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No. 65568-0-I

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

STEVEN AND KAREN DONATELLI, husband and wife,

Plaintiffs/Respondents,

v.

D.R. STRONG CONSULTING ENGINEERS, INC.,

Defendant/Appellant.

REPLY BRIEF

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I. Reply to Introduction

Mr. Donatelli incorrectly argues that D. R. Strong seeks the broadest possible interpretation of the bright line distinction adopted in *Berschauer/Phillips v. Seattle School District*, 124 Wn.2d 819, 881 P.2d 986 (1994); in fact, D.R. Strong seeks only to apply the rule as it has been applied by every construction industry decision of the Supreme Court and Court of Appeals since 1994. Commissioner Verellen correctly concluded the trial court's failure to apply the rule was obvious error.

And Mr. Donatelli does not advance his argument by filing and relying on only one of the three separate opinions of the Court in each of the new decisions issued on November 4, 2010, *Linda Eastwood, dba Double KK Farm v. Horse Harbor Foundation, Inc. et al* No. 81977-7 (hereinafter "*Eastwood*"), and *Affiliated FM Insurance v. LTK Consulting Services, Inc.*, No. 82738-9 (hereinafter "*Affiliated FM Insurance*"). Copies of all six opinions are attached to this Reply Brief.

II. Reply to Assignments of Error

The specific nature of the claim is very much at issue in this appeal because the claim is for commercial loss in which there has been no personal injury, no property damage and, therefore, no factual basis on which to invoke the "safety-insurance policy of tort law".

III. Reply to Statement of the Case

The issue before the court turns on these undisputed facts:

1. the claim arises from a failed land development,
2. Mr. Donatelli contracted with D.R. Strong to perform

engineering services for that development with a detailed scope of services and limitation of liability,

3. the damages alleged are Mr. Donatelli's commercial loss of his investment, and

4. there was no property damage or personal injury.

These are not “embellishments” – they are the facts of the case.

III. Reply Argument

A. The need for certainty and predictability in the construction industry that concerned the Court in 1994 is even greater today.

In *Berschauer/Phillips v. Seattle School District*, 124 Wn.2d 819, 881 P.2d 986 (1994), the Court declared unanimously that its objective was to “maintain the fundamental boundaries of tort and contract law by limiting the recovery of economic loss due to construction delays to the remedies provided by contract.” *Id.*, 124 Wn. 2d at 826. The Court cited the need for certainty and predictability in the construction industry as one reason for its holding, and what was no doubt true in 1994 is doubly so in

2010 when we are confronted with the worst financial crisis in our lifetimes. As the Court said so clearly in 1994, under any other rule, “certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer” and that is because “the fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.” *Id.* at 826-827.

Mr. Donatelli refused to address these very fundamental issues. He and his engineer made a bargain in which they agreed to a scope of services and a fee that was founded on their expected liability exposure. And when they made the contract, commercial loss like the alleged loss here was not recoverable in tort. In this case, it is fair and reasonable to hold the parties to their bargain.

B. The Court’s plurality decisions on November 4 are not relevant and no precedent in any event.

Mr. Donatelli’s confused reliance on the Court’s November 4 decisions in *Eastwood* and *Affiliated FM Insurance* is misplaced because neither decision overruled *Berschauer/Phillips*, its predecessor *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), or its successor, *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d

864 (2007).¹ Instead, the lead and two concurring opinions in both cases left intact the rule that is applied when the claim is for delay damages arising from a construction project.

In *Eastwood*, the issue was whether damages for waste of real property were recoverable in tort. No construction project or engineering design claim was at issue. Quite understandably, no party sought to apply what was then known as the Economic Loss Rule to the claims at trial, and no party asked that it be applied in the Court of Appeals. As stated in Justice Fairhurst's lead opinion, the Court of Appeals applied the economic loss rule on its own motion and without argument to *bar* the plaintiffs' claims for waste of property. Citing an 1822 landlord tenant law treatise and the evident substantial and material injury to real property, the Court had a well settled basis for reversing the Court of Appeals' *sua sponte* holding. Waste of real property is a tort, it always has been; its factual predicate is physical damage to or destruction of real property; and those facts and law have nothing at all to do with Mr. Donatelli's claims against D.R. Strong.

The lead opinion in *Eastwood* represents the view of three justices while the separate concurring opinions of Justice Chambers and Justice

¹ Mr. Donatelli's emphasis on the expression *En Banc* may be one source of his confusion. (Respondent's Brief at 13). Once discretionary review is accepted, all Supreme Court cases are heard *en banc* and have been since establishment of the Court of Appeals in 1969.

Madsen represent the views of the six remaining members of the Court. The concurring opinions of these six justices show that the rule barring claims for negligence in construction claims where there has been no personal injury or property damage is still the law in this state. *Eastwood* did not overrule *Berschauer/Phillips*, *Stuart*, or *Alejandre*. Indeed, the holdings of these cases were re-affirmed under a new name: “the independent duty rule.”

Justice Chambers reviewed the evolution of the rule formerly known as the economic loss rule and its governing policy considerations, citing the following language from *Stuart*:

the line between tort and contract must be drawn by analyzing interrelated factors such as [1] the nature of the defect, [2] the type of risk, and [3] the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to the claim in question. (J. Chambers concurring, slip opinion at 8).

Justice Chambers said that the independent duty rule limits tort remedies in the context of construction on real property and he observed that the Court has “done so in each case based upon policy considerations unique to those industries.” *Id.*, at 13. What was true then remains so today.

Mr. Donatelli offered no reason whatever to justify a deviation from the rule that bars tort remedies in construction delay claims, and none is apparent. The standard of review is *de novo*, and a *de novo* review shows no evidence of any factor that might implicate the safety-insurance policy of tort law. Mr. Donatelli's remedy, if one exists, is under his contract.

As to the decision in *Affiliated FM Insurance*, the first sentence of the lead opinion shows why it has no bearing on Mr. Donatelli's claim against D.R. Strong here. The opinion begins: "A fire ignited on the Seattle Monorail System's (Seattle Monorail) blue train in 2004." And the question before the Court was whether the operating company that suffered millions of dollars in damages caused by the fire could sue the maintenance engineer for negligence. Two justices signed the lead opinion, stating that "our decisions in this case and in *Eastwood* **leave intact our prior cases** where we have held a tort remedy is not available in a specific set of circumstances." (Lead opinion fn.3, emphasis added). Those cases are *Berschauer/Phillips v. Seattle School District*, *Stuart v. Coldwell Banker Commercial Group, Inc.*, and *Alejandre v. Bull*.

The remaining seven justices concurred in result only and a plurality opinion like *Affiliated FM Insurance* has limited precedential value. *Kailin v. Clallam County*, 152 Wn. App. 974, 220 P.3d 222 (Div.

1, 2009). Where there is no majority agreement as to the rationale for a decision, the holding of the Court is the position taken by those concurring on the narrowest grounds. *Kailin*, 152 Wn. App at 985-86. And the narrowest ground of agreement in *Affiliated FM Insurance* is the holding that a claim for fire loss damages is properly recoverable in negligence.

