

86590-6

No. 05568-0

**SUPREME COURT
OF THE STATE OF WASHINGTON**

STEVEN AND KAREN DONATELLI, a married couple,

Plaintiffs/Respondents,

v.

D.R. STRONG CONSULTING ENGINEERS, INC., STATE OF WASHINGTON

Defendant/Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
A. IDENTITY OF PETITIONER	1
B. COURT OF APPEALS DECISION	1
C. ISSUE PRESENTED FOR REVIEW	1
D. STATEMENT OF THE CASE	
A. The facts of the case	2
B. Procedural history	3
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	4
A. The decision conflicts with this Court's decisions.	5
B. The decision conflicts with decisions of two divisions of the Court of Appeals.	7
C. The issue is of substantial public interest that should be determined by the Supreme Court.	8
F. Conclusion	11
G. Appendix	12

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Affiliated FM Insurance Co. v. LTK Consulting Services, Inc.</i> , 170 Wn.2d 442, 243 P.3 rd 521 (2010)	4, 6
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007)	6
<i>Atherton Condominium v. Blume Development</i> , 115 Wn.2d 506, 799 P.2d 250 (1990)	5
<i>Berschauer/Phillips v. Seattle School Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994)	1, 3, 4, 5, 6, 8
<i>Carlson v. Sharp</i> , 99 Wn. App. 324, 994 P.2d 851 (Div. 3, 1999)	7
<i>Cox v. O'Brien</i> , 150 Wn. App. 24, 206 P.3 rd 682 (Div. 2, 2009)	7
<i>Eastwood v. Horse Harbor Foundation, Inc.</i> , 170 Wn.2d 380, 241 P.3 rd 1256 (2010)	4, 6
<i>Griffith v. Centex Real Estate Corp.</i> , 93 Wn. App. 202, 969 P.2d 486 (Div. 1, 1998)	8
<i>Jackowski v. Borchelt</i> , 151 Wn. App. 1, 209 P.3d 515 (Div. 2, 2009)	3, 10
<i>Kailin v. Clallam County</i> , 152 Wn. App. 974, 220 P.3d 222 (Div. 1, 2009) ...	10
<i>Stuart v. Coldwell Banker Comm'l Group, Inc.</i> , 109 Wn.2d 406, 745 P.2d 1284 (1987)	5

OTHER AUTHORITIES

Restatement (Second) of Torts (1977) section 552	6
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A. IDENTITY OF PETITIONER

D.R. Strong Consulting Engineers, Inc. asks this Court to accept review of the published Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

The decision of the Court of Appeals, Division One, was filed July 25, 2011. A copy of the decision is in the Appendix at pages A-1 through A-14. The decision was published by Order dated September 8, 2011. A-15.

C. ISSUE PRESENTED FOR REVIEW

Are plaintiffs' tort claims for negligence and negligent misrepresentation against the civil engineer barred under the rule adopted in *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994) where the claims

- arise from a failed construction project,
- the parties' contract contained a detailed allocation of rights and responsibilities,
- only commercial losses are at issue, and
- there is no bodily injury or property damage?

D. STATEMENT OF THE CASE

A. The facts of the case.

Steven and Karen Donatelli owned property in King County they wanted to develop into two short plats (the "Project").¹ Steve Donatelli signed a written agreement with D.R. Strong to perform six phases of engineering services for the Project. The engineer's fee was set at \$33,150. CP 23.

King County issued its five-year preliminary approval for the Project in October 2002. But the Project was not completed within this time frame and the preliminary approval expired in October 2007. Thereafter, D.R. Strong assisted the Donatellis in obtaining a new preliminary approval for the Project.

The real estate market crashed in 2008, before the Donatellis could obtain final plat approval and finish the Project. Ultimately, the Donatellis ran out of money and lost the property to foreclosure.

The Donatellis sued D.R. Strong to recover financial losses alleged to exceed \$1,500,000. CP 5. They alleged commercial loss only; there has been no bodily injury or property damage.

¹ The facts are set forth elegantly in Judge Cox's Opinion at App. A-2 to A-3 and are restated here. See also Plaintiffs' Complaint, CP 2-3.

B. Procedural history

The Donatellis' Complaint alleged claims for negligence, negligent misrepresentation, breach of contract and violation of the Consumer Protection Act. CP 1-5.

