

055680

055680

No. 65568-0-I

THE COURT OF APPEALS, DIVISION I
IN THE STATE OF WASHINGTON

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

v.

STEVEN AND KAREN DONATELLI, *Respondents*.

BRIEF OF RESPONDENTS

Justin D. Park, WSBA # 28340
ROMERO PARK & WIGGINS P.S.
Attorneys for Respondents
Pacific Plaza Building
155 – 108th Avenue N.E., Suite 202
Bellevue, WA 98004-5901
(425) 450-5000

2010 NOV 24 PM 1:45

ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
Cases.....	ii
Statutes.....	ii
Rules.....	ii
I. INTRODUCTION.....	1
II. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	2-5
A. Statement of Facts.....	2-5
IV. ARGUMENT.....	5-15
A. STANDARD OF REVIEW.....	5-6
B. THE ECONOMIC LOSS RULE DOES NOT ELIMINATE NEGLIGENCE CLAIMS WHEN PROFESSIONALS OWE A DUTY TO THEIR CLIENTS.....	6-10
1. The economic loss rule does not abrogate claims for professional negligence.....	6-7
2. Professional Engineers have legally established duties to their clients.....	8-10
3. When a “special relationship” and duty co-exist, professionals are potentially liable in tort for their actions, notwithstanding the economic loss rule...	10
C. RECENT WASHINGTON STATE SUPREME COURT DECISIONS CLARIFY THAT THE ECONOMIC LOSS RULE DOES NOT ELIMINATE TORT CLAIMS AGAINST PROFESSIONALS.....	11-15
V. CONCLUSION.....	15-16

TABLE OF AUTHORITIES

Cases

Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., 2010 WL 4350338, No. 82738-9 (Nov. 4, 2010).....13-15

Alejandro v. Bull, 159 Wn.2d 674, 681, 153 P.3d 864 (2007).....6-7, 11

Berschauer/Phillips Construction Co. v. Seattle School District no. 1, 124 Wn.2d 816, 881 p.2d 986 (1994).....1,11,13-15

Burg v. Shannon & Wilson, Inc., 110 Wn.App. 798, 806, 43 P.3d 526 (2002).....8-10,15

Boguch v. Landover Corp., 153 Wn.App. 595, 224 P.3d 795 (2009).....7

Eastwood v. Horse Harbor Foundation, Inc., 2010 WL 4351986, No. 81977-7 (Nov. 4, 2010).....11-13

Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).....5

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).....5

Jackowski v. Borchelt, 151 Wn.App. 1, 14, 209 P.3d 514 (2009).....7,10

Jarrard v. Seifert, 22 Wn.App. 476, 479, 591 P.2d 809 (1979)8

Ruff v. King County, 125 Wn. 2d 697, 703, 887 P.2d 886 (1995)5

Statutes

R.C.W. Chap. 18.43..... 8

Rules

WAC 197-27 A-020, and 030..... 8

WAC 197-27 A-020(2)..... 9

I. INTRODUCTION

D.R. Strong wants the broadest possible interpretation of the “bright line distinction” set by the Court in the *Berschauer/Phillips*¹ case. However, an examination of that case, together with the subsequent analysis provided by the appellate courts in Washington, shows that engineers do have a duty of care and are therefore subject to potential liability in tort for a breach of that duty. The lower court correctly ruled that summary judgment was inappropriate on that basis.

II. RESPONSE TO ASSIGNMENTS OF ERROR.

Appellant’s statement of the issue pertaining to the assignment of error contains unnecessary elements that do not accurately state the nature of this appeal. Certainly the issue on appeal is whether or not the economic loss rule bars Respondents’ claim for negligence, however, Respondents disagree with Appellant’s characterization of that claim as a claim for “defeated expectations arising from a failed land development”. However, as the specific nature of that claim beyond its existence as a claim for negligence is not at issue in this appeal, Respondents merely make this mention of their objection and accept the critical portion of said statement of issue.

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

III. STATEMENT OF THE CASE.

A. Statement of Facts.

Steve Donatelli is not a land developer. However, Mr. Donatelli has attempted to develop some properties he and his wife owned, with 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 nature of the Donatellis' claims that is not relevant to this appeal.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews summary judgment orders de novo and performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The Court should examine the pleadings, affidavits, and depositions before the trial court and “take the position of the trial court and assume facts [and reasonable inferences] most favorable to the nonmoving party.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)).

Here, the Donatellis were the nonmoving party. CP44, 54. Thus, all facts and reasonable inferences must be viewed in the light most favorable to their position. Summary judgment is only proper if the record before

the trial court establishes “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

B. THE ECONOMIC LOSS RULE DOES NOT ELIMINATE NEGLIGENCE CLAIMS WHEN PROFESSIONALS OWE A DUTY TO THEIR CLIENTS.

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 in this appeal is whether the economic loss rule wholly insulates professional engineers from negligence claims based on their established common law and statutory duties.

1. The economic loss rule does not abrogate 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. 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).

The principle is as follows: if a client hires a professional to perform specific act X, and the professional simply does not even attempt X, the client’s claim is purely contractual; however, if the professional is negligent in performing X, the client has also a claim sounding in tort, no matter the existence of the contract forming the basis of the client-professional relationship. Here, the Donatellis’ have claimed that DR Strong breached the professional duties it owed them by not knowing of or following applicable Country regulations related to the expiration of the Project’s pre-approval, much less managing the Project in accordance with the same. CP1-6; 64-71.

2. 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 R.C.W. 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).² 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 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 in favor of the special relationship that the *Burg* plaintiff lacked in

² 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.

arguing whether statutory duties attached to professional engineers. *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.

3. 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 clarifies 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 a contractual relationship, 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.

C. RECENT WASHINGTON STATE SUPREME COURT DECISIONS CLARIFY THAT THE ECONOMIC LOSS RULE DOES NOT ELIMINATE TORT CLAIMS AGAINST PROFESSIONALS.

DR Strong attacks the foregoing reasoning by dismissing any case that does not deal specifically with professional engineers, but offers no competing logic for why these principles should not apply to engineers. It then calls essentially the entire analysis made above merely “dicta” in an attempt to reinforce its reliance on a “bright-line” rule it claims is embodied in the *Berschauer/Phillips* case. This is merely an attempt to “shout down” the impact of the foregoing cited cases on the economic loss rule.

Fortunately, the Washington State Supreme Court has within the last month weighed in on these issues and produced two (2) opinions that support the Donatellis’ analysis. The first of these cases is *Eastwood v. Horse Harbor Foundation, Inc.*, 2010 WL 4351986, No. 81977-7 (Nov. 4, 2010)³. The *Eastwood* Court, sitting *En Banc*, deconstructed the economic loss rule:

Seeing both a contractual relationship and an economic loss, the Court of Appeals believed that *Alejandro [v. Bull, supra]* therefore compelled a holding that Eastwood's only remedy was a recovery for breach of lease. *Eastwood*, 144 Wash.App.

³ A copy of the slip opinion is attached as Appendix A.

1009, 2008 WL 1801332, at *2. The Court of Appeals' broad reading of this court's jurisprudence on the economic loss rule, while perhaps understandable, is not correct.

Eastwood v. Horse Harbor Found., Inc., 81977-7, slip op. at 8.

The *Eastwood* Court 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 8); 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 9-10. The *Eastwood* court 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 9-10.

The *Eastwood* Court then creates 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 17.

This test is 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 the *Eastwood* Court, the denial of DR Strong's Summary Judgment motion would be affirmed.

Assuming that the DR Strong response to the *Eastwood* case will be that it does not address *Berschauer/Phillips* or say that its principles apply to professional engineers, we turn to the second case decided only this month by the Supreme Court, *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 2010 WL 4350338, No. 82738-9 (Nov. 4, 2010).⁴ In this case, the Supreme Court, once again sitting *En Banc*, takes the application of the economic loss rule to professional engineers head on, after first adopting the holdings of *Eastwood*.

The *Affiliated FM* court first deals with *Berschauer/Phillips* in the context of the new "independent duty" doctrine. Essentially, the Court identifies the specific situation in which the economic loss rule as stated in *Berschauer/Phillips* 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 Ins. Co. at 13.

⁴ The Slip Opinion for this case is attached as Appendix B.

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 Court makes the distinction and limitation of the *Berschauer/Phillips* case very clear: “Although *Berschauer/Phillips* 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 15. It is simply not the law that *Berschauer/Phillips* 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 17.

DR Strong may argue 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.

Even prior to *Eastwood* and *Affiliated FM*, the case law shows an established legal duty of professional engineers and allows claims for negligence, notwithstanding the existence of a contract. Now, with the Court's decisions in *Eastwood* and *Affiliated FM*, the law is clearer than ever. Claiming the economic loss rule is simply not sufficient. The trial court was proper to deny the motion for summary judgment.