IV. Conclusion

Mr. Donatelli's claims against D.R. Strong are for commercial losses arising from alleged delay in the completion of a real estate development and his remedy, if any, under the controlling on-point precedent should be determined by the contract and not tort principles.

D.R. Strong asks the court to reverse Judge Rogers' ruling, Order the dismissal of plaintiff's claim of negligence and remand for further proceedings.

DATED this 17th day of December, 2010.

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APPENDIX A

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.

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(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

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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.

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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

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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.

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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

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CHAMBERS, J. (concurring) — I commend the lead opinion’s effort to refocus and rename what has heretofore been referred to by this court as the economic loss rule and will hereafter be referred to as the independent duty rule. I concur but write separately to emphasize it is the unique role of this court to decide what the law is and what tort duties are recognized in this state. *Brown v. State*, 155 Wn.2d 254, 261-62, 119 P.3d 341 (2005) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)). The independent duty rule was never a rule in the ordinary sense. Rather it described an analytical tool used to assist this court in determining whether to recognize a tort cause of action in the first instance. It does not describe any particular kind, type, class, or character of damages. Finally, this court has only applied what we now call the independent duty doctrine in cases involving product liability and claims arising out of construction or the sale of real estate. Lower courts should be cautious in its application, especially outside of those narrow areas. The role of the trial court is to determine if the duty sought to be enforced is a duty essentially assumed by agreement or a duty imposed by law. That determination will control the remedy.

I

First, I have a cautionary word for any court that attempts to apply contract law and remedies to the exclusion of other applicable bodies of law and remedies. Our jurisprudence has developed slowly and thoughtfully over

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many centuries. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 468 (1897). In its simplest form we have criminal law and civil law. Oliver Wendell Holmes, Jr., *The Common Law* 6 (Mark DeWolf Howe ed., 1963) (1881). Although, generally, the government enforces criminal law and the individual enforces civil law, they run parallel and may simultaneously apply to the same event. A wrongful death or a fraud may be both a tort and a crime. Similarly, in civil law we have several bodies of law including contract law and tort law, the former based upon duties voluntarily assumed by agreement and the latter based upon duties imposed by law, and they may simultaneously apply to the same event. Tort duties are important to our society and are imposed for a variety of reasons. We impose these duties to protect innocent parties, to deter hazardous, reckless, and negligent conduct, to compensate for injuries, and to provide a fair distribution of risk. The law often imposes greater duties on persons in relationships with each other because the harm is more foreseeable. In every business or contractual relationship, parties will have duties imposed by law in addition to any duties they have assumed by agreement. It is possible that parties will assume greater duties by agreement than imposed by law, and it is possible that parties may alter duties imposed by law with respect to one another. However, where society has imposed a duty by law, that duty is not abrogated merely because parties also have a business or contractual relationship. It is ultimately for the legislature and this court to define duties imposed by law in this state. This court may, from time to time, decide

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whether a duty is cognizable in tort. Once having decided that a duty is cognizable in tort, it is for this court to decide if the tort duty should no longer apply to certain circumstances or events.

II

Second, the term “economic damages” in the independent duty context is linguistic sophistry. I agree with the lead opinion that it was a misnomer. *See Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 968 (E.D. Wis. 1999, *aff’d*, 241 F.3d 915 (7th Cir. 2001)); *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990). The misnomer was unfortunate because any injury or damage that could be expressed in a dollar figure could also be thought to be an economic loss presumptively excludable under the doctrine. *Alejandre v. Bull*, 159 Wn.2d 674, 693, 153 P.3d 864 (2007) (Chambers, J., concurring). The words “economic loss rule” unfortunately gave the impression of a rule of general application; that anytime there is an economic loss, there would not be recovery in tort. But the terms “economic loss” and “economic damages” are much more expansive than the meaning encompassed by the term. For example, the Washington legislature declared that

“[e]conomic damages” means 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). Relevantly, Washington’s product liability act

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(WPLA), chapter 7.72 RCW, defines “Harm” to “include[] any damage recognized by courts of this state: PROVIDED, That the term ‘harm’ does not include direct or consequential *economic loss* under Title 62A RCW.” RCW 7.72.010(6) (emphasis added). Searching judicial opinions for the meaning of economic loss will support the conclusion that all monetary damages are economic.¹ Unfortunately, the imprecise use of the term “economic loss rule” by this court led many to erroneously conclude that it was a rule of general application that precluded recovery in tort of virtually any harm that could be measured in dollars if a business relationship also existed between the parties.

III

Third, again, the independent duty doctrine is not a rule at all; rather it is an analytical tool used by courts to decide whether there is an independent duty cognizable in tort in the first instance. Whether or not we recognize a

¹ In a workers’ compensation case, economic damages included lost wages and medical expenses. *Cruz v. Montanez*, 294 Conn. 357, 371-72, 984 A.2d 705 (2009). In a business tort, “economic damages” included loss of a \$500,000 investment. *Nutrigenetics, LLC v. Superior Court*, 179 Cal. App. 4th 243, 247, 101 Cal. Rptr. 3d 657 (2009). In a construction defect case where a masonry wall collapsed, economic damages included the cost of replacement and repair of the wall. *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 56, 831 N.E.2d 1 (2005). In a class action suit seeking reimbursement for excessive prices on synthetic thyroid medications, “economic damages” included the difference between what the drugs should have cost and what they did cost. *BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813, 817 (7th Cir. 2008). In an insurance bad faith case, the court described as “economic damages” that the insured was claiming included: underpaying and delaying payment of legal fees and costs, renegeing on agreements regarding the allocation of defense costs and a reasonable hourly fee rate, and refusing to contribute an adequate settlement, all of which exceeded \$1,000,000. *Compulink Mgmt. Ctr., Inc. v. St. Paul Fire & Marine Ins. Co.*, 169 Cal. App. 4th 289, 293, 87 Cal. Rptr. 3d 72 (2008).

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tort often involves policy considerations. *See, e.g., Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (recognizing tort of wrongful discharge in violation of public policy); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 393, 111 N.E. 1050 (1916) (recognizing cause of action for products liability in the absence of privity of contract in light of the foreseeable risk of harm caused by defective automobiles). In large part, because of the growing acceptance of a cause of action for products liability without privity of contract, the independent duty doctrine was developed to assist courts in defining the boundaries between torts and contracts.

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 826, 881 P.2d 986 (1994). The doctrine provided a framework to consider multiple factors in that analysis. In determining whether or not to recognize a duty in tort, we have recognized policy considerations such as assessing risks of harm, reducing hazards, affixing responsibility, protecting the reasonable business expectations of product manufacturers and others engaged in business, and fostering the ability to insure against and apportion risk. *Id.* at 826-27. These and other interrelated factors are part of the independent duty analysis.