D.R. Strong sought partial summary judgment dismissing the negligence claims under what was then known as the economic loss rule of *Berschauer/Phillips v. Seattle School District*, 124 Wn.2d 816, 881 P.2d 986 (1994) and the claim under the Consumer Protection Act. CP 44-53.

Superior Court Judge Jim Rogers denied the Motion to Dismiss the negligence claims.² CP 94, 95. While acknowledging the holding of *Berschauer/Phillips*, Judge Rogers thought that recent decisions of the Court of Appeals involving statutory claims against realtors, including *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 515 (Div. 2, 2009), supported Mr. Donatelli's common law negligence claims against his engineers. CP 95.

D.R. Strong filed a timely Notice of and Motion for Discretionary Review, and on August 11, 2010 Commissioner James Verellen granted the Motion for Discretionary Review concluding that the trial court's

² Judge Rogers granted the Motion to Dismiss the Consumer Protection Act claim, and that ruling is not at issue.

error was obvious under the plain holding of *Berschauer/Phillips*. App. A-16 to A-20.

On November 4, 2010 this Court issued opinions in *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010) and *Affiliated FM Insurance Co. v. LTK Consulting Services, Inc.*, 170 Wn. 442, 243 P.3d 521 (2010).

On July 25, 2011, the Court of Appeals issued an unpublished decision concluding, *inter alia*, that “*Berschauer/Phillips* does not control the disposition of this case, despite the fact that it lives on.” App. A-13.

D.R. Strong and two non-party attorneys sought publication of the decision, and on September 8, 2011 the Court of Appeals granted the motions to publish. App. A-15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted under RAP 13.4(b) (1), (2) and (4) because the Court of Appeals’ decision conflicts with this Court’s decisions, including and not limited to *Affiliated FM Insurance*, it conflicts with decisions of two divisions of the Court of Appeals, and the issue is one of substantial public interest that should be determined by the Court. The law governing claims for commercial losses arising from construction projects is in complete disarray. The certainty and predictability the Court sought to encourage in *Berschauer/Phillips* no longer exists.

A. The Court of Appeals' decision conflicts with this Court's decisions.

The decision allowing claims for negligence and negligent misrepresentation to proceed in construction cases alleging only commercial loss conflicts with the Court's decision in *Berschauer/Phillips v. Seattle School District*, 124 Wn.2d 816, 881 P.2d 986 (1994). The Court's unanimous decision in *Berschauer/Phillips* held that no tort claim is allowed in construction cases alleging what are in fact only commercial losses and the parties are limited to whatever remedies exist under their contract.

The *Berschauer/Phillips* Court cited its own precedent disallowing tort claims in construction cases in *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987)(defective walkways) and *Atherton Condominium v. Blume Development*, 115 Wn.2d 506, 799 P.2d 250 (1990)(exterior finishes that were in violation of the fire code), and the Court held:

We follow the *Stuart* and *Atherton* line of cases and maintain the fundamental boundaries of tort and contract law **by limiting the recovery of economic loss due to construction delays to the remedies provided by contract.** 124 Wn. 2d at 826, emphasis added.

The Court of Appeals' decision conflicts with that holding in *Berschauer/Phillips*.

The Court independently analyzed and affirmed the trial court's dismissal of the claim for negligent misrepresentation under Restatement (Second) of Torts, section 552. *Id.*, 124 Wn. at 828. The Court of Appeals' decision allows the claim for negligent misrepresentation to proceed and, again, it conflicts with the Court's decision in *Berschauer/Phillips*.

The *Berschauer/Phillips* Court stated that under any other rule, "certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer" and that is because "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 826-827.

The Court adopted the moniker "economic loss rule" – a misnomer to be sure – as Justice Chambers first aptly observed in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), concurring at 692. And while the name of the rule was changed in *Eastwood* and *Affiliated FM Insurance* to the "independent duty rule", the Court's lead opinion in *Affiliated FM Insurance* stated clearly that "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." (Lead opinion fn.3, emphasis

added). Those cases are *Berschauer/Phillips v. Seattle School District* and *Stuart v. Coldwell Banker Commercial Group, Inc.*

The Court of Appeals' decision conflicts with the Court's assertion that the decisions in *Affiliated FM Insurance* and *Eastwood* left intact the decisions where the Court held a tort remedy is not available. The rule barring tort claims for commercial losses in construction projects that the Court adopted in *Berschauer/Phillips* is still the law and should have been applied here.