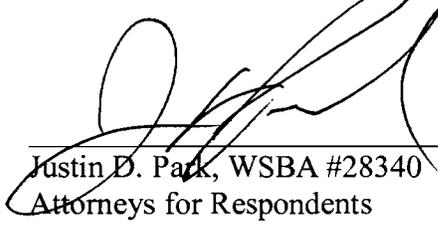
V. CONCLUSION

Respecting the Donatellis' negligence claim, DR Strong has not argued, or presented any evidence demonstrating, that there is any lack of a genuine issue of material fact concerning DR Strong's negligence as a professional engineer. DR Strong merely argues that the economic loss rule prohibits such claims. The law as cited above shows that the days when Defendants such as DR Strong could put up *Berschauer/Phillips* as their sole defense and successfully eliminate negligence claims are over. Engineers are subject to the principle that they have a duty to their clients

and that violation of that duty allows said clients to bring negligence claims.

RESPECTFULLY SUBMITTED this 22nd day of November, 2010.

ROMERO PARK & WIGGINS P.S.



Justin D. Park, WSBA #28340
Attorneys for Respondents

28340
ROMERO PARK & WIGGINS P.S.
ATTORNEYS FOR RESPONDENTS
PACIFIC PLAZA BUILDING
155 - 108th AVENUE N.E., SUITE 202
BELLEVUE, WA 98004-5901
(425) 450-5000

No. 65568-0-I

THE COURT OF APPEALS, DIVISION I
IN THE STATE OF WASHINGTON

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

v.

STEVEN AND KAREN DONATELLI, *Respondents*.

APPENDIX TO BRIEF OF RESPONDENTS

Justin D. Park, WSBA # 28340
ROMERO PARK & WIGGINS P.S.
Attorneys for Respondents
Pacific Plaza Building
155 – 108th Avenue N.E., Suite 202
Bellevue, WA 98004-5901
(425) 450-5000

**Appendix A Linda Eastwood, dba Double KK Farm v. Horse
Harbor Foundation, Inc. et al.....A-1 – A-29**

**Appendix B Affiliated FM Insurance Company v. LTK Consulting
Services, Inc.....B-1 – B-26**

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LINDA EASTWOOD, dba DOUBLE KK FARM,)	
)	
)	
Petitioner,)	
)	No. 81977-7
v.)	
)	
HORSE HARBOR FOUNDATION, INC.,)	EN BANC
a Washington corporation; MAURICE)	
ALLEN WARREN, a single person; and)	
KATHERINE DALING and MICHAEL)	Filed November 4, 2010
DALING, a husband and wife, and the)	
marital community composed thereof,)	
)	
Respondents.)	
_____)	

FAIRHURST, J. — Since the 1800s, lessors of real property in Washington have been able to recover damages for the tort of waste. In this case, however, the Court of Appeals interpreted our jurisprudence on the economic loss rule and concluded that lessor Linda Eastwood was limited to contractual remedies for the

damage done to her horse farm by lessee Horse Harbor Foundation, Inc. *See Eastwood v. Horse Harbor Found., Inc.*, noted at 144 Wn. App. 1009, 2008 WL 1801332. The Court of Appeals also held that Horse Harbor's employee and board directors could not be individually liable for breach of contract. We reverse. The availability of a tort remedy depends on the existence of a tort duty arising independently of a contract's privately negotiated terms, not on whether an injury can be labeled an economic loss. Because the duty to not cause waste is a tort duty independent from a lease's covenants, Eastwood had a cause of action for waste, and the trial court properly concluded she may recover tort damages from Horse Harbor's employee and two of its board directors.

I. FACTUAL AND PROCEDURAL HISTORY

Eastwood owns the Double KK Farm horse farm in Poulsbo, Washington. Horse Harbor, a nonprofit organization incorporated in 1997 under the Washington Nonprofit Corporation Act, chapter 24.03 RCW, cares for abused and abandoned horses. Maurice Allen Warren is Horse Harbor's paid manager, and Katherine and Michael Daling were two of Horse Harbor's corporate directors.

Eastwood and Horse Harbor entered into a lease for a portion of the Double KK, with covenants obligating Horse Harbor to maintain the farm and to return it to Eastwood in good condition. Eastwood accepted a rental rate below fair market

value in exchange for Horse Harbor's pledge to maintain the property. But "there was a broad, persistent, and systemic failure" to maintain the leasehold, according to the trial court. Clerk's Papers (CP) at 131. After moving 15 to 16 horses to the farm, Horse Harbor permitted manure and urine to accumulate, and the Kitsap County Health District cited Horse Harbor for unlawful burning of solid waste and improper management of horse manure. Horse Harbor also failed to keep the farm and its improvements properly drained, resulting in pools of standing water and accumulating mud. Other maintenance problems included broken fencing, a damaged riding arena floor, and the horses chewing wood surfaces.

Members of Horse Harbor's board of directors, including the Dalings, had the opportunity to observe the farm's condition. The board received written complaints and a video from Eastwood documenting maintenance issues. The Dalings visited the Double KK frequently. At one point, the board took a walking tour of the Double KK and then met to discuss the growing dispute and the legal ramifications. At the meeting, six people were present, including Warren and the Dalings. The board took no action.

Eastwood sued for breach of lease, the commission of waste, and negligent breach of a duty to not cause physical damage to the leasehold. She named Horse Harbor, Warren, and the Dalings as defendants. Following a bench trial, the trial

court found Horse Harbor committed waste and breached the lease covenant to maintain the leasehold. The court found Warren and the Dalings were grossly negligent and therefore individually liable for the damage they proximately caused. At no point did the court or the parties raise the economic loss rule.

On appeal, Horse Harbor, Warren, and the Dalings argued that the trial court erred by finding that their conduct rose to the level of gross negligence. They retried the case, rehashing the trial testimony and exhibits. They also argued that Horse Harbor's corporate form protected Warren and the Dalings from being held individually liable. At no point did they cite the economic loss rule.

The Court of Appeals did not address Eastwood's claim for waste or cite the waste statute, RCW 64.12.020, which gives a lessor a right of action for damages if the lessee commits waste. *See Eastwood*, 2008 WL 1801332. On its own motion and without argument, the court cited *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), our most recent case discussing the economic loss rule, a doctrine that has attempted to describe the dividing line between the law of torts and the law of contracts.

The Court of Appeals characterized Eastwood's claims as economic losses because they "result[ed] from [Horse Harbor's] actions that led to damages and breach of the lease agreement." *Eastwood*, 2008 WL 1801332, at *2. Based on

these circumstances, the court held the economic loss rule applied and limited Eastwood to recovery only for breach of lease, and Warren and the Dalings could not be individually liable for the damages. *Id.* at *2-*3. The Court of Appeals denied Eastwood's motion for reconsideration.

We granted Eastwood's petition for review. *Eastwood v. Horse Harbor Found., Inc.*, 165 Wn.2d 1016, 199 P.3d 411 (2009).¹

II. ISSUES

- A. When a lessee breaches a lease covenant requiring the lessee to repair and maintain the leased property, is the lessor limited to contract remedies, or may the lessor also recover for the tort of waste?
- B. Are employees of a lessee liable for the waste they cause?
- C. Does RCW 4.24.264 insulate the directors of a lessee nonprofit corporation from liability for permitting waste that rises to the level of gross negligence?
- D. Is Eastwood entitled to attorney fees?

III. ANALYSIS

- A. When a lessee breaches a lease covenant requiring the lessee to repair and maintain the leased property, is the lessor limited to contract remedies, or may the lessor also recover for the tort of waste?

“Waste is a tort.” William Woodfall, *The Law of Landlord and Tenant* 469

¹Horse Harbor did not appear before us. But Warren and the Dalings did, arguing in favor of affirming the Court of Appeals.

(6th ed. 1822). Arising in the context of a lease for real property, waste is a breach of the lessee's duty to avoid "an unreasonable and improper use" of the leasehold and "to treat the premises in such a manner that no harm be done to them, and that the estate may revert to those having the reversionary interest, without material deterioration." *Moore v. Twin City Ice & Cold Storage Co.*, 92 Wash. 608, 611, 159 P. 779 (1916). Only damage rising to the level of "substantial injury" is considered waste. *Id.* A lessor thus has a right to the reversionary interest in the property remaining free from substantial material injury. Rights and remedies go together, and a statutory remedy for waste has been available to lessors in Washington since the first territorial assembly enacted one in 1854. *See* Laws of 1854, XLIV, § 403. The current landlord-tenant waste statute, RCW 64.12.020, provides, "If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages."

A lease is a contract as well as a conveyance of a property interest, and the tort law duty to not cause waste is usually supplemented by a lease covenant allocating responsibility for repairs between the lessor and the lessee. *See* 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 6.39, at 367 (2d ed. 2004) ("A well drafted lease will make

provision for repairs, creating a contractual duty for either the landlord or tenant to make repairs or apportioning repair duties between the parties.”). When a lessee breaches such lease provisions and consequently harms the property, the issue is whether the lessor’s injury is only an economic loss remediable under the law of contracts or whether it is also the tort of “waste” within the meaning of RCW 64.12.020. Stated another way, can a breach of lease simultaneously be a breach of a tort duty that arises independently of the lease’s terms? We hold it can because an independent tort duty can overlap with a contractual obligation.