I agree with the lead opinion that an examination of how we got here is useful. However, I find it more useful to trace the independent duty rule from its inception to best understand its development. The lead opinion properly discusses the influential decision of *East River Steamship Corp. v.*

Transamerica Delaval, Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865

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(1986), a case that never uses the words “economic loss doctrine” by name but is seminal to its development. The defendant, Delaval, had manufactured defective turbines that, once installed in the plaintiffs’ boats, malfunctioned, causing significant loss of income. The plaintiffs sued in tort, based on a theory of products liability, among others. The defendants argued that the plaintiffs were limited to their contract damages. Under products liability law, 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*, 217 N.Y. at 389). The court noted that we impose product liability in tort on the manufacturer “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. Cola 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 products liability action could be brought when the product damaged was the product that had been purchased from the defendant. The court concluded that it could not because “a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.” *Id.* at 871. The court characterized the plaintiffs’ significant consequential damages as the “benefit of its bargain” and concluded that the law of warranty was better suited to

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redress plaintiffs' contractual disappointments. *Id.* at 868. The *East River* court mentioned the phrase "risk of harm" in discussing the policy of allowing parties to allocate risk among themselves. Since then, this court has discussed the risk of harm approach in determining liability for construction defects where the result of deterioration caused damage only to the defective product itself. *See Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 860-65, 774 P.2d 1199 (1989); *see also Alejandre*, 159 Wn.2d at 684 (citing *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 351, 831 P.2d 724 (1992)).

The first time we discussed the independent duty doctrine, we found that a boat manufacturer who manufactured a defective fishing boat that caused no injuries when it broke down *was* answerable for the fishermen's lost profits. *See Berg v. Gen. Motors Corp.*, 87 Wn.2d 584, 597, 555 P.2d 818 (1977). "The *Berg* decision was short-lived, however, as the Legislature effectively overruled *Berg* in 1981 with the enactment of the Washington product liability act (WPLA), RCW 7.72." *Berschauer/Phillips*, 124 Wn.2d at 822. We next examined the doctrine in the wake of the WPLA in *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987). In *Stuart*, we were asked to determine if there was a cognizable action in tort for negligent construction against contractors for deterioration to decks and walkways of a condominium complex. The condominium owners sued for negligent construction, breach of warranty, misrepresentation, and violations of the Consumer Protection Act (CPA), chapter 19.86 RCW. *Id.* at

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410-11. Most of the claims, including the warranty claims, were dismissed on summary judgment as time barred, leaving the issue before us whether negligent construction itself, outside the warranty context, was a cognizable tort cause of action in Washington. We examined the different policy goals served by tort and contract law. We noted that tort law is concerned with duties imposed by law rather than contract:

As a matter of public policy, it is appropriate that a duty be imposed on manufactures to produce products that will not unreasonably endanger the safety and health of the public, whether the ultimate impact of the danger is suffered by people, other property, or on the product itself. In contrast, contract law protects expectations interests, and provides an appropriate set of rules when an individual bargains for a product of particular quality or for a particular use.

Id. at 420. In *Stuart*, although we discussed the public policy choice between tort and contract remedies as applying the doctrine, importantly, we did not suggest that the *type* of damages was a consideration. Instead we said that the line between tort and contract must be drawn by analyzing interrelated factors such as [1] the nature of the defect, [2] the type of risk, and [3] the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to the claim in question.

Id. at 420-21. Further, we cautioned that in applying the economic loss doctrine “the determinative factor should not be the items for which damages are sought, such as repair costs.” *Id.* at 420. We reasoned, if the plaintiffs were allowed to sue for negligent construction rather than only breach of contract, the builder-vendors in Washington would “become the guarantors of

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the complete satisfaction of future purchasers.” *Id.* at 421. We found this was troubling, among other things, because builders and buyers could not allocate the risk of faulty construction or meaningfully settle a dispute arising from a specific known defect. A subsequent purchaser, even knowing of the defect and benefiting from an initially low purchase price could buy a defective condominium at a reduced price and yet still sue the builder-vendor for negligent construction. *Id.* at 421-22. We did not think that recognizing a tort remedy that would encompass such claims was necessary. *Id.* at 420. We held that the owners could not recover in tort for deterioration to the decks themselves, and we grounded our decision on policy considerations. *Id.* at 421.

Two years later, we were asked to consider the interplay of the WPLA and the doctrine. *Graybar*, 112 Wn.2d at 862-67. Under the WPLA, a party suing for an injury caused by a product defect may recover “any damages recognized by the courts of this state” with the exception of “direct or consequential economic loss.” *Id.* at 851 (quoting RCW 7.72.010(6)). Washington Water Power sued for damages resulting from defective insulators in federal court on a variety of theories,² seeking both direct and consequential economic damages, as well as personal injury and other property damages. *Id.* at 849. The federal court certified to this court whether the WPLA preempted common law remedies and if so, whether the

² *Graybar* sued for breach of contract and warranty, as well as under the federal racketeer influenced and corrupt organizations act, 18 U.S.C. § 1964, WPLA, and the CPA, and for negligence, strict liability, fraud, negligent misrepresentation, and estoppel. *Graybar*, 112 Wn.2d at 849-50.

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loss was compensable under the act. *Id.* at 848. This court found that the WPLA did preempt common law remedies and that the WPLA provided the plaintiff no remedy because the only damages available were economic losses barred by the statute of limitations. We again rooted our analysis in public policy, and we again focused duties owed by the parties. *Id.* at 860-65.³ We found that the “risk of harm analysis appropriately accommodates the safety and risk-spreading policies that underlie the law of product liability, and ‘provides a workable and accurate distinction between accidents that should be actionable in tort and losses that should remain in the domain of warranty law.’” *Id.* at 865 (quoting Lindley J. Brenza, Comment, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. Chi. L. Rev. 277, 300 (1987)). Under this analysis, in the products liability context, if the product was hazardous and caused harm, the defendant breached the duty of care and tort law applied. If the product merely disappointed the consumer in light of the contractual bargain, the defendant potentially breached a warranty, and the law of contracts applied. WPLA did not (and does not) define “economic loss.” See RCW 7.72.010 (definition section). In that context, we said, “Generally speaking . . . ‘economic loss’ describes the diminution of product value that results from a product defect.” *Graybar*, 112 Wn.2d at 856 n.5.

In *Atherton Condominium Apartment-Owners Ass’n Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 534, 799 P.2d 250

³ “Like the common law actions they displaced, the causes of action authorized by the WPLA place liability for injuries resulting from hazardous product defects on the manufacturers and distributors who are best positioned to avoid those injuries.” *Graybar*, 112 Wn.2d at 864.

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(1990), we discussed the doctrine only briefly. Again, we rejected plaintiffs' negligent design claim against the architect of their condominium project because the specific defects complained of were not caused by the architect's work and because the plaintiffs cited no relevant authority that an architect had a tort duty to third party purchasers. *Id.* In a footnote, and without relevant analysis, the court also noted that the plaintiff owners had "fail[ed] to articulate a recognizable negligence claim [and] appear to seek only economic loss damages which are not recoverable under tort law." *Id.* at n.17 (citing *Architect and Engineer Liability: Claims Against Design Professionals* § 7.9 (Robert F. Cushman & Thomas G. Bottum eds., 1987)).