B. The Court of Appeals' decision conflicts with decisions of two divisions of the Court of Appeals.

All three divisions of the Court of Appeals have, not surprisingly in view of the plain, unambiguous and unanimous holding in *Berschauer/Phillips*, barred tort claims where only commercial losses were at issue. See, for example, *Cox v. O'Brien*, 150 Wn.2d 24, 206 P.2d 682 (Div. 2, 2009). Two divisions of the Court of Appeals applied the rule to claims arising on a construction project.

In *Carlson v. Sharp*, 99 Wn. App 324, 994 P.2d 851 (Div. 3, 1999), the Court of Appeals, Division Three, applied *Berschauer/Phillips* to bar tort claims brought against a civil engineer for a faulty soils report used in the construction of a new home.

In *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (Div. 1, 1998), the Court of Appeals, Division One, applied *Berschauer/Phillips* to bar tort claims arising from the construction of allegedly defective condominiums.

The Court of Appeals' decision here allowing a tort claim to proceed in a construction case where the damages are commercial loss conflicts with every reported decision of the Court of Appeals, including the two cited above.

C. The issue is of substantial public interest that should be determined by the Supreme Court.

The law governing construction claims is in utter disarray, as is shown by the Court's three separate opinions in *Affiliated FM Insurance* and its companion case, *Eastwood*. In those cases, the Court did not overrule *Berschauer/Phillips*, and if its unanimous holding is still good law, then the Court should take this opportunity to say so.

The Court in *Berschauer/Phillips* adopted "a bright line distinction" limiting economic losses in construction related claims to contract, *Id.*, 124 Wn.2d at 822, and that bright line distinction brought certainty to the construction industry. The Court stated that under any other rule, "certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in

particular would suffer” and that is because “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 826-827.

What was true in 1994 is doubly or triply so in 2011 when our state’s construction industry is aground on the shoals of the worst economic downturn in generations.

The reasons for the rule limiting claims for construction project delay to the remedies of the contract squarely apply to the facts of this case. The contract for services that Mr. Donatelli and D.R. Strong agreed to reflected a detailed scope of services establishing exactly what services the engineer was required to perform. The responsibilities of the “Client” and the “Consultant” were allocated; it set an agreed upon price for the services totaling \$33,150 and the contract included terms by which the damages for any liability would be limited to the fees paid. By its terms, Mr. Donatelli could have waived this limitation by payment of consideration; he chose not to do so. In this detailed contract the parties allocated among themselves the risks, responsibilities, and benefits of their bargain. The parties did exactly what the Court in *Berschauer/Phillips* asked them to do. Is it all for naught?

The cases indicate that plurality decisions, like those in *Affiliated FM Insurance Co.* and *Eastwood*, have limited precedential value. *Kailin v. Clallam County*, 152 Wn. App. 974, 220 P.3d 222 (Div. 1, 2009). For that reason and others, the trial courts are struggling with what they mean. The undersigned is counsel for the architect in two other delay and impact construction cases where the application of the Court's November 2010 decisions were at issue. In one county, the trial court ruled that the tort claim was dismissed. King County No. 09-2-25274-2SEA. In another county, the trial court ruled that the tort claim could proceed. Snohomish County No. 09-2-09847 4. One or the other is correct, but not both. Construction project owners and developers, the contractors and designers who provide the goods and services for the projects, their counsel and the trial courts all need the Court's guidance as to what extent, if any, that *Berschauer/Phillips* lives on.

Two attorneys unrelated to this case sought publication of the Court of Appeals' decision. One of them is counsel in *Jackowski v Borchelt*, 151 Wn. App. 1, 209 P.3d 515 (Div. 2, 2009), which was argued recently in this Court, and he intends to use the Court of Appeals' decision in support of his contention in that case. This demonstrates one more reason why the issue is of substantial public interest.

F. CONCLUSION

D.R. Strong asks the Court to accept this case for review and decide whether plaintiffs' tort claims for negligence against the civil engineer still are barred under the rule adopted in *Berschauer/Phillips* where the claims arise from a failed construction project, the contract contained a detailed allocation of rights and responsibilities, only commercial losses are at issue, and there is no bodily injury or property damage.