1. *The “economic loss rule”*

In reaching the opposite conclusion, the Court of Appeals picked several statements from *Alejandre* to support its analysis. *Alejandre* defined an economic loss as an injury in a contractual relationship “where the parties could or should have allocated the risk of loss, or had the opportunity to do so.” 159 Wn.2d at 687. The lease between Eastwood and Horse Harbor actually allocated the risk of the property falling into disrepair, as the lease assigned most responsibilities for maintenance to Horse Harbor. The Court of Appeals thought the breach of this contractual arrangement was therefore an economic loss under *Alejandre*. The court also noted the statements from *Alejandre* that “the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship

exists and the losses are economic losses,” and “[i]f the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.” *Id.* at 683. Seeing both a contractual relationship and an economic loss, the Court of Appeals believed that *Alejandre* therefore compelled a holding that Eastwood’s only remedy was a recovery for breach of lease. *Eastwood*, 2008 WL 1801332, at *2. The Court of Appeals’ broad reading of this court’s jurisprudence on the economic loss rule, while perhaps understandable, is not correct.

The term “economic loss rule” has proved to be a misnomer. It gives the impression that this is a rule of general application and any time there is an economic loss, there can never be recovery in tort. This impression is too broad for two reasons. First, it pulls too many types of injuries into its orbit. When a contractual relationship exists between the parties, any harm arising from that relationship can be deemed an economic loss for which the law of tort never provides a remedy. Further, any injury that can be monetized can be thought of as an economic loss presumptively excludable under the rule because the legislature has defined “[e]conomic damages” as “objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of

employment, and loss of business or employment opportunities.” RCW 4.56.250(1)(a).

Second, and most importantly, the broad application of the economic loss rule does not accord with our cases. Economic losses are sometimes recoverable in tort, even if they arise from contractual relationships. For instance, we recognize the torts of intentional and wrongful interference with another’s contractual relations or business expectancies, *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314, 322 (1992); wrongful discharge in violation of public policy, *Smith v. Bates Technical College*, 139 Wn.2d 793, 803-04, 991 P.2d 1135 (2000); failure of an insurer to act in good faith, *American States Insurance Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 469, 78 P.3d 1266 (2003); fraudulent concealment, *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960); fraudulent misrepresentation, *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969); negligent misrepresentation, *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 825, 959 P.2d 651 (1998); breach of an agent’s fiduciary duty to act in good faith, *Moon v. Phipps*, 67 Wn.2d 948, 956, 411 P.2d 157 (1966); and negligent real estate appraisal, *Schaaf v. Highfield*, 127 Wn.2d 17, 27, 896 P.2d 665 (1995). “We will not overrule such binding precedent sub silentio.” *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049, 1056 (1999). Thus, 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.

2. *The rule is merely a case-by-case question of whether there is an independent tort duty*

The question is how a court can distinguish between claims where a plaintiff is limited to contract remedies and cases where recovery in tort may be available. 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. The court determines whether there is an independent tort duty of care, and “[t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.” *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation marks omitted) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994)); see also *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, No. 82738-9, at 7-8 (Wash. Nov. 4, 2010). Where this court has stated that the economic loss rule applies, what we have meant is that considerations of common sense, justice, policy, and precedent in a particular set of circumstances led us to the legal

conclusion that the defendant did not owe a duty. When no independent tort duty exists, tort does not provide a remedy.

For example, *Alejandre v. Bull* involved a real estate sales contract, and the Alejandres (buyers) complained that Bull (seller) failed to tell them about a defect in the home's septic tank. 159 Wn.2d at 677. The Alejandres sued for negligent misrepresentation, and so the issue was whether Bull owed them a "duty of care under the *Restatement (Second) of Torts* § 552 (1977)," which is the duty to use ordinary care in obtaining or communicating information during a transaction. 159 Wn.2d at 686.

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 (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 (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.

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. 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. We held that the general contractor could not sue in tort to recover damages for lost profits. *Id.* at 826. 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.

In *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990), plaintiff condominium owners claimed fraudulent concealment, negligent construction, and negligent design. Fraudulent concealment in a real estate transaction is a cause of action that has long been recognized in Washington. *Perkins v. Marsh*, 179 Wash. 362, 367-68, 37 P.2d 689 (1934). Independent of the obligations in a lease or a residential real estate sales contract, the vendor or lessor has an affirmative duty to “disclose material facts,” of which the vendor or seller has knowledge, and which are “not readily observable upon reasonable inspection by the purchaser” or lessee. *Hughes v. Stusser*, 68 Wn.2d 707, 711, 415 P.2d 89 (1966); *see also Obde*, 56 Wn.2d at 452. Thus, it is a well-rooted tort duty that arises independently of the contract, and we recognized in *Atherton* that the plaintiffs could pursue their fraud claim. 115 Wn.2d at 525-26.² As for the plaintiffs’ claim of negligent construction,

²This is the same affirmative duty to disclose material facts, of which the seller has knowledge, that would have been the basis for the Alejandres’ fraud claim in *Alejandre* had they offered enough evidence. This is a slightly different, though potentially overlapping, duty from the duty of ordinary care that can be the basis for a negligent misrepresentation claim.

however, we held they could not recover, because the defendant builder did not owe an independent tort duty to avoid defects in construction quality. *Id.* at 526. Similarly, we rejected the plaintiffs' claim for negligent design against the architect because they failed to show that the architect "breached any duty of care and that such breach was the proximate cause of the alleged damages." *Id.* at 534 n.17.

In *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987), we decided whether plaintiffs could recover damages in tort for construction defects in a condominium complex. *Id.* We recognized that original purchasers could recover damages from the condominium builder-vendor for breach of an implied warranty of habitability under the law of contracts. *Id.* at 421. But, with an eye toward public policy considerations, we refused to recognize a tort duty to avoid defects in quality, lest builder-vendors "become the guarantors of the complete satisfaction of future purchasers." *Id.* We cautioned, however, that when a court considers whether recovery in tort is permissible, "the determinative factor should not be the items for which damages are sought, such as repair costs." *Id.* at 420. The ultimate question was whether the builder-vendor was under an independent tort duty to avoid the condominium owners' injury, and we concluded not.

The economic loss rule in Washington was heavily influenced by the United

States Supreme Court opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), and that case also rests on the proposition that 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. In *East River*, the plaintiff ship-chartering companies alleged that the defendant shipbuilder sold them oil supertankers with defective turbines, and they sought to recover under a strict liability theory of tort, with damages for the cost of repairs as well as the revenues lost when the tankers were not working. *Id.* at 861. The defendant argued that the plaintiffs were limited to their contract damages. Under products liability, the manufacturer is strictly liable “where a product ‘reasonably certain to place life and limb in peril,’ distributed without reinspection, causes bodily injury.” *Id.* at 866 (quoting *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050 (1916)). The court noted a manufacturer is liable in tort for product defects “because ‘public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.’” *Id.* (quoting *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P.2d 436 (1944) (Traynor, J., concurring)). “For similar reasons of safety, the manufacturer’s duty of care was broadened to include protection against property damage.” *Id.* at 867. The question

arose “whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, *independent of any contractual obligation.*” *Id.* (emphasis added).

The court deemed the plaintiffs’ loss an economic loss because “the injury suffered--the failure of the product to function properly--is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.” *Id.* at 868.

But the court did not simplistically rest its holding on its finding that the plaintiffs’ losses were economic losses. Although the law of contracts applied, the court also inquired whether there was a tort duty independent of any contractual terms. As a policy matter, the court preferred warranty law’s “built-in limitation on liability” and sought to protect a manufacturer from worrying about “the expectations of persons downstream who may encounter its product.” *Id.* at 874. Based on these considerations, the court “h[eld] that a manufacturer in a commercial relationship has no duty under either a negligence or a strict products-liability theory to prevent a product from injuring itself.” *Id.* at 871.

In sum, the economic loss rule does not bar recovery in tort when the defendant’s alleged misconduct implicates a tort duty that arises independently of the terms of the contract.³ In some circumstances, a plaintiff’s alleged harm is

nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise. In other circumstances, however, the harm is simultaneously the result of the defendant breaching an independent and concurrent tort duty. Thus, while the harm can be described as an economic loss, it is more than that: it is an injury remediable in tort.⁴ The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract. The court defines the duty of care and the risks of harm falling within the duty's scope. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

Other states use the same approach. *See, e.g., Tommy L. Griffith Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995) (“A breach of a duty arising independently of any contract duties between

³Of course, we do not disturb “[t]he general rule . . . that a party to a contract can limit liability for damages resulting from negligence.” *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 797 P.2d 477 (1990). “Exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced.” *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992). An “inconspicuous” exculpatory clause is unenforceable. *Id.* at 492.