In *Berschauer/Phillips*, 124 Wn.2d 816, we again decided a question of duty. We held as a matter of public policy that design professionals are not liable in tort to a general contractor for design defects that result in construction delays. *Id.* at 826. Although we relied upon the logic of our previous independent duty holdings that as a matter of public policy, in the construction industry parties could allocate risk among themselves in their contracts. *Berschauer/Phillips* differed from other cases in which we have discussed the independent duty doctrine because most of the parties had no contracts between or among themselves; thus, we were not saying the parties were limited to their contract remedies. We simply held, based upon public policy considerations, there was no duty of care owed by design professionals to general contractors. *Id.* at 826-28.

In *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969

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P.2d 486 (1998), the Court of Appeals, applying the independent duty doctrine, held that a claim of negligent misrepresentation did not lie for a claim of defective cedar siding installation where the risks of water penetration of siding was specifically covered by the purchase and sale agreement and a one year limit for warranty claims for such defects was contained in the contract. *Id.* at 213.⁴

Similarly, in *Alejandre*, 159 Wn.2d 674, the plaintiff sued to recover damages arising from the purchase of a house. *Id.* at 677. The buyer claimed that the house was not as he believed because the septic system needed repair. *Id.* The sale of the house was controlled by a purchase and sale agreement that placed the burden on the buyer to perform an inspection; the sale was specifically conditioned upon the buyer's inspection of the septic system and "[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion." *Id.* at 678 (quoting earnest money agreement) (alterations in *Alejandre*).⁵ In *Alejandre*, the parties had, in essence, by agreement, modified the duty to disclose imposed by law. This court relied upon the independent duty doctrine as an analytical tool to support its conclusion that given the detailed contractual terms covering the sale of the

⁴ The Court of Appeals also held there were genuine and material facts as to whether Centex engaged in unfair or deceptive acts and reversed the trial court's dismissal of plaintiffs' class action CPA claims. *Griffith*, 93 Wn. App. at 217-18.

⁵ The seller disclosed that a few years before the pipe between the house and the septic tank had been replaced. *Alejandra*, 159 Wn.2d at 679. The buyer had the septic tank pumped and inspected; the inspector stated that the "back baffle could not be inspected but there was '[n]o obvious malfunction of the system at the time of work done.'" *Id.* (citing record) (alterations in *Alejandre*). Had the back baffle been inspected, the defect likely would have been discovered. *Id.* at 690.

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house and the duties of the buyer to inspect, the seller did not have an independent duty to the buyer under the tort theory of negligent misrepresentation. Importantly, in *Alejandre*, we made no meaningful analysis of the nature of the damages and only said, “Here, the injury complained of is a failed septic system. Purely economic damages are at issue.” *Id.* at 685. We cited *Stuart*, 109 Wn.2d at 420, and *Griffith*, 93 Wn. App. at 213, for support of that statement that the claim was for purely economic damages. See *Alejandre*, 159 Wn.2d at 684-85.

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

IV

To summarize, duties imposed by law and duties assumed by agreement often apply to the same events. It is the province of this court to decide the duties imposed by law and once having recognized a tort duty, it is the province of this court to decide that a duty no longer applies to certain circumstances or events. *Cf. United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139

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L. Ed. 2d 199 (1997)). The independent duty doctrine has been an analytical tool used by the court to maintain the boundary between torts and contract. It is an analytical tool to apply policy considerations to determine if a tort should be recognized in the first instance. I agree with the lead opinion that the analysis involves “considerations of common sense, justice, policy, and precedent.” Lead opinion at 10. I agree with the lead opinion that there is a duty in tort not to commit waste. It is a duty imposed by common law and codified in RCW 64.12.020. The duty not to commit waste is and always has been independent of and in addition to any duties assumed by contractual lease covenants. This court has never held otherwise. If our jurisprudence has recognized a tort in the past, lower courts should recognize those torts unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise. It is my reading of the lead opinion that the role of the trial court is to determine if the duty sought to be enforced is one essentially assumed by agreement or imposed by law. If it is a duty solely assumed by agreement, contract remedies apply, and if it is a duty based upon a standard of care imposed by established law, unless clearly waived or modified by agreement, tort remedies apply. I agree that is the appropriate role of the trial court.

I do not find the lead opinion’s discussion of proximate cause particularly enlightening. Lead opinion at 17, 24. It is enough to say that the legislature and the court define the existence of a duty as a matter of law. The issue of the scope of the duty is complex and largely controlled by

foreseeability.

I agree with and commend the lead opinion’s conclusion that the term independent duty rule is a more appropriate term than economic loss rule to describe the doctrine. *Id.* at 17. I disagree with Chief Justice Madsen’s attempt to define “economic losses” in her concurrence. Those losses we have excluded by application of what we called the economic loss rule we have called economic losses, and we have excluded economic losses by application of what we called the economic loss rule. It is perversely circular to begin the analysis with the end result.

Finally, I agree with the lead opinion that Maurice Warren, an employee of Horse Harbor, may be liable for tortious conduct, that the Dalings are not shielded by RCW 4.24.264(1) and are liable for their gross negligence in permitting waste, and Linda Eastwood is entitled to an award of reasonable attorney fees.

With these observations, I concur with the lead opinion.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson

Justice Richard B. Sanders

Justice Debra L. Stephens

Eastwood (Linda) v. Horse Harbor Found. Inc., No. 81977-7

Linda Eastwood, d/b/a Double KK Farm v. Horse Harbor Foundation, Inc.

No. 81977-7

MADSEN, C.J. (concurring)—The lead opinion’s lengthy discourse on the economic loss rule and its new approach for determining when the rule applies is unnecessary for two reasons. First, we cannot apply the common law economic loss rule to nullify the statutory cause of action for waste without violating separation of powers principles and encroaching on the legislature’s authority to establish a cause of action. The issue whether the plaintiff was entitled to bring an action for waste should be resolved entirely on statutory grounds. Second, the injury to property here does not constitute an economic loss within the rule.

RCW 64.12.020 provides: “If a guardian, tenant in severalty or in common, for life or for years, or by severance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages.” This statute plainly provides a statutory cause of action for waste. Many courts have concluded that a statutory cause of action cannot be barred under the economic loss rule, including the Court of Appeals of this state. In *Park Avenue Condominium Association v.*

Buchan Developments, LLC, 117 Wn. App. 369, 382, 71 P.3d 692 (2003), the court stated that the judicially created economic loss rule arose in a context where the legislature had not spoken. “Where the legislature has acted to create rights and remedies, courts cannot enlarge or restrict those rights or remedies” but can interpret an unclear statute in a manner consistent with legislative intent. *Id.*

Using similar reasoning, the United States District Court for the Western District of Washington held that the economic loss rule did not apply to bar a statutory trade secret misappropriation claim under RCW 19.108.010 *et seq.* *Veritas Operating Corp. v. Microsoft Corp.*, No. C06-0703-JCC, 2008 WL 474248, at *4 (W.D. Wa. Feb. 4, 2008) (unpublished). In a leading opinion on this point, the Florida State Supreme Court held in *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 2000) that the economic loss rule does not bar statutory causes of action. The Florida court observed that “[i]t is undisputed that the Legislature has the authority to enact laws creating causes of action. If the court limits or abrogates such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature’s right to act in this area.” *Id.* at 1222. The court concluded that the economic loss rule did not bar statutory claims for injury resulting from violations of the building code during construction under West’s Florida Statutes Annotated § 553.84.