Respectfully submitted this 7th day of October, 2011.

By Michael J. Bond
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CONSULTING ENGINEERS, INC.

APPENDIX

1. Court of Appeals' DecisionA-1 to A-14
2. Order Granting Motion to PublishA-15
3. Commissioner's Ruling Granting Discretionary Review...A-16 to A-19

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN and KAREN DONATELLI, a married couple,)	No. 65568-0-1
)	
Respondents,)	DIVISION ONE
)	
v.)	
)	
D.R. STRONG CONSULTING ENGINEERS, INC., a Washington corporation,)	UNPUBLISHED
)	FILED: <u>July 25, 2011</u>
Petitioner.)	
)	

FILED
COURT OF APPEALS
DIVISION ONE
JUL 25 2011

Cox, J. — Professional engineers have a duty to exercise reasonable skill and judgment in performing engineering services.¹ That duty exists despite the assertion of the defense of the economic loss rule, which is now known as the “independent duty doctrine.”²

Here, D.R. Strong Consulting Engineers, Inc., sought summary dismissal of the negligence and negligent misrepresentation claims asserted by Steven and Karen Donatelli solely on the basis that the economic loss rule bars these

¹ Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc., 170 Wn.2d 442, 453, 461, 243 P.3d 521 (2010) (Chambers, J., concurring).

² Id. at 460-62 (Chambers, J., concurring).

tort claims. The trial court denied this motion for partial summary judgment, and this court granted discretionary review.

Thereafter, the supreme court issued two opinions that modified then existing case law: Eastwood v. Horse Harbor Foundation, Inc.,³ and Affiliated FM Insurance Co. v. LTK Consulting Services, Inc.⁴ Specifically, the court held that professional engineers may be liable in tort despite the assertion of the independent duty doctrine, formerly known as the economic loss rule, as a defense.⁵ In accordance with Eastwood and Affiliated, we affirm the trial court's denial of partial summary judgment to D.R. Strong on these tort claims and remand for further proceedings.

Steven and Karen Donatelli owned property in King County that they wanted to develop into two short plats (the "Project"). Steven Donatelli signed a written agreement with D.R. Strong to perform six phases of engineering services for the Project.

King County issued its five-year preliminary approval for the Project in October 2002. But the Project was not completed within this time frame, and the preliminary approval expired in October 2007. Thereafter, D.R. Strong assisted the Donatellis in obtaining a new preliminary approval for the Project.

³ 170 Wn.2d 380, 241 P.3d 1256 (2010).

⁴ 170 Wn.2d 442, 243 P.3d 521 (2010).

⁵ Id. at 460-62 (Chambers, J., concurring).

The real estate market crashed in 2008, before the Donatellis could obtain final plat approval and finish the Project. Ultimately, the Donatellis ran out of money and lost the property to foreclosure.

The Donatellis sued D.R. Strong, alleging breach of contract, Consumer Protection Act ("CPA") violations, negligence, and negligent misrepresentation. D.R. Strong moved for partial summary judgment on the CPA, negligence, and negligent misrepresentation claims. It argued that the negligence and negligent misrepresentation tort claims were barred by the economic loss rule.

The trial court granted summary judgment on the CPA claim, but denied summary judgment on the two negligence claims. The trial court also denied D.R. Strong's motion for reconsideration of the denial of its motion for partial summary judgment on these latter claims.

D.R. Strong petitioned this court for discretionary review, which we granted in August 2010. On November 4, 2010, the supreme court issued Eastwood and Affiliated.

DUTY

D.R. Strong argues that the trial court erred, as a matter of law, in denying its motion for partial summary judgment on the Donatellis' claims of negligence and negligent misrepresentation. This argument is based solely on its assertion of the affirmative defense of the economic loss rule. We hold that the independent duty doctrine, formerly known as the economic loss rule, does not bar assertion of these tort claims.

We will affirm an order granting summary judgment if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law.⁶ We review de novo a summary judgment order, taking the evidence and all reasonable inferences from it in the light most favorable to the nonmoving party.⁷

Here, the sole basis for D.R. Strong's motion for partial summary judgment was that the economic loss rule barred recovery for the tort claims the Donatellis asserted against it. The purpose of the economic loss rule is to bar recovery for an alleged tort where there is a contractual relationship between parties and the losses are economic.⁸ When a party's economic loss potentially implicates contract and tort relief, the economic loss rule limits the party to contract remedies.⁹ Whether the economic loss rule applied was purely a question of law and did not require that the trial court consider whether any genuine issues of material fact existed for summary judgment purposes.

