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COURT OF APPEALS  
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No. 65568-0-I

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

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STEVEN AND KAREN DONATELLI, husband and wife,

*Plaintiffs/Respondents,*

v.

D.R. STRONG CONSULTING ENGINEERS, INC.,

*Defendant/Appellant.*

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**APPELLANT'S BRIEF**

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## TABLE OF CONTENTS

	<u>Page</u>
I. Assignments of Error .....	1
Issues pertaining to assignment of error .....	1
II. Statement of the case.....	1
A. The facts of the case .....	1
B. Procedural history .....	4
III. Argument .....	5
A. The economic loss rule bars Mr. Donatelli’s negligence claim.....	5
B. No appellate decision retreats from the bright line rule in construction related claims .....	9
IV. Conclusion .....	10

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007) .....	5, 6, 8
<i>Atherton Condominium v. Blume Development</i> , 115 Wn.2d 506, 799 P.2d 250 (1990) .....	6
<i>Berschauer/Phillips v. Seattle School District</i> , 124 Wn.2d 819, 881 P.2d 986 (1994) .....	4, 8
<i>Boguch v. Landover Corp.</i> , 153 Wn. App. 595, ___ P.3d ___ (Div. 1, 2009) .....	10
<i>Burg v. Shannon &amp; Wilson, Inc.</i> , 110 Wn. App. 798, 43 P.3d 526 (Div. 1, 2002) .....	9
<i>Carlson v. Sharp</i> , 99 Wn. App. 324, 994 P.2d 851 (Div. 3, 1999) .....	9
<i>Griffith v. Centex Real Estate Corp.</i> , 93 Wn. App. 202, 969 P.2d 486 (Div. 1, 1998) .....	9
<i>Jackowski v Borchelt</i> , 151 Wn. App. 1, 209 P.3d 515 (Div. 2, 2009) .....	10
<i>Stuart v. Coldwell Banker Comm'l Group, Inc.</i> , 109 Wn.2d 406, 745 P.2d 1284 (1987) .....	6

I. Assignments of Error

The trial court erred when it denied defendant's motion for partial summary judgment to dismiss plaintiffs' claim of negligence.

Issues pertaining to assignment of error.

Does the economic loss rule bar all negligence claims for defeated contractual expectations arising from a failed land development?

II. Statement of the case.

A. The facts of the case.

Plaintiff Steve Donatelli is a land developer. CP 2. Defendant D.R. Strong Consulting Engineers, Inc. (hereinafter "D.R. Strong") is a firm of civil engineers and surveyors. CP 2.

The claims in this suit arise from a short plat development of land that Mr. Donatelli owned in unincorporated King County. CP 2. Mr. Donatelli's plan was to create two short plats and then build single family homes for sale. CP 2.

Mr. Donatelli contracted with D.R. Strong to prepare the civil engineering design documents for the short plat of the property. CP 20-26. The contract's scope of services set forth six phases of the work the engineer was required to perform: Phase 100 – Final Engineering Plans, Phase 200 – Sanitary Sewer & Water Main Extensions, Phase 300 – Construction Staking Services, Phase 400 – Construction Phase Assistance

& Construction Observation, Phase 500 – As-Built Survey & Plans, Phase 600 – Final Plat Map, and Additional Services. CP 21-23. To complete these tasks, the responsibilities of the “Client” and the “Consultant” were allocated; their contract set an agreed upon price for the services of \$33,150 and the terms of the contract included a limitation of professional liability by which the liability was limited to the fees paid. CP 26. By its terms, Mr. Donatelli could have waived this limitation by payment of consideration; he chose not to do so. CP 26. The engineers’ contracted services did not include construction of the improvements.

The plat design was based on a Preliminary Approval that King County granted on October 4, 2002. CP 28. The Preliminary Approval was valid for 60 months, which means that the engineering plans have to be completed and approved and the plat improvements, i.e. water, power and sewer utilities, have to be built and the final plat map recorded within 60 months of the date of the Preliminary Approval. In this case, the Preliminary Approval was dated October 4, 2002 and it would and did expire on October 4, 2007. CP 2.