Other cases are similar. *See, e.g., Boehme v. United States Postal Service*, 343 F.3d 1260 (10th Cir. 2003) (economic loss rule has no application to statutory cause of action for unlawful detainer under Colorado

law); *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, No. MDL-1703, 2009 WL 937256, at *9 (N.D. Ill. Apr. 6, 2009) (economic loss rule does not bar statutory claims); *Wolf Tory Medical, Inc. v. C.R. Bard, Inc.*, 2008 WL 541346, at *3 (D. Utah Feb. 25, 2008) (unpublished) (statutory trade secret claim not barred by the economic loss rule under Utah law); *Stuart v. Weisflog's Showroom Gallery, Inc.*, 308 Wis. 2d 103, 746 N.W.2d 762 (2008) (economic loss doctrine does not bar claims under the Home Improvement Practices Act, Wis. Admin. Code ATCP § 110).

I would hold that the economic loss doctrine cannot be applied to bar a statutory cause of action. The legislature has authority to establish a cause of action, and we would encroach upon its authority to do so if we were to nullify its action by applying the economic loss rule to prohibit a statutory claim.

The lead opinion asserts that my conclusion accounts for only half of the equation because under the parties' arguments there is an issue whether the plaintiff's claim is for waste within the meaning of the statute or instead for the lost benefit under contract, i.e., an economic loss. Lead opinion at 24 n.5. The lead opinion believes it is therefore still necessary to look at what legal duties are breached. *Id.* This is an example of the lead opinion's unnecessary complication of the issues in this case. If the loss qualifies as waste under the statute, the economic loss rule simply cannot bar a plaintiff's claim under the statute. It makes no difference whether the loss would, in the absence of the statute, constitute an economic loss. The economic loss rule would be completely removed from the equation.

disposes of the plaintiff's argument that the damage to her property does not fall within the economic loss rule. Under our case law, economic losses are distinguished from personal injury or injury to other property. *Alejandre v. Bull*, 159 Wn.2d 674, 684, 153 P.3d 864 (2007); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420-21, 745 P.2d 1248 (1987). In these cases and *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990), the damages sought were economic—consisting of the costs of repairs to correct the defects and to compensate for additional injury to the property itself caused by the defective conditions. Thus, the purchaser of the property in each case did not obtain the benefit of the bargain—the purchased item failed to meet the buyer's economic expectations because of the defects. In *Stuart*, the allegations were that decks, walkways, and railings did not meet uniform building code water-tightness requirements, which resulted in rotting and substantial impairment of the decks, walkways, and railings. In *Atherton*, the alleged “defects [were] latent structural deficiencies primarily pertaining to the inner construction of the floors and ceilings.” *Atherton*, 115 Wn.2d at 521. In *Alejandre*, the septic system of a residence was defective. In each case, the property contracted for purchase was defective and not what the contracting party expected to receive as the benefit of the bargain made.

The present case does not fall within this class of cases. The plaintiff did not purchase property that turned out to contain defects that themselves required repair or that led to further damage to the property itself.¹

The lead opinion incorrectly states a

general rule of law that does not accord with our cases on the economic loss rule. It unnecessarily engages in a long and ultimately confusing discussion of how the economic loss rule is to be applied in the future. The issue that is so exhaustively examined has an easy and straightforward resolution in this case. The economic loss rule should not be applied to bar a statutory cause of action, here the statutory cause of action for waste.

I concur in the result.

¹ As the court explained in *Alejandre*, “[t]he key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.” *Alejandre*, 159 Wn.2d at 684. As mentioned, the property itself was not property that was purchased and turned out to be defective, nor did it cause personal injury or injury to other property.

The lead opinion misrepresents my analysis to conclude that it favors a determination that the injury to property here is an economic loss. Lead opinion at 21-22. A comparison of what I actually say, in full, and what the lead opinion thinks I should have said shows that this is not the case and that the economic loss rule set forth in our prior cases is not as difficult to apply under these facts as the lead opinion portrays.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Gerry L. Alexander

2010 DEC 17 11:02 AM

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,)
Defendant-Appellee.)

Filed November 4, 2010

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 *Alejandre 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.

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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 jackstraws." 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

No. 82738-9

CHAMBERS, J. (concurring) — I agree with the lead opinion in result and would answer the certified question in the affirmative. This court has long recognized that engineers have a duty to exercise reasonable skill and judgment in performing engineering services. We have never held that engineers do not have a cognizable duty in tort, and I agree we should not so hold today. And I would not reexamine that duty just because the defendant has raised the independent duty doctrine as a defense to a tort claim. The lead opinion's approach suggests that this court is going to reexamine every tort duty established by common law or statute in the face of a claim that the independent duty doctrine bars the claim. While, I agree with the lead opinion's result, I would treat this case like an ordinary tort case and resolve it based upon our established tort precedent.

The Seattle Monorail System takes passengers between downtown Seattle and the Seattle Center. Seattle Monorail Services Joint Venture (SMS) operates the monorail under a concession agreement with the city of Seattle. Among other terms, SMS agreed to provide emergency maintenance and to bring trains back into service following an accident. LTK Consulting Services, Inc. (LTK) contracted with the city to provide engineering services relating to examining and recommending repairs to the monorail system. At least for the purposes of the certified question, there is no contractual

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

A fire damaged the blue and red trains of the monorail. SMS suffered millions of dollars in damages. Affiliated FM Insurance Co. (Affiliated), SMS's insurer, paid for damages caused by the fire. Then, standing in the shoes of SMS as its subrogee, Affiliated brought this negligence action against LTK. Affiliated contends that as part of its work, LTK recommended removing an electrical grounding system from the monorail that would have prevented the fire. Affiliated contends that this advice was negligent and that such negligence was a proximate cause of the fire and subsequent damage to its insured.

We largely clarified this court's independent duty jurisprudence in *Eastwood v. Horse Harbor Found.*, No. 81977-7 (Wash. Nov. 4, 2010). This case is, in my view, a straightforward claim of professional negligence. Professionals, including engineers, owe a duty to "exercise the degree of skill, care, and learning possessed by members of their profession in the community." 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 15.51, at 504-05 (3d ed. 2006). The only issue is whether LTK owed that duty to SMS as a concessionaire. I agree with the lead opinion that it did. This case does not implicate in any way the independent duty doctrine, formerly known as the economic loss rule. *Eastwood*, slip op. at 22. The term "economic loss rule" was a misnomer. *Id.* As I note in *Eastwood*, "[u]nfortunately, the imprecise use of the term

‘economic loss rule’ by this court led many to erroneously conclude that it was a rule of general application that precluded recovery in tort of virtually any harm that could be measured in dollars if a business relationship also existed between the parties.” *Eastwood* concurrence at 4. In *Eastwood*, we took the opportunity to clarify that the economic loss rule had been read too broadly by lower courts, adopted the term “independent duty” rule in its stead, and explained that the independent duty doctrine focused on the duty owed rather than any particular kind of damage suffered.