Eastwood and Affiliated control the question of law that is before us: whether the independent duty doctrine, formerly known as the economic loss rule, bars recovery for tort claims against professional engineers. The supreme court decided both cases after we granted discretionary review in this case.

In Eastwood, the lead opinion, authored by Justice Fairhurst and signed by three justices, traces the origin and development of the economic loss rule.

⁶ CR 56(c).

⁷ Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

⁸ Alejandre v. Bull, 159 Wn.2d 674, 683, 153 P.3d 864 (2007).

⁹ Id. at 681.

Those who signed the lead opinion concluded that the term is a misnomer and renamed it the "independent duty" doctrine.¹⁰ The opinion holds that under the newly named doctrine "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract."¹¹

In the plurality opinion in that case, which Justice Chambers authored, four justices agreed that the independent duty doctrine is a more appropriate term than the economic loss rule.¹² These four justices also concluded that a duty not to commit waste is and always has been "independent of and in addition to any duties assumed by" contract.¹³

Reading the lead and plurality opinions in Eastwood together, we draw several conclusions. First, a majority of the supreme court held that the "economic loss rule" is a misnomer and will now be known as the "independent duty doctrine." Second, a majority of the court also held that breach of a tort duty that arises independently from the terms of a contract is actionable, despite the assertion of the economic loss rule as a defense.

On the same day that the supreme court decided Eastwood, it also decided Affiliated. That case was before the Washington State Supreme Court

¹⁰ Eastwood, 170 Wn.2d at 387-94, 402.

¹¹ Id. at 402.

¹² Id. at 417 (Chambers, J., concurring).

¹³ Id. (Chambers, J., concurring).

on the basis of a certified question regarding Washington law from the Ninth Circuit Court of Appeals.¹⁴

There, a fire damaged the Seattle Monorail.¹⁵ Investigation revealed that a faulty grounding system, recommended by LTK Consulting Services, an engineering firm, caused the fire.¹⁶ Seattle Monorail Systems (SMS) was the company in charge of operating the Monorail. Its insurer, Affiliated FM (AFM), was subrogated to SMS' rights against LTK by virtue of paying the claim.¹⁷ AFM then sued LTK for negligence.¹⁸

In U.S. District Court, LTK argued that the economic loss rule prohibited the lawsuit because the damages suffered were purely economic.¹⁹ The U.S. District Court granted LTK's motion for summary judgment on that ground and AFM appealed to the Ninth Circuit.²⁰ The Ninth Circuit certified to the Washington State Supreme Court the following question:

May party A (here, SMS, whose rights are asserted in subrogation by AFM), who has a contractual right to operate commercially and extensively on property owned by non-party B (here, the City of Seattle), sue party C (here, LTK) in tort for damage to that property,

¹⁴ See Affiliated FM Ins. Co. v. LTK Consulting Serv. Inc., 556 F.3d 920 (9th Cir. 2009).

¹⁵ Affiliated FM Ins. Co., 170 Wn.2d at 443.

¹⁶ Id. at 444.

¹⁷ Id. at 446.

¹⁸ Id.

¹⁹ Id. at 447.

²⁰ Id.

when A(SMS) and C(LTK) are not in privity of contract?^[21]

Affiliated was also a case in which the court issued three separate opinions. Justice Fairhurst authored the lead opinion, signed by only two justices. Justice Chambers authored the plurality opinion, which four justices signed. Chief Justice Madsen authored a third opinion, signed by three justices.

The lead opinion concludes that LTK, by undertaking to provide engineering services, assumed a duty of reasonable care, despite the assertion of the economic loss rule as a defense.²² In so concluding, it applies the independent duty doctrine from Eastwood to a suit against professional engineers.²³

The plurality opinion, authored by Justice Chambers and signed by four justices, concludes that the supreme court "has long recognized that engineers have a duty to exercise reasonable skill and judgment in performing engineering services."²⁴ These justices viewed the case as "a straightforward claim of professional negligence," since professionals "owe a duty to exercise the degree of skill, care, and learning possessed by members of their profession in the community."²⁵ Concurring in the result reached by the lead opinion, Justice Chambers stated:

²¹ Affiliated FM Ins. Co., 556 F.3d at 922.