⁴Conceiving of harm as potentially both an economic loss resulting from a contract breach and an injury resulting from a tort is akin to concluding, for example, that a citizen's injury is the result of the government's breaching both a statutory obligation and a constitutional provision. When a court says, “the economic loss rule applies,” the court is simply articulating a conclusion that, in a particular set of circumstances, the law of contracts is the only source of a defendant's obligations and no tort duty exists.

the parties . . . may support a tort action.”); *Congregation of Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill. 2d 137, 636 N.E.2d 503, 514, 201 Ill. Dec. 71 (1994) (“Where a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty.”); *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992) (“A legal duty independent of contractual obligations may be imposed by law as an incident to the parties’ relationship.”). In fact, we agree with the Supreme Court of Colorado’s belief “that a more accurate designation of what is commonly termed the ‘economic loss rule’ would be the ‘independent duty rule.’” *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1262 n.8 (Col. 2000).

Although we find clarity in thinking of the problem in terms of an independent duty, we see potential difficulty, when a defendant has obligations under both the contract terms and an independent tort duty, in distinguishing between a harm that implicates only the contract and a harm that implicates the independent duty as well. It is a factual question of proximate causation. As a matter of law, the court defines the duty of care and the risks of harm falling within the duty’s scope. *Sheikh*, 156 Wn.2d at 448. As a matter of fact, the jury decides whether the plaintiff’s injury was within the scope of the risks of harm, which the court has held the defendant owed a duty of care to avoid. *Rikstad v. Holmberg*, 76 Wn.2d 265, 270, 456 P.2d 355

(1969).

In deciding whether a reasonable juror could find causation, an analytical tool that a court can use is the risk-of-harm approach utilized in *Stuart* and our product liability cases. In *Stuart*, we concluded that a condominium builder did not owe a duty to avoid a risk of economic loss, which we defined as a mere defect in the bargained-for quality. 109 Wn.2d at 420. But we implied that the builder had an independent duty to avoid unreasonable risks of harm to persons and other property. *Id.* at 420-21. To decide whether the plaintiffs' injury fell outside the scope of risks covered by the tort duty, we analyzed "interrelated factors such as [1] the nature of the defect, [2] the type of risk, and [3] the manner in which the injury arose." *Id.* at 421. Applying this risk-of-harm test, we concluded, "The nature of the defect here was that the decks and walkways were not of the quality desired by the buyers. The 'injury' or damage suffered was that the decks themselves deteriorated, not through accident or violent occurrence, but through exposure to the weather." *Id.* Thus, there was no factual question whether the injury was caused by a breach of the duty to avoid risks of physical harm to persons or other property.

Under the Washington product liability act (WPLA), chapter 7.72 RCW, a product manufacturer has a tort duty to avoid product designs and construction that are unreasonably dangerous. RCW 7.72.030. But the WPLA's definition of

“[h]arm” excludes “direct or consequential economic loss,” RCW 7.72.010(6), leaving the law of sales contracts as the sole source of a plaintiff’s remedy for economic loss. To differentiate a harm that is an “economic loss” from a harm for which damages are recoverable in tort, the risk-of-harm test determines whether the harm can reasonably be traced back to the tort duty. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 351, 831 P.2d 724 (1992); *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 866, 774 P.2d 1199, 779 P.2d 697 (1989). When a product defect results in a personal injury or damage to other property, the cause can plainly be a breach of the tort duty. When a product defect results in injury only to the product itself, however, the risk of harm must be carefully analyzed. The WPLA tort duties are implicated if a hazardous product exposes a person or property to an unreasonable risk of harm such that the safety interests of the WPLA are implicated. *Touchet Valley*, 119 Wn.2d at 353-54. For example, the sudden collapse of a grain storage building creates “a real, nonspeculative threat to persons and property” and is therefore not a mere economic loss. *Id.* at 353. Thus, the availability of a tort remedy depends on the nature of the risk that created the harm.

3. *The lack of utility in relying only on strict categories to define economic loss*

The alternative to the careful, case-by-case analysis of the independent duty would be a bright-line rule relying strictly on the three categories of injuries we have described before: (1) economic losses, (2) personal injury, and (3) property damage. *See, e.g., Alejandre*, 159 Wn.2d at 684. Although these categories can be helpful, they are derived from product liability cases. They can be confusing when removed from their original context. Further, it can be unclear where economic loss ends and property damage begins, and this case provides a good example of that. Eastwood claims harm to real property. But we have held there was an economic loss in cases where the plaintiff complained of a defective septic tank, *Alejandre*, 159 Wn.2d at 685; a condominium’s construction defects, *Atherton*, 115 Wn.2d at 512-13; and deteriorated walkways and decks in a condominium complex, *Stuart*, 109 Wn.2d at 421. All of these involve fixtures and therefore real property.

However, the concurrence written by Chief Justice Madsen argues that a close look at *Alejandre*, *Atherton*, and *Stuart* will reveal the line between economic loss and property damage. The concurrence states that “[i]n these cases, the damages sought were economic—consisting of the costs of repairs to correct the defects and to compensate for additional injury to the property itself caused by the defective conditions.” Concurrence (Madsen, C.J.) at 4 (citation omitted). The Madsen concurrence elaborates on its definition of economic loss as the failure to

“obtain the benefit of the bargain” and observes that in *Alejandre, Atherton*, and *Stuart* “the purchased item failed to meet the buyer’s economic expectations because of the defects.” *Id.*

But it was for these same reasons that the Court of Appeals concluded Eastwood’s losses are nothing more than economic losses. There was a contract in the form of a lease, and several provisions defined Eastwood’s contractual expectations. In the lease, Horse Harbor pledged to “keep and maintain the leased premises and appurtenances in good and sanitary condition and repair during the term of this lease.” Ex. 101, at 2. Eastwood assumed responsibility for “[m]ajor maintenance and repair of the leased premises, not due to Lessee’s misuse, waste, or neglect or that of his employee, family, agent, or visitor.” *Id.* Eastwood was obligated to repair any part of the leasehold “partially damaged by fire or other casualty,” unless the cause was Horse Harbor’s “negligence or willful act.” *Id.* Under the surrender covenant, if Horse Harbor did not exercise a purchase option, Horse Harbor promised to “quit and surrender the premises . . . in as good [a] state and condition as they were at the commencement of this lease, reasonable use and wear thereof and damages by the elements excepted.” *Id.* at 3. These contractual terms indicate Eastwood’s expected benefit of the bargain: Horse Harbor would be responsible for most maintenance, and Eastwood would have the leasehold returned

to her in good condition. In fact, because Horse Harbor promised to maintain the farm at its own expense, Eastwood agreed to a monthly rent amount that was one-third less than the fair market value. The measure of Eastwood's losses was the cost of repairing the horse farm. Because Eastwood failed to obtain the benefit of her contractual bargain with Horse Harbor and because she sought damages in the form of the cost of repairs, Eastwood's injury was an economic loss by the Madsen concurrence's own definition. Its arguments underscore the difficulties of drawing a line between economic loss and property damage and applying product liability categories to new settings.

4. *The duty to not cause waste is a duty that arises independently of the lease covenants*

Having described what we now will call the independent duty doctrine, we next must decide whether the duty to not cause waste arises independently of the contract. An early American authority described the duty to not cause waste as an obligation the tenant owes even if the lease covenants say nothing about the issue: "Independently of any express agreement, the law imposes upon every tenant, whether for life or for years, an obligation to treat the premises in such a manner, that no substantial injury shall be done to them." John N. Taylor, *A Treatise on the American Law of Landlord and Tenant* § 343, at 261 (6th ed. 1873) (emphasis

added). This duty not to cause waste has long been recognized in Washington. *See McLeod v. Ellis*, 2 Wash. 117, 120, 26 P. 76 (1891).

Still, Warren and the Dalings argue that it is novel for a landlord to recover damages under theories of both breach of lease and the tort of waste. But in Washington, we have already allowed a plaintiff landlord to recover under both theories. *See, e.g., Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 726 P.2d 8 (1986). In *Fisher Properties*, the lease included a covenant where the lessee promised to, “at its own expense, make and do all repairs of all kinds, both inside and outside the demised premises . . . and keep the same in good order and repair.” *Id.* at 829 (quoting lease at ¶ 8). This same covenant also mentioned waste expressly: “The Lessee agrees that it will not permit or suffer any waste, damage or injury to the said building or premises.” *Id.* (quoting lease at ¶ 8). Still, we permitted the plaintiff lessor to recover for both breach of the lease and waste. *Id.* at 854-55. We hold the duty to not cause waste is a tort duty that arises independently of a lease agreement and an aggrieved lessor may pursue damages concurrently under theories of tort and breach of lease. *Accord Vollertsen v. Lamb*, 302 Or. 489, 508, 732 P.2d 486 (1987). Eastwood thus had a right of action to recover tort damages under RCW 64.12.020.⁵

⁵The concurrence written by Chief Justice Madsen posits that our analysis to this point is unnecessary and that we need not say more than: “the economic loss doctrine cannot be applied to

Because we conclude there existed both a contractual obligation under the lease terms and an independent tort duty, an issue arises whether Eastwood's alleged harm was traceable, as a factual matter, to the independent tort duty. Once the independent duty is held to exist as a matter of law, the connection between the breach and the plaintiff's injury becomes a factual question of proximate cause. After the bench trial in this case, the trial court found that Warren and the Dalings breached their tort duty not to cause waste and that this tortious conduct was the proximate cause of some of the damage to the horse farm. CP at 133 ("This gross negligence resulted in waste and damage to plaintiff's farm and they are liable for the damage it proximately caused."). We think there was ample evidence in the record from which the trial court could reasonably find proximate causation.

bar a statutory cause of action." Concurrence (Madsen, C.J.) at 3. The Madsen concurrence is correct that we cannot use a common law doctrine to abolish a statutory cause of action. But this view accounts for only half of the equation in this case. RCW 64.12.020, by its terms, gives a remedy for waste, not other sorts of injuries. Thus, when a plaintiff brings an action under RCW 64.12.020, an issue is whether the plaintiff's injury is waste within the meaning of the statute. Eastwood claims her damages are for waste, whereas Warren and the Dalings, following the Court of Appeals' analysis, insist that Eastwood's injury is merely an economic loss in the sense that she lost the benefit of a contractual bargain. As in all cases involving the economic loss rule, we cannot resolve these competing claims without looking to the legal duties breached by Horse Harbor, Warren, and the Dalings. Further, RCW 64.12.020 simply provides a right of action for an aggrieved plaintiff. The plaintiff's substantive right, however, is one defined at common law.