This case arose before our decision in *Eastwood* could be announced. Recognizing the confusion in our jurisprudence before *Eastwood*, the United States Court of Appeals for the Ninth Circuit certified the following question to this court:

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, 556 F.3d at 922. Ultimately, the question certified is one of duty. The lead opinion properly notes that engineers have long had a common law “‘duty to exercise reasonable engineering skill and judgment.’” Lead opinion at 15 (quoting *G.W. Constr. Corp. v. Prof’l Serv. Indus., Inc.*, 70 Wn. App. 360, 366, 853 P.2d 484 (1993)). Yet LTK argues that it owed no duty to SMS because SMS’s losses were essentially economic. This argument is precisely the argument that we dispatched in *Eastwood*. Given that, the

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answer to the certified question is a straightforward yes. I would not reassess the policy behind the common law duty of engineers to exercise reasonable engineering skill and judgment. I concur with the lead opinion in result.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson

Justice Richard B. Sanders

Justice Debra L. Stephens

No. 82738-9

MADSEN, C.J. (concurring/dissenting)—Legal doctrines develop, and course corrections are frequently made, in response to factual circumstances that demonstrate the need for refinement of a rule of law or legal analysis. The lead opinion’s new approach to the economic loss rule is more than a course correction. It is, in effect, a wholesale rejection of our prior cases. In exchange, the lead opinion substitutes an analysis that involves little more than this court’s ad hoc determination of whether a duty should lie. I am not convinced that the “independent duty” approach is an improvement in determining when parties will be held to their contract remedies.¹

But there is a more immediate problem with the lead opinion’s analysis in this

¹ The lead opinion’s analysis posits that if a breach of contract is also a breach of an independent duty of care under tort law principles, then it is compensable under tort law. This is a significant departure from our prior understanding of the economic loss rule, which limits relief to contract remedies when losses were suffered as a result of breach of a contract. “Economic loss is a conceptual device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remedial only in contract.” *Berschauer-Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986 (1994). Necessarily, therefore, the economic loss rule is not implicated unless both contract and tort remedies are potentially available, and a tort remedy is not potentially available unless a duty is found. But if finding a tort duty is equivalent to finding an “independent duty” precluding application of the economic loss rule, one can legitimately ask what is left of the economic loss rule.

case. The lead opinion should not even engage in its "independent tort" analysis because without question, the losses that Seattle Monorail Services (SMS) suffered are not economic losses within the meaning of the economic loss doctrine and there is no basis for assuming that a choice must be made between contract and tort remedies. This being the case, whether Affiliated FM Insurance Company, which is subrogated to any rights that SMS has to proceed against LTK Consulting Services, Inc., can seek a tort remedy for those losses is a matter to be decided solely under settled tort law principles without regard to the economic loss rule. The answer to the United States Court of Appeals for the Ninth Circuit's certified question is that in the circumstances of this case, the economic loss rule is not implicated at all and therefore it certainly does not apply to bar Affiliated FM's tort claims.

Analysis

The lead opinion mistakenly assumes that there is an issue about whether Affiliated FM, standing in its insured's SMS's shoes, is seeking relief for economic losses for which contractual remedies are available and that there is therefore a question about whether the economic loss rule applies in this case. The lead opinion says that "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,' . . . the court must apply the . . . independent duty doctrine." Lead opinion at 8 (quoting *Eastwood v. Horse Harbor Found.*, No. 81977-7, slip op. at 4 (Wash. Nov. 4, 2010). But here there is no question of any contract remedies being available and the economic loss

rule is not implicated at all.

However, inventing its own hypothetical set of facts, the lead opinion claims that it is appropriate to apply its “independent tort” analysis notwithstanding the lack of any actual contractual relationship between SMS and LTK Consulting that would implicate the economic loss rule. The lead opinion points to SMS’s agreement with the city of Seattle to carry fire insurance and says that SMS *could have* negotiated with the city to obtain the right to contract for engineering and other repair services. Lead opinion at 7 n.1. The lead opinion evidently believes this would sufficiently bring the case within the class of cases where both contract and tort remedies are permissible and a court accordingly must decide whether the economic loss rule bars tort remedies.

In the first place, the lead opinion’s explanation assumes that the city would have relinquished its rights as owner of the monorail to contract for such services. SMS had only the right to operate the monorail as a concessionaire. It did not have ownership rights and nothing suggests the city would have relinquished its own rights. The lead opinion’s assumption about nonexistent facts cannot substitute for SMS in actual fact having the right and responsibility to contract for engineering services.

In the second place, the relevant relationship is that between SMS and LTK Consulting. Not only would SMS have had to have had the right to contract for engineering, it would have had to have actually exercised this right and entered a contract with LTK Consulting. But just as nothing in the record even hints that SMS would ever have had the right to contract with LTK Consulting, it obviously never entered into any

such contract with LTK Consulting. There was never any contract between SMS and LTK Consulting, never any expectations of any bargain. There simply was never any relationship between SMS and LTK Consulting, nor any recognized basis in our law for presuming circumstances that would give rise to the possibility that the economic loss rule might apply.

And third, the lead opinion's explanation of why the economic loss rule might be implicated perpetuates an unfortunate misreading of our decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). Some parties and courts have taken statements and portions of that decision out of context to conclude that if a party could have contracted or negotiated a matter, then the economic loss rule is implicated. That is much too broad a principle and it has never been the law in this state, but the lead opinion does the same thing when it says that SMS could have negotiated with the city to obtain the right to contract for engineering and other repair services.

Alejandre provides an extended discussion of the economic loss rule as it developed prior to the "independent duty" approach favored by the lead opinion, including a discussion of why the rule exists and when it is implicated. As to the latter, the *Alejandre* opinion can only fairly be read, when read properly as a whole, to say that in general 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*. The losses must be economic losses for which this risk allocation could or should have been negotiated, with these losses not being in the nature

of personal injury or injury to property.

Here, SMS simply had no contractual relationship with LTK Consulting and the economic loss rule does not apply.

There is not even a colorable claim that a choice must be made between contract remedies and tort remedies, and this is what the lead opinion should say. We should not engage in an analysis to decide whether the economic loss rule would apply when there is no way in which it could ever apply under the facts here.

One has to ask the question—if we simply presume economic losses in a case and therefore engage in the “independent tort” analysis, what happens if we find no independent tort? We certainly would not apply the economic loss rule if it is not implicated.

The lead opinion has the whole analysis upside down.

This is a huge mistake in analysis and presents an extremely distorted assumption about what constitute economic losses implicating the economic loss rule. This case is not about whether Affiliated FM will be held to SMS’s contract remedies under the concessionaire agreement between the city of Seattle and SMS or about any contract remedies existing under the city’s contract with LTK. It is instead about whether Affiliated FM can seek tort remedies in an action against LTK Consulting, with which SMS had no contract or, indeed, any relationship at all.