²² Affiliated FM Ins. Co., 170 Wn.2d at 460-61.

²³ Id. at 449-54.

²⁴ Id. at 461 (Chambers, J., concurring).

²⁵ Id. at 462 (Chambers, J., concurring).

The only issue is whether LTK owed that duty to SMS as a concessionaire. I agree with the lead opinion that it did. This case does not implicate in any way the independent duty doctrine, formerly known as the 'economic loss rule.'^[26]

Carefully reading together these two opinions, we conclude that a majority of the supreme court in Affiliated held that professional engineers owe a tort duty of reasonable care to their clients. This is consistent with prior Washington law.²⁷ Moreover, this duty arises despite the existence of a contract between such engineers and their clients. That the plurality opinion did not embrace the application of the independent duty doctrine is irrelevant to this conclusion.

Here, Steven Donatelli, individually, signed a contract for engineering services with D.R. Strong. The contract limited D.R. Strong's professional liability to \$2,500 or the fee charged, whichever is greater. The limitation of liability could

²⁶ Id. (Chambers, J., concurring) (citing Eastwood, 170 Wn.2d at 398).

²⁷ See Jarrard v. Seifert, 22 Wn. App. 476, 591 P.2d 809 (1979) (holding that professional engineers and land surveyors breached their duty to act with reasonable diligence, skill and ability by failing to search for existing easements on a property because it is common practice for these types of professionals to do so); Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 43 P.3d 526 (2002) (holding that professional engineers have statutory duties under chapter 18.43 RCW and chapter 196-27 WAC to their clients, their employers, and members of the public with whom they have a "special relationship"); WAC 196-27A-020(2) ("(a) Registrants are expected to strive with the skill, diligence and judgment exercised by the prudent practitioner, to achieve the goals and objectives agreed upon with their client or employer. They are also expected to promptly inform the client or employer of progress and changes in conditions that may affect the appropriateness or achievability of some or all of the goals and objectives of the client or employer. . . . (d) Registrants shall be competent in the technology and knowledgeable of the codes and regulations applicable to the services they perform. . . . (h) Registrants shall advise their employers or clients in a timely manner when, as a result of their studies and their professional judgment, they believe a project will not be successful.")

be waived "upon the Client's written request made at the time of the initial authorization on a given project, . . . [if] the Client agrees to pay for this waiver an additional 5% of our total fee or \$500, whichever is greater."²⁸ Steven Donatelli did not waive the liability limitation by paying this fee.

In their complaint in this action, the Donatellis allege the following:

Third Cause of Action: Negligence

.....

23. Beginning in 2002, Defendant had a duty to complete the Project in a timely, competent, and cost effective manner. It failed to do so by, among other things, taking over 5 years to complete the work (and even then not completing all of the work), charging well over double the amount than it originally quoted to do the work; and having to redo work it had previously done due to it being inaccurate.

24. Defendant's breach of duty proximately caused Donatelli damages.

25. As a result of Defendant's negligence, Donatelli has suffered damages in an amount to be proven at trial, but which amount is believed to exceed \$1,500,000.

Fourth Cause of Action: Negligent Misrepresentation

.....

27. Defendant originally represented to Donatelli that the Project should be able to be completed within approximately one and ½ years, if not less time, from the date Defendant started working on the Project and that the Project should not take more than \$50,000 to complete.

28. These representations were false when made.

29. Defendant was negligent in making these representations.

²⁸ Clerk's Papers at 26.

30. Donatelli justifiably relied on these misrepresentations and agreed to have Defendant do the Project.

31. As a result of Defendant's misrepresentations, Donatelli has suffered damages in an amount to be proven at trial, but which amount is believed to exceed \$1,500,000.^[29]

In its motion for partial summary judgment, D.R. Strong argued that the Donatellis' negligence and negligent misrepresentation claims were barred by the economic loss rule. It did not address whether there were any genuine issues of material fact, the other prong of the summary judgment standard.

