE NATURE OF RAP 13.4(b)(2).

Petitioner claims that the Court of Appeals decision in this case should be reviewed simply because in Divisions II and III, cases were decided under *Berschauer* before the Supreme Court issued the *Eastwood* and *Affiliated FM* cases.

From a policy standpoint, RAP 13.4(b)(2) can only have meaning as a reason justifying Supreme Court review if it applies in two situations: (1) where two or more Divisions have cases that differently interpret existing Supreme Court precedent; or (2) two or more Divisions have cases that differ on treatment of an issue that has not yet been determined by the Supreme Court.

If RAP 13.4(b)(2) was interpreted as requested by Petitioners, so long as a single Division has not, in a published decision, relied upon a new Supreme Court-established precedent, all Court of Appeals decisions involving that Supreme Court-created precedent would inherently be in conflict and require Supreme Court review. To put this in terms of this case, just because Divisions II and III have yet to decide a case based upon

Eastwood and/or *Affiliated FM*, does not mean that the case at hand is in conflict with Divisions II and III.

Regardless of whether and to what extent the earlier cases cited by Petitioner would be affected by *Eastwood* and *Affiliated FM*, there are distinguishing facts in each of the cases cited by Petitioners that question whether or not they would affect the outcome of the case at hand.

In *Cox v. O'Brien*, 150 Wn.App. 24, 206 p.3d 682 (2009), a purchaser of real estate sued a pest inspector for an allegedly negligent report. The interesting fact is that the inspector contracted originally with the seller, not the purchaser, and the seller provided a copy of the report to the purchaser. *Id.* at 28. Moreover, the purchaser chose to forego their right to an inspection on their side, relying only on the seller's report. *Id.* at 28-9. This differs significantly from the case at hand, where a clear cut relationship between the parties existed, creating the duty identified.

Carlson v. Sharp, 99 Wn.App. 324, 994 P.2d 851 (Div. III 1999), deals with the case of a set of homeowners suing a geotechnical engineer who was originally hired and paid by the developer, who then sold the homes. The difference here is that in the case at hand, the Donatellis are the actual party in privity with the engineer, and therefore the direct beneficiary of the independent duty.

Griffith v. Centex, 93 Wn.App. 202, 969 P.2d 486 (1998), involved homebuyers suing the builder/seller of the homes for negligent misrepresentation, not a violation of any duty to exercise professional competence in performing hired work. *See Id.* at 213. The case at hand involves the duty of an engineer to perform its work at a competent level for its client.

Even if these cases would be decided differently based on the independent duty doctrine, that alone does not create a conflict as any contrary inferences from these cases would be superseded by the Supreme Court's decision. RAP 13.4 (b)(2) does not apply in the case at hand.

C. PUBLIC INTEREST DOES NOT DEMAND REPEATED REVIEW OF A DECIDED ISSUE.

Certainly the Donatellis do not deny that there is an interest in having clearly defined legal standards in the construction (and in every other) industry. However, such an interest does not justify the granting of a petition for review in every case. Once clearly defined legal standards are set, that one party disagrees with that standard is no justification for multiple reviews of the same standard.

Petitioner's request for review is founded upon a flawed idea: that there is confusion as to the confluence of the independent duty doctrine

and the economic loss rule in the context of construction contracts. But a reading of *Affiliated FM* demonstrates otherwise.

It is important to note that the only question in the case at hand to date is whether the economic loss rule bars the Donatellis negligence claim. It is difficult to read *Eastwood* and *Affiliated FM* in any way that does not clearly answer that question in the negative. Petitioner wants the idea that the *Eastwood* and *Affiliated FM* cases may have an impact on the construction industry to result in Supreme Court review of the case at hand. While that may have been enough in the original cases of *Eastwood* and/or *Affiliated FM*, now that the issue is decided, further review of these cases is not required. To do so would be against public interest as it would be repetitive jurisprudence regarding an issue already decided. The Court should deny the Petition for Review.

IV. CONCLUSION

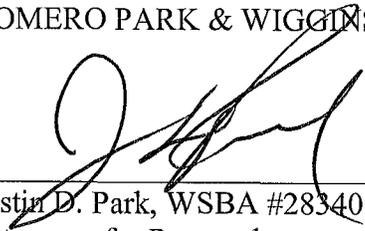
This Court has already established the independent duty doctrine, and dealt specifically with the continued role of the *Berschauer* case going forward. The Court does not need to revisit this issue again, much less here where there is no conflict between the case at hand and any Supreme Court decision. The Divisions are not in conflict as they have clear precedent and direction from the Supreme Court on which they must rely.

While public interest in clear legal standards always exists, now that the standard is established, there is no interest in repetitive jurisprudence.

The Court of Appeals decision in this case should stand and be the end of appellate review of this issue, allowing the parties to get on with resolving the remainder of their case and achieve finality. The Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 9th day of November, 2011.

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