In general, the economic loss rule “prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from contract” because “tort law

is not intended to compensate parties for losses suffered as a result of duties assumed only by agreement.” *Factory Mkt., Inc. v. Schuller Int’l, Inc.*, 987 F. Supp. 387, 395 (E.D. Pa. 1997) (quoting *Duquense Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995) and *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1271 (M.D. Pa. 1990)). This does not mean that if a loss occurs under a contract, i.e., any contract with anyone at all, then the loss is an economic loss within the meaning of the economic loss doctrine.

As the court has explained, the economic loss rule applies to limit recovery for economic losses to contract remedies “to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract.” *Berschauer-Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994); accord *Alejandre*, 159 Wn.2d at 684. In general, if the plaintiff and the defendant do not have a contract, there has been no give and take negotiation regarding allocation of risks. Absent a contract between the parties, the economic loss rule is never implicated at all.²

Here, Affiliated FM is not suing the city of Seattle and it is not seeking remedies

² We have recognized that strict contractual privity is not required in the construction industry where the various design professionals and contractors are involved in planning and building a building or other structure. The specialized rule relating to the “network” of contracts in such circumstances is not implicated here. I address this issue of privity below in the text.

The economic loss rule also applies under Washington’s product liability act (PLA), ch. 7.72 RCW, to exclude recovery in tort for economic losses, although the PLA does not prevent the recovery of economic losses under the Uniform Commercial Code, Title 62A RCW. See RCW 7.72.010(6); .020(2); *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 84-85, 866 P.2d 15 (1993).

under the contract SMS has with the city of Seattle nor, more importantly, is it trying to *avoid remedies SMS has under the contract with the city* in favor of tort remedies *from the city*. Affiliated FM is suing LTK Consulting Services, an engineering firm with which SMS did not have a contractual relationship³ (and therefore with which it never engaged in the negotiation of risks normal in the context of a contractual undertaking).

The federal district court similarly failed to appreciate that the question whether the economic loss rule applies arises in this case only if there was a breach of contract between SMS and LTK Consulting. It apparently accepted LTK Consulting's argument in support of its motion for summary judgment that losses other than an injury to one's own property or person are economic losses and outside the bounds of a tort action, regardless of any contract. The district court therefore focused on the question of what kind of a property interest, if any, SMS acquired in the monorail property under the SMS-city of Seattle Monorail Concession Agreement, and concluded that the economic loss rule applies because under its contract with the city of Seattle SMS did not exercise the degree of possession and control over the trains sufficient to demonstrate ownership.

Certainly the nature of the injury can be important to the question since, for example, personal injuries are not within the scope of the economic loss rule. But the overarching inquiry into whether economic losses are at issue is an inquiry into whether there is a contract, breach of which is alleged to have caused the loss because, if it

³ The lead opinion says that the contract between the city and LTK Consulting is not in the record but assumes that SMS was not a party to that contract. The Ninth Circuit's order in this case states as a fact that SMS was not a party to the contract between LTK Consulting and the city.

applies, the economic loss rule is designed to hold parties to their contract remedies rather than tort remedies.

A discussion of contractual risk allocation would be incomplete without addressing the construction cases, where lack of direct contractual privity does not preclude application of the economic loss rule. LTK Consulting relies heavily on one of these cases, *Berschauer-Phillips*, 124 Wn.2d at 822, but *Berschauer-Phillips* does not support its argument that the economic loss rule applies here. Rather, *Berschauer-Phillips* and the Colorado Supreme Court's decision in *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72-73 (Colo. 2004) explain why the economic loss rule is applied in the context of the interrelated disciplines and agreements that generally exist with respect to a construction project, even without direct privity between each of the design professionals, contractors and subcontractors, and inspectors that may be involved in development and construction of a building or the like. As is apparent from these cases, the nonprivity construction cases do not stand for a universal rule that privity is not required, nor do they stand for a broad rule that the nature of the property damage dictates in the first instance whether the economic loss rule applies.

In *Berschauer-Phillips*, a contractor sought to bring tort claims against an architect, a structural engineer, and an inspector, none of whom were in contractual privity with the contractor, alleging that defective design and negligent failure to inspect increased costs of construction and caused delay costs. The contractor alternatively sought to bring a tort claim for negligent misrepresentation under the *Restatement*

(*Second of Torts* § 552 (1977) for negligent misrepresentation. The court held that the economic loss rule barred the tort claims, despite the lack of direct contractual privity.

The court explained:

The economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others. The economic loss rule was developed to prevent disproportionate liability and allow parties to allocate risk by contract.

...
We . . . maintain the fundamental boundaries of tort and contract law by limiting the recovery of economic loss due to construction delays to the remedies provided by contract. We so hold to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts. If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract. . . .

A bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary. We preserve the incentive to adequately self-protect during the bargaining process. If we held to the contrary, a party could bring a cause of action in tort to recover benefits they were unable to obtain in contractual negotiations.

Berschauer-Phillips, 124 Wn.2d at 821, 826-27 (citations omitted).

In a similar vein, the Colorado Supreme Court also held that despite the lack of direct privity, the economic loss rule applied to bar a steel subcontractor's tort claims against an engineering firm and an inspector alleging that an improper plan and negligent

inspections caused cost overruns on a public works project. The Colorado Court of Appeals had held that the economic loss rule did not preclude the tort claims because, under the “independent duty” approach, a licensed engineer owes an independent duty of care under tort law to contractors and subcontractors with regard to plans and specifications that the engineer drafted and prepared and which were relied upon by the contractor or subcontractor. The court of appeals had also held that the inspector had the same duty of care in inspecting and directing the project. The Colorado Supreme Court reversed:

[The subcontractor] argues that the application of the economic loss rule is limited to cases where the parties contracted directly with each other for their rights and obligations. [The subcontractor] claims that it did not have an “opportunity . . . to bargain directly with [the inspector] and [the engineer] over the risk of the harm which would result from defective specifications and negligent project administration.” We disagree and hold that the economic loss rule applies when the claimant seeks to remedy only an economic loss that arises from interrelated contracts.

The economic loss rule applies between and among commercial parties for three main policy reasons, none of which depends upon or is limited to the existence of a two-party contract: (1) to maintain a distinction between contract and tort law; (2) to enforce expectancy interests of the parties so that they can reliably allocate risks and costs during their bargaining; and (3) to encourage the parties to build the cost considerations into the contract because they will not be able to recover economic damages in tort.

In the context of larger construction projects, multiple parties are often involved. These parties typically rely on a network of contracts to allocate their risks, duties, and remedies.

[C]onstruction projects are multi-party transactions, but rarely is it the case that all or most of the parties involved in the project will be parties to the same document or documents. In fact, most construction transactions are documented in a series of two-party contracts, such as owner/architect, owner/contractor, and contractor/subcontractor. Nevertheless, the conduct of most construction projects

contemplates a complex set of interrelationships, and respective rights and obligations.