B. Are employees of a lessee liable for the waste they cause?

Because Eastwood's claim for waste is not barred, the question arises whether Warren can be individually liable for the waste he caused within the scope of his employment as Horse Harbor's manager. The law is well settled that "an employee who tortiously causes injury to a third person may be held personally liable to that person regardless of whether he or she committed the tort while acting within the scope of employment." 27 Am. Jur. 2d *Employment Relationship* § 409 (2004); accord *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 754, 600 P.2d 1272 (1979) (stating that a principal and an agent "are jointly and severally liable for all damages suffered by a plaintiff who has been injured as a result of the agent's negligence"). The trial court found Warren was liable for his gross negligence in permitting waste, and the independent duty doctrine does not bar Eastwood's claim for waste. Warren may be held individually liable.

C. Does RCW 4.24.264 insulate the directors of a lessee nonprofit corporation from liability for permitting waste that rises to the level of gross negligence?

RCW 4.24.264(1) provides that "a member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes

gross negligence.” The question is whether the actions or omissions of the Dalings, acting as directors of the Horse Harbor nonprofit corporation, “constitute[d] gross negligence” within the meaning of RCW 4.24.264(1).⁶ The Court of Appeals held RCW 4.24.264 is a complete limitation on individual directors’ liability for a nonprofit corporation’s breach of contract, and only torts could meet the “gross negligence” exception. *Eastwood*, 2008 WL 1801332, at *2. According to the Court of Appeals, the trial court erred by holding the Dalings liable, because the trial court made a nonprofit corporate director “individually liable where a breach of contract rose to gross negligence.” *Id.* But the trial court imposed liability on the Dalings only for gross negligence in permitting waste, not for breach of contract:

The degree of neglect, its persistence and visibility, supports a finding that the care exercised by Kay and Michael Daling lack [sic] was substantially and appreciably greater than ordinary negligence. This gross negligence resulted in *waste* and damage to plaintiff’s farm and they are liable for the damage it proximately caused.

CP at 133 (emphasis added). Because gross negligence for a tort falls squarely within the exception enumerated in RCW 4.24.264, the Dalings are individually liable for their gross negligence in permitting waste.⁷

⁶Neither side contends that the Dalings’ actions or omissions were not a “decision or failure to decide” within the meaning of the statute, and so we accept that their actions and omissions fall within the scope of the statute.

⁷Because the Dalings’ liability flows from their gross negligence in permitting waste, a tort, we do not reach the issue of whether a nonprofit corporate director could ever be individually liable for the corporation’s breach of contract.

D. Is Eastwood entitled to attorney fees?

Eastwood seeks attorney fees. The lease agreement provided that Horse Harbor would pay Eastwood reasonable attorney fees if Eastwood were to sue Horse Harbor to enforce her rights. Ex. 101, at 3 (“Lessee shall pay all reasonable attorneys’ fees necessary to enforce Lessor’s rights.”). The waste statute also provides for an award of reasonable attorney fees. RCW 64.12.020. We grant Eastwood’s request. See RAP 18.1; RCW 4.84.330; *Boyd v. Davis*, 127 Wn.2d 256, 264-65, 897 P.2d 1239 (1995).

IV. CONCLUSION

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. Because the term “economic loss rule” inadequately captures this principle, we adopt the more apt term “independent duty doctrine.” The existence of an independent duty is a question of law for courts to decide. We hold the duty to not cause waste is an obligation that arises independently of the terms of a lease covenant, and sufficient evidence supported the trial court’s findings of a causal connection between Eastwood’s losses and a breach of this independent duty. Thus, the Court of Appeals was mistaken to hold Eastwood could not recover tort damages for waste. Warren is individually liable

for the waste he permitted, even if within the scope of his employment. RCW 4.24.264 does not protect the Dalings from individual liability in this case. We grant Eastwood's request for attorney fees.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Susan Owens

Justice James M. Johnson

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED)
STATES COURT OF APPEALS FOR THE)
NINTH CIRCUIT)

IN)
AFFILIATED FM INSURANCE)
COMPANY, a Rhode Island corporation,)

Plaintiff-Appellant,)

No. 82738-9

v.)

EN BANC

LTK CONSULTING SERVICES, INC.,)
a Pennsylvania corporation,)

Filed November 4, 2010

Defendant-Appellee.)
_____)

FAIRHURST, J. — A fire ignited on the Seattle Monorail System’s (Seattle Monorail) blue train in 2004. The monorail’s private operating company, Seattle Monorail Services (SMS), suffered millions of dollars in losses. The question presented is whether SMS, which does not own the Seattle Monorail, can bring a tort action against LTK Consulting Services, Inc., an engineering firm that worked on monorail maintenance before the fire, for negligently causing the fire. LTK

assumes, for the sake of argument in its motion for summary judgment, that the cause of the fire was the train's faulty grounding system, the design of which LTK had itself suggested. LTK argues, however, that SMS's damages are purely economic losses stemming from repair costs, which SMS was contractually obligated to pay, and from business interruption. LTK believes that SMS's tort claims for such damages are barred under Washington tort law. We disagree. By undertaking professional engineering services, LTK bore a tort law duty of reasonable care encompassing safety risks of physical damage to SMS's property interests in the monorail. Hence, SMS's subrogee, Affiliated FM Insurance Company (AFM), may bring a claim of negligence against LTK for LTK's tortious injury of those interests.

I. FACTUAL AND PROCEDURAL HISTORY

A. The fire

The Seattle Monorail is the elevated transportation system that connects Seattle Center with downtown Seattle, Washington. One day in May 2004, after leaving the Seattle Center Station with a load of passengers, the monorail blue train caught fire. The fire started beneath the floor of the passenger compartment of the train's front two cars, but the fire soon pierced the floor and engulfed the seating in both front passenger cars. Smoke from the fire spread to all four blue train cars. On

the other monorail track, the red train stopped alongside the blue train, helping passengers escape. The red train was damaged by smoke. The cause of the fire was later found to be electrical: a shaft in the monorail's blue train motor had disintegrated, colliding with an electrically charged collector shoe.

B. SMS and the monorail concession agreement

Ten years before the fire, in 1994, the city of Seattle (City) entered a monorail concession agreement with SMS. The agreement granted rights to SMS related to the operation of the monorail:

The City hereby grants to [SMS] . . . the concession right and privilege to maintain and exclusively operate the Monorail System including the facilities, personal property and equipment, together with the right to use and occupy the areas, described in this section, all subject to the conditions and requirements set forth in this Agreement.

Excerpt of Record (ER) 030, Ex. 1, § III.A. The agreement permitted SMS to run concession stands and required SMS to collect fares according to an agreed schedule. In exchange for these rights, SMS promised to pay “concession fees and charges” to the City. ER 034, Ex. 1, § V.A.

The agreement allocated responsibility among SMS and the City for maintaining the monorail. ER 053-074, Ex. 1, § XI.A-N. LTK and AFM agree that SMS bore the responsibility for emergency maintenance. ER 395. The agreement required SMS to grant the City “access to the Monorail System at all reasonable

times to inspect the same and to make any repair, improvement, alteration or addition thereto of any property owned by or under control of the City.” ER 095, Ex. 1, § XIX.A. To the extent “reasonably required” for such repairs or improvements, the agreement permitted the City to “interfere with the conduct of the business and operations of [SMS].” *Id.* § XIX.B.

The agreement also required SMS to carry an insurance “policy for fire and extended coverage, upset, collision and overturn, vandalism, malicious mischief, and other perils commonly included in the special coverage form,” with the City designated as the loss payee. ER 081-082, Ex. 1, § XVII.A.1. In the event of damage from a fire for which SMS was not responsible, the agreement gave SMS the right to suspend payments to the City or terminate the agreement altogether, depending on the severity of the damage. ER 097, Ex. 1, § XXII.B-C.

C. LTK works on the monorail

The City contracted with LTK in 1999 “to examine the Monorail system and recommend repairs.” Resp. Br. of LTK at 3. LTK completed its contractual obligations by 2002. The agreement between the parties is not before us, but we understand that SMS was not a party to the contract.