The Preliminary Approval was subject to several conditions, one of which is relevant to Mr. Donatelli’s claim against D.R. Strong. CP 29-34. Under the Preliminary Approval, Mr. Donatelli had to either install a new fire hydrant or fire sprinkle the new homes, and Mr. Donatelli chose to

add the fire hydrant. CP 92, 93. If he installed a new fire hydrant, Mr. Donatelli was required to obtain a permit from the King County Fire Protection Engineer. CP 29-34, Condition 6 A, page 4 of 6. The Preliminary Approval and its various conditions were delivered to Mr. Donatelli on or about October 4, 2002. CP 12, 32.

In 2004, the City of Seattle Public Utilities Department (they provided the water) and the King County Fire Marshall indicated that the plans were approved and the Fire Marshall re-iterated the fact that a permit for the new hydrant was required. CP 42, 43. These approvals were delivered to Mr. Donatelli. CP 41.

As of July 12, 2007 all improvements, including the new fire hydrant, had been constructed and the plans were ready to be recorded when Mr. Donatelli discovered he failed to obtain the required permit to install the hydrant. CP 16, pp. 75-76. On July 12, 2007, Mr. Donatelli filed an Expedited Permit Review application for construction of the fire hydrant that was already installed. CP 39.

After reviewing the Permit Application, the Fire Marshall imposed a new requirement that was not set forth in the conditions of the Preliminary Approval. Now, even though a new hydrant had been installed, the Fire Marshall also wanted the new homes to be fire

sprinkled, and a dispute arose between the Fire Marshall and King County Roads division. CP 92, 93

While Mr. Donatelli and D.R. Strong wrestled with the King County bureaucracy, on October 4, 2007 the Preliminary Approval expired. A new Preliminary Approval was applied for and granted. CP 93.

Then, in 2008, the largest financial crisis in lending history erupted world wide. CP 3. Mr. Donatelli was unable to complete his development and he lost the property to foreclosure. CP 3.

B. Procedural history.

Mr. Donatelli brought this suit against D.R. Strong to recover financial losses resulting when the property was taken in foreclosure. CP 1-5. He claims the engineers' delayed and defective performance led to his loss of the property and he alleged claims for negligence, breach of contract and violation of the Consumer Protection Act, and he seeks damages in excess of \$1,500,000. CP 5. Plaintiff alleged economic loss only as there has been no bodily injury or property damage.

D.R. Strong sought partial summary judgment dismissing the claims for negligence under the economic loss rule of *Berschauer/Phillips v. Seattle School District*, 124 Wn.2d 819, 881 P.2d 986 (1994) and the claim under the Consumer Protection Act. CP 44-53.

Judge Jim Rogers denied the Motion to Dismiss the claims of negligence.<sup>1</sup> CP 94, 95. While acknowledging that the language of *Berschauer/Phillips* would bar a tort claim arising from a contractual relationship, Judge Rogers thought that recent decisions of the court of appeals involving statutory claims against realtors supported Mr. Donatelli's common law negligence claims against his engineers. CP 95.

A timely Notice of Discretionary Review was filed, and on August 11, 2010 Commissioner Verellen granted defendant's Motion for Discretionary Review.

### III. Argument

#### A. The economic loss rule bars Mr. Donatelli's negligence claim.

Washington follows the economic loss rule and has done so consistently since the Court issued its unanimous decision in *Berschauer/Phillips v. Seattle School District*, 124 Wn.2d 819, 881 P.2d 986 (1994). Under the economic loss rule, the 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. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). The rule prohibits plaintiffs from recovering in tort for solely economic losses when their entitlement flows only from contract. *Id.*

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<sup>1</sup> Judge Rogers granted the Motion to Dismiss the Consumer Protection Act claim, and that ruling is not at issue.

Where only economic losses occur, recovery is confined to contract "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*, 124 Wn.2d at 826. In short, 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 only economic. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. *Alejandre v. Bull*, *supra*.

The *Berschauer/Phillips* Court explained the important role of the economic loss rule in the construction industry. The Court began its analysis by asserting that "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." *Id.*, 124 Wn. 2d at 821.

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

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

The Court stated that under any other rule, “certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer” and that is because “the fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.” *Id.* at 826-827.