Fundamentals of Construction Law 4-5 (Carina Y. Enhada et al., eds., 2001).

In such a contract chain, the parties do have the opportunity to bargain and define their rights and remedies, or to decline to enter into the contractual relationship if they are not satisfied with it. Even though a subcontractor may not have the opportunity to directly negotiate with the engineer or architect, it has the opportunity to allocate the risks of following specified design plans when it enters into a contract with a party involved in the network of contracts. In this situation, application of the economic loss rule encourages a subcontractor to protect itself from risks, holds the parties to the terms of their bargain, enforces their expectancy interests, and maintains the boundary between contract and tort law.

The policies underlying the application of the economic loss rule to commercial parties are unaffected by the absence of a one-to-one contract relationship. Contractual duties arise just as surely from networks of interrelated contracts as from two-party agreements.

BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 72-73 (Colo. 2004) (some alterations in original) (citations omitted).⁴

⁴ The lead opinion claims that *Stuart v. Coldwell Bankers Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987) shows that the economic loss cases are not limited to cases where a contractual relationship exists and construction cases involving a single construction project. I am not going to pretend that all economic loss cases fall neatly into these categories because this is an area where courts across the country have not always decided cases in a cohesive manner.

Nonetheless, the primary area where the economic loss rule has been applied outside of contractual privity is in the construction context. I explain why in the text. *Stuart* does not undercut the explanation, but instead the court there considered the economic loss rule in a different context, that of products liability. In *Stuart*, the plaintiff homeowners' association sued the builder-vendor for construction defects in a condominium complex. The plaintiff sought to assert what the court called a "peculiar combination of tort and contract law, closely related to the law of products liability." *Id.* at 418. The court explained the history of products liability and liability of manufacturers, and the difficulty of suing in the absence of strict contractual privity, noting, among other things, that this led to the distinction between tort recovery for physical injuries and warranty recovery for economic loss. *Id.* at 418-20. The court said that "[i]n cases such as the present one where *only the defective product is damaged*, the court should identify whether the particular injury amounts to economic loss or physical damage." *Id.* at 420 (emphasis added). The court identified factors to use in distinguishing whether a loss is an economic loss or physical damage and said these factors "bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of *warranty law* is most applicable to the

Unlike *Berschauer-Phillips* and *BRW*, the present case does not involve the construction industry and the interconnectedness of related disciplines involved in constructing buildings and similar structures (or a similar commercial context involving such interconnectedness), where each entity knows of the involvement of the others and can negotiate risks by contract, including matters concerning the risks of potential liability. Instead, there was a contract between the city of Seattle and SMS, governing in great detail the operation of the monorail system. This contract is, as it is titled, a concession agreement between the city of Seattle and SMS that granted to SMS a concessionaire's right to operate the monorail system belonging to the City.

A concession agreement is akin to a lease, but distinct in that concessionaires do not take a proprietary interest in real property, but rather are given the privilege of operating in connection with governmental property under contractual terms that specify the scope of governmental permission. A concession agreement allows a private company to provide goods or services on public property that might otherwise be provided directly by government personnel.

Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 1 U. Chi. Legal F. 187, 199 (2009).

As an entirely separate matter, the city of Seattle contracted with LTK Consultants for that business's services. It cannot be said that operating the monorail as a

claim in question." *Id.* at 421 (emphasis added). Then the court said that the nature of the defect was "that the decks and walkways were not of the quality desired by the buyers" and the injury or damage was because the decks deteriorated though exposure to weather. *Id.*

The court's analysis in *Stuart* was premised on product liability law, in accord with the plaintiff's somewhat odd argument. While the court could have simply said builders are not product manufacturers, it instead explained why even if they were considered to be, the plaintiff's claim would fail under the products liability argument that the plaintiff made.

concessionaire, as SMS did, or doing engineering work for the city with respect to the monorail, as LTK Consulting did, contemplated a complex set of interrelationships with respective rights and obligations. There is also no evidence or even a hint of any history or practice common to either activity that is comparable to that in the construction industry, where it is routine for members of interrelated professional disciplines and contractors to engage in such a series of interconnected contractual arrangements—a process that is widely known and extremely common.

There 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. SMS had no contractual relationship with LTK Consulting. There is no basis to conclude that SMS was a third-party beneficiary of the contract between LTK Consulting and the city of Seattle. SMS's losses are not remediable through any contract with defendant LTK Consulting.

The federal district court held that summary judgment must be granted in favor of LTK Consulting because the economic loss rule bars Affiliated FM's tort claims. It does not. Absent any contract between SMS and LTK Consulting, there is no basis to conclude that SMS's losses are economic losses within the meaning of the economic loss rule. Accordingly, on the facts here, the answer to the Ninth Circuit's certified question is that the economic loss rule does not bar Affiliated FM's tort claims. Whether there is a reason specific to tort law why such claims might be barred—unrelated to the economic loss rule—is a separate question that the district court did not address.⁵

Conclusion

The lead opinion erroneously assumes that economic losses are at issue. The economic loss rule is premised on the principle that if the risk of loss can be allocated in a negotiated contract, then a party to that contract will be held to the contract remedies if breach of the contract results in economic losses. Affiliated FM is not suing the city and is not seeking to avoid contract remedies under SMS's contract with the city. Rather, Affiliated FM is suing LTK Consulting, an entity with which SMS has no contract. The lack of any such contract means there are no competing contract and tort remedies and no need to determine whether the economic loss rule will apply to bar claims for tort remedies.

The lead opinion's huge assumption leads to its lengthy and misleading analysis, which is likely to muddle the entire area of law. Parties may well believe that the economic loss rule must be considered whenever commercial parties sue each other, and this, of course, is not the case. It is unfortunate that the lead opinion also may well

⁵ In engaging in an extended discussion of the nature of the tort duty it finds, and the damages it believes are recoverable, the lead opinion goes far beyond the question certified. In certifying its question, the Ninth Circuit clarified that if we decide that "the economic loss rule, or some other rule, bars [Affiliated FM's] suit," then it will affirm summary judgment in favor of LTK Consulting. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 556 F.3d 920, 922 (2009). Thus, this court should be deciding whether any doctrine *bars* the suit. If we do not perceive a reason that a tort suit is barred, that is all we should say. After all, this is a case being prosecuted in federal court and the federal courts are perfectly capable of applying a tort analysis. We do not have jurisdiction to do any more than answer the question asked. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (when this court undertakes to answer a question certified by a federal court, the federal court retains jurisdiction over all matters except the question certified). We do not need to define the tort duty, its nature and extent, or define recoverable damages.

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encourage parties to make unnecessary or unavailing arguments in the mistaken belief that the court must assume that there is a question about whether the economic loss rule applies any time there is a contract lurking *anywhere* in the record, regardless of the fact that it is not between the parties.

I would hold that the answer to the Ninth Circuit's certified question is that the economic loss rule does not bar tort claims in this case because there was no contract between LTK Consulting and SMS and no basis under the facts of this case for applying the economic loss rule in the absence of contractual privity.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Gerry L. Alexander

Justice James M. Johnson