D. After the fire, AFM becomes involved

SMS and the City amended their agreement after the fire to allocate the costs

and responsibilities for repairing the fire and smoke damage to the monorail. ER 349-50. SMS's insurer, AFM, paid \$3,267,861 to SMS and was subrogated to SMS's rights against LTK. Asserting those rights now, AFM seeks to recover damages from LTK for SMS's losses.

E. The lawsuit

AFM brought suit against LTK in King County Superior Court in November 2006, claiming that LTK was negligent "in changing the electrical ground system for the Blue and Red Trains." ER 003, Compl. ¶ 4.2. AFM alleges that as part of LTK's contract with the City, "LTK Engineering recommended that the grounding system for the Blue and Red Trains that made up the Seattle Monorail System be changed." ER 002, Compl. ¶ 3.1.

LTK removed the suit to the United States District Court for the Western District of Washington and moved for summary judgment. LTK denied that it suggested changes to the trains' grounding system or that these changes were implemented, but for purposes of argument on summary judgment, assumes "that it recommended changes to the City, that those changes were implemented, and that their implementation resulted in a condition where the fault that occurred as a result of the drive shaft disintegration was not prevented." ER 384 n.2 (Def.'s Mot. for Summ. J.). However, LTK argued that SMS's losses were purely economic and that

it was not liable in tort for economic losses, at least in this circumstance where it was not in contractual privity with SMS. The losses were purely economic, in LTK's view, because they stemmed from business interruptions and SMS's contractual obligations to repair the City's monorail trains, and SMS did not have a property interest in the Seattle Monorail. The district court granted LTK's motion for summary judgment and denied AFM's motion for reconsideration.

AFM appealed to the United States Court of Appeals for the Ninth Circuit, which certified the following question for this court's review:

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, when A(SMS) and C(LTK) are not in privity of contract?

Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 556 F.3d 920, 922 (2009).

The Ninth Circuit indicated it will "affirm the district court's grant of summary judgment in favor of LTK" if we "decide[] the economic loss rule, or some other rule, bars such a suit in tort." *Id.* We accepted the certified question pursuant to the Federal Court Local Law Certificate Procedure Act, chapter 2.60 RCW, and RAP 16.16.

II. ANALYSIS

The federal district court concluded that SMS's injury was "outside the

bounds of tort recovery” because it was “strictly economic--i.e., business interruption and the cost of repairing the damaged train.” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 2007 WL 2156593, at *4 (W.D. Wash.). In so holding, the court relied on a doctrine of Washington law that we have previously termed the “economic loss rule,” which is “a doctrine that has attempted to describe the dividing line between the law of torts and the law of contracts.” *Eastwood v. Horse Harbor Found.*, No. 81977-7, slip op. at 4 (Wash. Nov. 4, 2010). However, as we said of the state Court of Appeals in *Eastwood*, the federal district court’s “broad reading of this court’s jurisprudence on the economic loss rule, while perhaps understandable, is not correct.” *Id.* at 7-8. In *Eastwood*, we recognized two perils to treating this doctrine as a bright-line “rule of general application” that holds “any time there is an economic loss, there can never be recovery in tort.” *Id.* at 8. “First, it pulls too many types of injuries into its orbit” because the definitions of economic injuries are broad and malleable. *Id.*¹ Second, “[e]conomic losses are sometimes

¹The concurrence/dissent does not successfully articulate a consistent, logical rule for narrowing the sweep of the definition. First, the concurrence/dissent argues that harm is never an economic loss within the meaning of the economic loss rule unless the plaintiff and the defendant had a contract or unless the parties were contractors on the same construction job. See concurrence/dissent at 4, 8. But in *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), an economic loss case, neither condition was present. The defendant was the builder-seller of a condominium complex, and the plaintiff was the homeowners association, which represented many subsequent purchasers who were not in contractual privity with the defendant. *Id.* at 411. The concurrence/dissent has no answer for *Stuart*. Other jurisdictions have also found an economic loss even when the parties were not in contractual privity. See, e.g., *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 413, 573

recoverable in tort, even if they arise from contractual relationships.” *Id.* For these reasons, we concluded that “[t]he term ‘economic loss rule’ has proven to be a misnomer.” *Id.*

In a case like this one, where a court applying Washington law is called to “distinguish between claims where a plaintiff is limited to contract remedies and cases where recovery in tort may be available,” *id.* at 9, the court’s task is not to superficially classify the plaintiff’s injury as economic or noneconomic. Rather, the court must apply the principle of Washington law that is best termed the independent duty doctrine. *See id.* at 27. Under this 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.” *Id.* at 10. Using “ordinary tort principles,” the court

N.W.2d 842 (1998) (“[W]e conclude that the economic loss doctrine precludes a commercial purchaser from recovering in tort from a manufacturer for solely economic losses, regardless of whether privity of contract exists between the parties.”).

Second, the concurrence/dissent attempts to recast *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), arguing that “the economic loss rule is implicated when the parties are in a contractual relationship and could or should have negotiated allocation of risks associated with the subject matter of their agreement,” concurrence/dissent at 4, and argues that “[t]here is no reasonable basis for thinking that SMS should have or could have protected itself through contractual risk allocation from any alleged breach by LTK Consulting of LTK Consulting’s contract with the City,” concurrence/dissent at 13. Even by the concurrence/dissent’s own standard, its conclusion is incorrect. The subject matter of the contract was the operation of the Seattle Monorail, and surely maintenance issues and the risks of mechanical or electrical failure are associated with that. Further, SMS agreed by contract to obtain fire insurance, and, having obtained the exclusive right to operate the Seattle Monorail, SMS could have negotiated the exclusive right to contract for engineering and other repair services. Cases like this one can be resolved only by analyzing the duties and the risks of harm involved.

decides as a matter of law whether the defendant was under an independent tort duty. *Id.* at 9. In the law of negligence, a duty of care “is defined as ‘an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.’” *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985) (quoting William L. Prosser, *Handbook of the Law of Torts* § 53, at 331 (3d ed. 1964)). The duty of care question implicates three main issues--“its existence, its measure, and its scope.” Dan B. Dobbs, *The Law of Torts* § 226, at 578 (2000).² So the duty question breaks down into three inquiries: Does an obligation exist? What is the measure of care required? To whom and with respect to what risks is the obligation owed?

To decide if the law imposes a duty of care, and to determine the duty’s measure and scope, we weigh “considerations of ‘logic, common sense, justice, policy, and precedent.’” *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation marks omitted) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994)). (Hereinafter, we will call these considerations “the duty considerations.”) “The concept of duty is a

²See also *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002), where we explained that the issues are not only whether a person “owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed. The answer to the second question defines the class protected by the duty and the answer to the third question defines the standard of care.” (Citation omitted.)

reflection of all those considerations of public policy which lead the law to conclude that a ‘plaintiff’s interests are entitled to legal protection against the defendant’s conduct.’” *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (quoting W. Page Keeton, et al., *Prosser and Keeton on Torts* § 53, at 357 (5th ed. 1984)). Using our judgment, we balance the interests at stake. *See, e.g., Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976) (balancing the interests and holding that the defendant owed the plaintiff “a duty to avoid the negligent infliction of mental distress”).³

³The 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.” Concurrence/dissent at 1. 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. It is the concurrence/dissent that wishes to reject this court’s cases. First, the concurrence/dissent suggests that tortfeasors can be automatically absolved of their tort liability when their misconduct breaches both a contract and a tort duty. Concurrence/dissent at 1 n.1. This view conflicts directly with the long standing rule that a contract can limit a party’s liability for breaching a tort duty only if the contract includes a conspicuous exculpatory clause that does not violate public policy. *See Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 490, 492, 834 P.2d 6 (1992). Washington law has never permitted a tortfeasor to escape tort liability for wrongful conduct just because a contract exists. “We will not overrule such binding precedent sub silentio.” *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999).

Second, the concurrence/dissent argues that a tort remedy is not available when (1) the plaintiff’s damages are economic, and (2) the parties are in contractual privity or are contractors on the same construction job. *See* concurrence/dissent at 4, 8. As we established in *Eastwood*, however,

[e]conomic losses are sometimes recoverable in tort, even if they arise from contractual relationships. For instance, we recognize the torts of intentional and wrongful interference with another’s contractual relations or business expectancies, *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314, 322 (1992); wrongful discharge in violation of public policy, *Smith v. Bates Technical College*, 139 Wn.2d 793, 803-04, 991 P.2d 1135 (2000); failure of an insurer to act in good faith, *American States Insurance Co. v.*

LTK seems to put at issue every aspect of its tort duty--the existence, measure, and scope. LTK argues, “LTK’s duty of care was created by its contract with the City, and that contract created no independent duty to avoid SMS’ or AFM’s economic loss.” Resp. Br. of LTK at 29.

- A. Does an engineering firm undertaking engineering services assume a tort law duty of reasonable care independent of its contractual obligations?