Eastwood and Affiliated control the dispositive issue in this review: whether D.R. Strong is entitled to judgment as a matter of law based on the independent duty doctrine, formerly known as the economic loss rule. Eastwood holds that the independent duty doctrine is not so broad as to bar claims based on extra-contractual duties between parties to a contract. Affiliated applies that rule to tort claims against professional engineers. In light of these cases, we conclude that D.R. Strong is not entitled to judgment as a matter of law on the Donatellis' negligence claims. Thus, denial of summary judgment was proper.

D.R. Strong attempts to distinguish Eastwood on its facts. It also notes that Eastwood does not overrule the previous economic loss cases. These arguments are unpersuasive.

While both of these distinctions are true, neither makes the holding in Eastwood inapplicable to this case. Eastwood represents an analytical shift in the way courts should interpret tort claims between contracting parties. While not

²⁹ Clerk's Papers at 4-5.

overruling the case law under the economic loss doctrine, the court clarified the doctrine by requiring consideration of “whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract.”³⁰ In analyzing the previous economic loss cases, the court explained that the results of each were also proper under the independent duty rule because the plaintiffs’ claims did not arise independently of their contracts.³¹ Therefore, although Eastwood is factually distinguishable from this case, its clarification of the independent duty doctrine is applicable here.

D.R. Strong argues that Affiliated is also distinguishable. It appears to argue that the narrowest ground of agreement in the case is that a claim for fire loss damages is properly recoverable in negligence. We disagree because this reading is entirely too limited.

The lead opinion, authored by Justice Fairhurst and signed by only two justices, discussed whether damages related to safety concerns, such as fire, would result in negligence liability for an engineer. That opinion applied the independent duty doctrine and concluded that the professional engineers in that case assumed a duty of care by undertaking engineering services.³² We do not read the opinion to, necessarily, limit the scope of the duty to property damage.

In any event, the plurality opinion, authored by Justice Chambers and signed by four justices, concurred in the result reached in the lead opinion. It

³⁰ Eastwood, 170 Wn.2d at 394.

³¹ Id. at 389-93.

³² Affiliated FM Ins. Co., 170 Wn.2d at 460-61.

said nothing about limiting the duty to property damage. In fact, we read this opinion to be one in which there is “a straightforward claim of professional negligence.”³³ The opinion does not indicate that such a straightforward claim should be limited to property damage. In sum, we conclude that Affiliated cannot be limited in the way that D.R. Strong urges.

At oral argument, D.R. Strong emphasized footnote three of the lead opinion.³⁴ D.R. Strong appears to argue that the footnote leaves intact the holding of Berschauer/Phillips Construction Co. v. Seattle School District No.1.³⁵

Reading the footnote in context, it is a response to the concurring/dissenting opinion authored by Chief Justice Madsen and signed by only three justices. While the footnote does not specifically refer to Berschauer/Phillips, D.R. Strong maintains that the lead opinion implies that Affiliated and Eastwood do not modify the rule in Berschauer/Phillips. D.R. Strong misreads Affiliated and Eastwood.

In Berschauer/Phillips, the general contractor for a school construction project sued the architect, structural engineering company, and construction

³³ Id. at 462.

³⁴ Id. at 450 n.3 (“The concurrence/dissent asserts that the independent duty inquiry is ‘a wholesale rejection of our prior cases’ and is ‘little more than this court’s ad hoc determination of whether a duty should lie.’ Neither accusation is correct. ***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.***”) (Chambers, J., concurring) (internal citations omitted, emphasis added).

³⁵ 124 Wn.2d 816, 881 P.2d 986 (1994).

inspector for negligence.³⁶ 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.³⁷ The supreme court held that the general contractor could not sue in tort to recover damages due to these construction delays.³⁸ It reasoned that if design professionals had a 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.³⁹

Here, there is a contract between the Donatellis and D.R. Strong, unlike the situation in Berschauer/Phillips. Following the underlying logic of that case here, there would have been an opportunity for the Donatellis and D.R. Strong to adjust between themselves by contract the risks of loss. And, in fact, there was such an opportunity here, as the plain words of their contract make clear.

But Eastwood and Affiliated also clarify that where there is an independent duty that arises separate from the contract, breach of that duty will be actionable, despite the contract. In short, Berschauer/Phillips does not control the disposition of this case, despite the fact that it lives on.

³⁶ Id. at 819.

³⁷ Id.