These reasons for the rule limiting claims for delay in construction related contracts to the remedies of the contract squarely apply to the facts of this case. Mr. Donatelli and D.R. Strong agreed to a contract for services with a detailed scope of services establishing exactly what services the engineer was required to perform. The responsibilities of the “Client” and the “Consultant” were allocated; it set an agreed upon price for the services of \$33,150 and the terms of the contract included a limitation of professional liability by which the liability was limited to the fees paid. CP 21-26. By its terms, Mr. Donatelli could have waived this limitation by payment of consideration; he chose not to do so. CP 26. In this detailed contract the parties allocated among themselves the risks,

responsibilities and benefits of their bargain. The parties did exactly what the Supreme Court encouraged them to do in *Berschauer/Phillips*.

Judge Rogers' ruling disregarded the plain mandate of the Supreme Court's decision in *Berschauer/Phillips* and reallocated the parties' negotiated allocation of risk and benefits from a specifically defined scope of services to a general tort duty of care.

The *Berschauer/Phillips* Court said "The economic loss rule was developed to prevent disproportionate liability and allow parties to allocate risk by contract." *Id.* at 822. That is the reality in this case. The parties negotiated a contract for \$33,150 in fees and a limitation of liability to the fee; but according to plaintiff's complaint he seeks damages "believed to exceed \$1,500,000." CP 5. By allowing a tort claim to proceed, the court disregarded the parties' contractual allocation of risk and subjected the defendant to disproportionate liability.

Instead of retreating or narrowing the scope of the economic loss rule, the Court expanded the scope of the economic loss rule 13 years after *Berschauer/Phillips* by another unanimous decision in *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), citing extensively from the Court's decision in *Berschauer/Phillips*. (Justices Chambers and Sanders concurred in the application of the economic loss rule with an analysis

favoring a distinction between the expressions economic loss and commercial loss.)

Judge Rogers erred by disregarding the on point and controlling authority of *Berschauer/Phillips* and its progeny.

B. No appellate decision retreats from the bright line rule in construction related claims.

The Court in *Berschauer/Phillips* adopted “a bright line distinction” limiting economic losses in construction related claims to contract, *Id.*, 124 Wn.2d at 822, and no appellate court has retreated from that bright line distinction in construction cases. Instead, the appellate courts, including two Division 1 decisions, have consistently applied it in construction related cases in *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App 798, 43 P.3d 526 (Div. 1, 2002), *Carlson v. Sharp*, 99 Wn. App. 324, 994 P.2d 851 (Div. 3, 1999), and *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (Div. 1, 1998). No court in the state has retreated from that bright line distinction in a construction case until now.

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

Judge Rogers allowed the negligence claim to proceed in reliance on *dicta* from two decisions involving realtors, one of which had nothing to do with whether the parties could proceed in negligence for economic loss. *Jackowski v Borchelt*, 151 Wn. App. 1, 209 P.3d 515 (Div. 2, 2009), *Boguch v. Landover Corp.* 153 Wn. App. 595, \_\_ P.3d \_\_ (Div. 1, 2009).

In *Jackowski*, **no negligence claim survived**. The court of appeals did not rule that **a tort claim** based on statutory violations could proceed, the court did nothing more than allow claims for violation of specific statutory duties of a realtor to proceed. Mr. Donatelli did not plead a claim for violation of statutory duties, he pled claims for common law negligence, only, a fact that Judge Rogers acknowledged in his Order. CP 95.

In *Boguch*, the economic loss rule was not at issue, no party sought to assert a negligence claim for economic loss and the court did not address that issue. The portion of the decision in *Boguch* that misled Judge Rogers here dealt with the recovery of attorney fees under the contract and nothing else.

And in any event, the claims in *Jackowski* and *Boguch* were not asserted against a construction industry professional, they did not arise from an alleged problem with the defendant's performance of a construction design contract, they were not claims against an architect or

engineer who was under contract with a defined scope of services and a negotiated fee. Instead, in *Jackowski* and *Boguch*, plaintiff sued a realtor who did nothing more than sell a house and was paid by commission as a percentage of the sale.

It was error to apply *Jackowski* and *Boguch* to the facts of Mr. Donatelli's claim instead of the on point decisions cited above.

IV. Conclusion

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 20 day of October, 2010.

By Michael J. Bond

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