At issue first is the existence of a duty of care independent of LTK’s contract with the City. Viewed within the framework of our duty analysis, the question is

Symes of Silverdale, Inc., 150 Wn.2d 462, 469, 78 P.3d 1266 (2003); fraudulent concealment, *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960); fraudulent misrepresentation, *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969); negligent misrepresentation, *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 825, 959 P.2d 651 (1998); breach of an agent’s fiduciary duty to act in good faith, *Moon v. Phipps*, 67 Wn.2d 948, 956, 411 P.2d 157 (1966); and negligent real estate appraisal, *Schaaf v. Highfield*, 127 Wn.2d 17, 27, 896 P.2d 665 (1995). . . . Thus, 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.

Eastwood, slip op. at 8-9 (citation omitted). The concurrence/dissent’s formulation of the economic loss rule would implicitly nullify these causes of action.

As discussed fully in *Eastwood*, slip op. at 9-17, the connection between a plaintiff’s injury and the defendant’s tort duties has always been at the core of our analysis. By focusing the court’s attention on this ordinary tort question of whether the defendant was under an independent tort duty, we have simply restated what has always been there. The concurrence/dissent itself cites two foreign cases that recognize the key inquiry is whether the injury flows only from a breach of a contractual obligation, or whether a tort duty was breached simultaneously. *See Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995) (stating that “the economic loss doctrine . . . prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows *only from a contract*” (emphasis added)); *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1271 (M.D. Pa. 1990) (noting that “tort law is not intended to compensate parties for losses suffered as result of a breach of duties assumed *only by agreement*,” “to recover in tort a plaintiff must allege facts showing a breach of some duty imposed *by law*”). For ages, common law courts have defined tort duties, so we do not share the concurrence/dissent’s pessimism about the independent duty analysis.

this: Do the duty considerations dictate that engineers who provide services be required by law to use reasonable care? An initial policy consideration is the usefulness of private ordering. We assume private parties can best order their own relationships by contract. The law of contracts is designed to protect contracting parties' expectation interests and to provide incentives for "parties to negotiate toward the risk distribution that is desired or customary." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 827, 881 P.2d 986 (1994). In contrast, "tort law is a superfluous and inapt tool for resolving purely commercial disputes." *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990). If aggrieved parties to a contract could bring tort claims whenever a contract dispute arose, "certainty and predictability in allocating risk would decrease and impede future business activity." *Berschauer/Phillips*, 124 Wn.2d at 826.

In *Berschauer/Phillips*, we considered how this preference for private ordering affects an engineer's obligations under the law of torts. In that case, the general contractor for a school construction project sued three defendants for negligence--the project's architect, structural engineering company, and construction inspector. *Id.* at 819-20. 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. The contractor conceded these were economic losses. *Id.* We held that “the economic loss rule does not allow a general contractor to recover purely economic damages in tort from a design professional.” *Id.* at 823. Our overriding concerns were protecting all of the parties’ contractual expectancies and giving an incentive to negotiate risk. *Id.* at 826-27. 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.

But this case reminds us that a fire can ignite as a result of an engineer’s work, imperiling people and property. An interest we must consider is the safety of persons and property from physical injury, an interest that the law of torts protects vigorously. *See Dobbs, supra*, § 1, at 3 (“Legal rules give the greatest protection to physical security of persons and property.”). The record before us does not indicate whether any passengers on the monorail were injured or if the fire caused damage to property beyond the Seattle Monorail. But the parties agree that the fire caused damage to the monorail trains themselves. And, in Washington, it is common knowledge that the monorail trains carry thousands of people every year between Seattle Center and downtown Seattle. A fire on these trains is a severe safety risk, highlighting the interest in safety that is at stake when engineers do their work.

Imposing a duty of care on engineers could be an effective way to guard

against unreasonable curtailments of the safety interest in freedom from physical injuries. Because engineers occupy a position of control, they are in the best position to prevent harm caused by their work. Tort liability would force negligent engineers to internalize the costs of their unreasonable conduct, making them more likely to take due care. Further, engineers have ample training, education, and experience, and can use their professional judgment about the design needs of a particular project. By deterring unreasonable behavior before it occurs and placing responsibility in the hands of the persons who can best mitigate the risks, a duty of reasonable care could reduce the overall social costs.

We recognize that some economic considerations militate in favor of holding that an engineer in LTK's shoes is not under a duty of care. Engineers provide socially beneficial services. If tort claims against them were to be layered on top of the breach of contract suits that they already face, the costs of engineering services would likely increase. Although engineers could probably mitigate their risk exposure with malpractice insurance, they might pass along the increased costs of doing business to their clients. And the liability for some accidents could prove so costly that engineering companies go out of business. Society as a whole could incur more costs and could have fewer engineers willing to take on the risks of liability.

On balance, however, we think engineers who undertake engineering services

in this state are under a duty of reasonable care. The interest in safety is significant. Although *Berschauer/Phillips* 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. Even in a calamity, an innocent party who never had the opportunity to negotiate the risk of harm would be forced to bear the costs of a careless engineer's work.

Although we have not held so specifically until now, we think engineers' common law duty of care has long been acknowledged in this state.⁴ For example, in *Seattle Western Industries, Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 10, 750 P.2d 245 (1988), implicitly recognizing the duty exists, we held that the scope of the "engineer's common law duty of care" is not necessarily always limited to the engineer's contractual obligations. The Court of Appeals has explicitly recognized a common law duty of care, holding in *G.W. Construction Corp. v. Professional Service Industries, Inc.*, 70 Wn. App. 360, 366, 853 P.2d 484 (1993), that the defendant engineer performing an inspection under contract had an independent "duty to exercise reasonable engineering skill and judgment." Nationally, it is the same. *See, e.g.*, Jay M. Feinman, *Professional Liability to Third Parties* § 11.3.1, at

⁴Nothing we say should be understood to mean that every tort duty of care should be reexamined upon a claim that a person has only contractual remedies for an injury. Rather, we inquire into the duty question here because this court has never explicitly held before that such a duty exists.

228 (2000) (“Most courts have extended liability to architects and engineers by applying the ordinary law of negligence.”); 4 Stuart M. Speiser et al., *The American Law of Torts* § 15:117, at 852 (1987) (“It is well settled, in the modern law, that architects or engineers may be subject to liability for property loss or damage resulting from defective designs, specifications, plans, drawings, supervision and administration, and the like.”).

We are aware of the economic drawbacks of the dangers of creating “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441 (1931). Still, we think economic concerns about liability run amok are overstated and can be addressed through conventional concepts of the measure and scope of a duty of care.

B. What is the measure of an engineer’s duty of care?

A duty of care is necessarily limited to the level of care that is reasonable in the particular circumstances. In these circumstances--an engineer providing professional services--the usual measure of care, ordinary care, is not sensitive enough to the technical aspects of an engineer’s professional responsibilities. What is reasonable care should be measured against what a reasonably prudent engineer would do. A higher degree of care, such as utmost care, would make engineers

insurers and expose them to an intolerably high risk of liability. As Professor DeWolf and Mr. Allen note, “an engineer does not and cannot insure or in any sense guarantee a satisfactory result.” 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 15.51, at 505 (3d ed. 2006). Requiring utmost care would be unduly burdensome. 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. *Cf.* RCW 7.70.040(1) (defining the measure of care for health care providers).

We now turn to the scope of the duty of care.

C. Does the scope of an engineering firm’s duty of care encompass companies in SMS’s position and the class of harms like the ones suffered by SMS?

By scope, we mean that a duty of care encompasses classes of harm and classes of persons. *See* Dobbs, *supra*, § 182, at 450 (“[D]uty rules are classically categorical and abstract; they cover a class or category of cases.”). A duty’s scope involves a question of law. *See, e.g., Schooley v. Pinch’s Deli Mkt., Inc.*, 134 Wn.2d 468, 475 n.3, 951 P.2d 749 (1998). This is necessarily a judgment built on the duty considerations, and so the reasons for recognizing that a class of people or risks of harm is within the scope of a duty are often the same reasons for

recognizing a duty of care in the first instance.

1. *Does an engineer's duty of care extend to the class of harm suffered by SMS?*

LTK argues it had no obligation with respect to risks of harm to the business expectancies of third parties. LTK argues that SMS was in a position to negotiate better contract terms with the City, but SMS accepted the risk that the City could hire an engineer whose negligence would cause extensive property damage to the monorail and business losses. LTK suggests that SMS made a deal, and we should hold SMS to its bargain. As LTK has framed it, the issue is whether the duty of care assumed by an engineering firm extends to the business expectancies of a company with a commercial interest in the property on which the engineering firm worked. However, the question here is whether an engineer's duty of care extends to safety risks of physical damage to the property on which the engineer works. We hold it does. As we have already observed, the harm in this case exemplifies the safety-insurance concerns that are at the foundation of tort law. A fire broke out suddenly on the Seattle Monorail's blue train, endangering people and causing extensive physical damage to property. Given the safety interest that justifies imposing a duty of care on engineers, LTK was obligated to act as a reasonably prudent engineer would with respect to safety risks of physical damage.