³⁸ Id. at 825-27.

³⁹ Id. at 826-27.

Finally, D.R. Strong argues that the court of appeals cases on which the trial court relied to deny summary judgment in this case are distinguishable. We need not decide whether these cases are distinguishable. Under Eastwood and Affiliated, which were not decided at the time of the trial court's ruling, the court correctly denied summary judgment. It does not matter whether the court of appeals cases on which the trial court relied in its ruling are applicable.

In sum, we conclude that the independent duty doctrine, formerly known as the economic loss rule, does not bar the tort claims asserted in this case. In so concluding, we neither address whether D.R. Strong breached a duty to the Donatellis nor do we address the scope of such a duty. Likewise, we do not address causation or damages, other elements of a tort claim. These and other related questions are not currently before us.

We affirm the denial of the motion for partial summary judgment on these tort claims and remand for further proceedings.

Cox, J.

WE CONCUR:

Dyer, C.J.

Schmalzer, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STEVEN and KAREN DONATELLI, a
married couple,

Respondents,

v.

D.R. STRONG CONSULTING
ENGINEERS, INC., a Washington
corporation,

Petitioner.

No. 65568-0-1

ORDER GRANTING
MOTION TO PUBLISH
OPINION

Petitioner, D.R. Strong Consulting Engineers, Inc., and Matthew F. Davis and William R. Hickman, both persons not a party to this appeal, have moved for publication of the opinion filed in this case on July 25, 2011. Respondents, Steven and Karen Donatelli, filed an answer to the motion agreeing that the opinion should be published. The panel hearing the case has considered the motions and Respondents' answer and has determined that the motions should be granted. The court hereby

ORDERS that the motions to publish the opinion are granted.

Dated this 8th day of September 2011.

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DIVISION ONE
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FOR THE PANEL:

COX, J.

Judge

required both the hydrant and the installation of fire sprinklers in all new homes. While Donatelli and Strong pursued these issues with the county, the preliminary approval expired. Donatelli obtained a new preliminary approval, but ultimately, the project failed and lenders foreclosed on the property.

Donatelli sued Strong alleging negligence, breach of contract and violation of the Consumer Protection Act. The trial court denied Strong's motion for partial summary judgment to dismiss the negligence action, but dismissed the Consumer Protection Act claim. The claims for breach of contract and negligence remain for trial.

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is available only:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

DECISION

The economic loss rule precludes a claim for negligence against a professional when the only losses are economic and based in the contract, such as construction delay claims against an engineer or architect, rather than claims

No. 65568-0/3

for bodily injury or property damage. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994) ("limiting the recovery of economic loss due to construction delays to the remedies provided by contract"). The trial court noted the history of the Berschauer line of cases, but perceived emerging exceptions in the arena of professional malpractice. The trial court apparently relied upon Jackowski v. Borchelt, 151 Wn. App. 1, 1215, 209 P.3d 514 (2009) (affirming summary judgment of a home buyer's negligent representation claim by applying the economic loss rule in the presence of a contract and reversing summary judgment against a real estate agent and firm because of an improper application of the economic loss rule that precluded a professional malpractice claim when the agent and firm's duties were rooted in statutes and the common law and not the contract), rev. granted, 168 Wn.2d 1001, 226 P.3d 780 (2010), and Boguch v. Landover Corp., 153 Wn. App. 595, 610, 224 P.3d 795 (2009) (noting real estate agent retains common law duties owed to clients in context of negligence claim for agent's involvement in an inaccurate boundary description.) The limited references in those cases to potential tort claims against real estate agents who have a retained common law duty do not overrule or call into question the fundamental doctrine of the economic loss rule as applied to professional services in the construction arena. The allegations in this litigation appear to fit squarely within the holding of Berschauer.

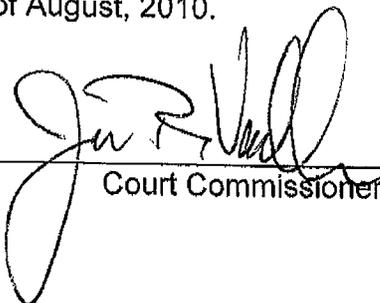
I conclude that in this setting, discretionary review is warranted.

No. 65568-0/4

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is granted.

Done this 11th day of August, 2010.



Court Commissioner

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