When a defendant is under a duty of care with respect to certain risks of harm and admits breach, as LTK assumes here, “the connection between the breach and the plaintiff’s injury becomes a factual question of proximate cause.” *Eastwood*, slip op. at 24. The court decides whether a reasonable juror could conclude that “the plaintiff’s injury was within the scope of the risks of harm, which the court has held the defendant owed a duty of care to avoid.” *Id.* at 18. Here, we have held an engineer, such as LTK, had a duty of care with respect to safety risks of physical damage. Because no reasonable jury would find a risk of fire fell outside the scope of LTK’s duty of care, proximate causation is not disputable. The simultaneous realization of a risk of harm to SMS’s business expectancy is irrelevant. By itself, a breach of LTK’s tort duty with respect to safety risks is sufficient to state a claim.⁵

2. *Does an engineer’s duty of care extend to the persons who have a property interest to use and occupy the property?*

A duty’s scope can be limited to designated classes of persons. *See, e.g.,*

⁵LTK challenges our jurisdiction to review whether SMS’s losses arose from a tortious risk of harm. LTK says the Ninth Circuit decided that “any loss suffered by SMS was a ‘contractually-created’ economic loss, not damage to its own property.” Resp. Br. of LTK at 9 (quoting *Affiliated FM*, 556 F.3d at 921). Because this was a “ruling not certifi[ed] for consideration,” LTK believes we may not address AFM’s argument that SMS’s losses are merely economic. *Id.* (quoting *Affiliated FM*, 556 F.3d at 921); *see also id.* at 30 (“The Ninth Circuit did not raise those issues in its certified question.”). LTK is wrong. The Ninth Circuit did not issue a “ruling” on this point; it merely described the ways the losses *could* be characterized. *See Affiliated FM*, 556 F.3d at 921. We have jurisdiction to address the issue *de novo* because the Ninth Circuit has asked us whether SMS has a cause of action in tort, a purely state law question, and we cannot answer the question unless we inquire into the nature of the losses.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 832, 959 P.2d 651 (1998).

The issue is whether a duty of care respecting damage to property extends only to the persons who hold an ownership interest in that property.

LTK argues that regardless of whether SMS's property interest can be classified as a lease, a license, or some other property interest, only the owner of property can sue in tort for damage to the property. LTK's understanding of the relationship between ownership and the scope of tort duties would lead to absurd results. SMS would not be able to sue for trespass if someone occupied the monorail stations or trains without SMS's permission. SMS would not be able to sue for damages if an arsonist intentionally set the trains or stations afire. SMS would not be able to recover in a negligence suit if a truck driver on the Seattle Center grounds negligently fell asleep, lost control, and rammed into the monorail station and trains parked there. In these examples, under LTK's proposed rule, only the City, as owner, would be protected by tort law.

We reject LTK's argument and hold that the scope of an engineer's duty of care extends to the persons who hold a legally protected interest in the damaged property. "'Property' is made up of an infinite collection of 'interests' that may be held, separated, divided, transferred, restricted--combined and recombined like jack-straws." 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real*

Estate: Property Law § 1.1, at 3 (2d ed. 2004). Accordingly, more than one person can “own” or “hold” an interest in property. *See id.* The law protects a wide range of property interests from harm. A license, a privilege to use property, is entitled to legal protection against interference by a third person if the license is not terminable at will or grants possession to the exclusion of the third person. Restatement of Property § 521(2)-(3) (1944).⁶ An easement is a right to enter and use property for some specified purpose. 17 Stoebuck & Weaver, *supra*, § 2.1, at 80. A cousin of easements, a profit a prendre, “is the right to sever and to remove some substance from the land.” *Id.* “Profits are typically to remove minerals, gravel, or timber.” *Id.* Such nonpossessory interests are entitled to legal protection against “actual or threatened harm.” 2 American Law of Property § 8.106, at 312 (A. James Casner, ed. 1952). The holder of a nonpossessory interest does not have to hold title to the servient estate in order to sue for damage to the nonpossessory interest. *See* 28A C.J.S. Easements § 243, at 466 (2008) (“The owner of an easement whose right has been invaded and injured or destroyed has a right of action therefor.”). As this discussion shows, property interests falling well short of a full fee simple estate are worthy of legal protection.

⁶LTK urges us to reject the *Restatement’s* view, but we have already adopted it. *See McInnes v. Kennell*, 47 Wn.2d 29, 36, 286 P.2d 713 (1955). We see no reason to abandon it now, lest a license holder who meets the requirements of § 521(2)-(3) be left without a remedy should a third party wrongfully destroy the value of the license.

In this case, we do not need to label SMS's property interest as a lease, a license, a profit, or an easement. It is plain that the City granted to SMS "the concession right and privilege to maintain and exclusively operate the Monorail System including the facilities, personal property and equipment, together with the *right to use and occupy* the areas, described in this section." ER 030, Ex. 1, § III.A (emphasis added). These are property interests in using and possessing the Seattle Monorail, and thus SMS was within the scope of LTK's duty of care.⁷ To be sure, the City reserved "access to the Monorail System at all reasonable times to inspect the same and to make any repair, improvement, alteration or addition thereto of any property owned by or under control of the City." ER 095, Ex. 1, § XIX.A. But a "landlord's retention of the right to enter, inspect and repair is not inconsistent with a full surrender of possession to the tenant." 49 Am. Jur. 2d Landlord and Tenant § 386 (2006).

Still, LTK asks us to view the agreement through the prism of contract. LTK argues that "SMS' obligation to pay some of the repair cost . . . was a commercial

⁷The property interest created by an instrument poses a mixed question of law and fact. The parties' intent is a question of fact, and the legal effect of their intent is a question of law. See, e.g., *Veach v. Culp*, 92 Wn.2d 570, 599 P.2d 526 (1979) (railroad right-of-way deed); *Barnett v. Lincoln*, 162 Wash. 613, 617, 299 P. 392 (1931) (lease). When reasonable minds could reach but one conclusion on the factual issue, the court may decide the issue as a matter of law. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973-74, 948 P.2d 1264 (1997). We do so here.

obligation it undertook by contract, not the reflection of any ownership interest in the damaged property.” Resp. Br. of LTK at 17. In a narrow sense, this is true. In Washington, commercial leases usually contain a “contractual duty for either the landlord or tenant to make repairs or apportioning repair duties between the parties.” 17 Stoebuck & Weaver, *supra*, § 6.39, at 367.

But SMS’s property interest derives not from the repair provisions, but from section III.A of the agreement, which granted the “*right and privilege to maintain and exclusively* operate the Monorail System including the facilities, personal property and equipment, together with the *right to use and occupy* the areas, described in this section.” ER 030, Ex. 1, § III.A (emphasis added). That the City conveyed these enumerated property interests in a contract is unexceptional, because almost all property interests must be conveyed in writing. Oftentimes, these writings include contractual obligations that define the relationship between the parties with an interest in the property and allocate responsibilities among them for caring for the property. *See, e.g.*, 17 Stoebuck & Weaver, *supra*, § 6.4, at 316 (“[T]he act of leasing land is a conveyance, a transfer of an estate, and the various conventional undertakings that are practically always made, including the covenant to pay rent, are contractual promises.”). Despite LTK’s attempts to portray SMS’s rights differently, SMS is not a simple third-party contractor hired by the City to

maintain the monorail whenever necessary.

Because LTK's duty of care extended to SMS as holder of the property interests in using and possessing the Seattle Monorail, AFM properly seeks damages for the harm to property interests of SMS. Standing in SMS's shoes, AFM may claim the damages necessary to return SMS as nearly as possible to the position it would have been in, and any claimed damages for SMS's lost profits might be recoverable as damages consequential to LTK's negligence. *See* 16 DeWolf & Allen, *supra*, §§ 5.3-5.4, 5.9, at 174-77, 186.⁸

⁸The scope of LTK's duty of care is an issue certified to us, contrary to the concurrence/dissent's argument. Concurrence/dissent at 13-14 n.5. Further, we must inquire into the duty's scope, rather than simply hold that an independent duty exists, as the concurrence by Justice Chambers prefers. *See* concurrence at 3-4. The Ninth Circuit broadly phrased its certified question, and the Ninth Circuit indicated that the resolution of LTK's motion for summary judgment turns entirely on our answer to the question whether "a party with a contractual right to operate commercially and extensively on another's property may bring a suit in tort against a third party for damage to that property." *Affiliated FM*, 556 F.3d at 922. As the Ninth Circuit recognized, "this important question of Washington tort law is not entirely settled and involves matters of policy best left to state resolution." *Id.* This court, therefore, must address the scope of LTK's duty of care, and not punt the issue back to the federal courts.

III. CONCLUSION

Applying the independent duty doctrine here, we hold that SMS may sue LTK for negligence. LTK, by undertaking engineering services, assumed a duty of reasonable care. This obligation required LTK to use reasonable care, as we have defined it, with respect to risks of physical damage to the monorail. SMS enjoyed legally protected interests in the monorail, and LTK's duty encompassed these interests. By subrogation to SMS's rights, AFM may pursue a claim for negligence against LTK. Consistent with this opinion, the answer to the Ninth Circuit's certified question is yes.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Susan Owens
