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CLARIFYING WASHINGTON'S APPROACH TO THE INDEPENDENT DUTY DOCTRINE

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Abstract: When faced with limited or no recovery under contract law, resourceful lawyers often turn to tort law. The economic loss rule restricts this practice by barring recovery in tort for solely economic losses. However, what qualifies as "economic loss" is not always clear. In 2010, the Washington State Supreme Court announced it was clarifying the economic loss rule by adopting the independent duty doctrine.[1] Rather than analyze the type of loss suffered, the independent duty doctrine determines whether a party owed a tort duty independent of the relevant contract, closely mirroring a traditional tort inquiry. When establishing the independent duty doctrine, the court left intact cases decided under the economic loss rule and the rule's general role as "the boundary between torts and contract [law]."[2]

However, the very nature of these two rules conflict. Upholding both rules has led to bitterly split opinions from the Washington State Supreme Court and confusion among litigants and other courts. This Comment argues that the court's construction of the independent duty doctrine generally, and its decision to maintain the economic loss rule's theory and jurisprudence, has resulted in misapplication of the independent duty doctrine by litigants and within other courts. It proposes that the Washington State Supreme Court clarify the doctrine by abrogating the state's economic loss rule jurisprudence and re-framing the independent duty doctrine analysis around when tort duties can be assumed in a contract.

INTRODUCTION

When faced with limited or no recovery under contract law, resourceful lawyers frequently turn to tort law. Historically, the Washington State Supreme Court has applied the economic loss rule to limit this practice.[3] The economic loss rule prohibits tort actions for purely economic losses.[4] "Economic loss" is a conceptual device used to classify damages, which are generally defined as losses other than those resulting from personal injury or property damage.[5] However, making these determinations, and

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1. Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 388, 241 P.3d 1256, 1261 (2010).

2. *Id.* at 416, 241 P.3d at 1275.

3. Elcon Constr., Inc. v. E. Wash. Univ., 174 Wash. 2d 157, 165, 273 P.3d 965, 969 (2012) (quoting *Eastwood*, 170 Wash. 2d at 416, 241 P.3d at 1275 (Chambers, J., concurring)).

4. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist., 124 Wash. 2d 816, 833, 881 P.2d 986, 996 (1994).

5. *See* Miller v. U.S. Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990) (discussing how, as Judge Posner has explained, the term "economic loss" is a misnomer: "It would be better to call it a

drawing boundaries around what qualifies as an "economic loss" has been notoriously difficult.[6]

In 2010, the Washington State Supreme Court announced it was clarifying the economic loss rule by adopting the independent duty doctrine.[7] Unlike the economic loss rule, which analyzes the type of loss suffered, the independent duty doctrine determines whether the party owed a duty independent of the contract.[8] Despite this change, the court left intact the economic loss rule and its caselaw.[9]

In adopting the independent duty doctrine, the Washington State Supreme Court attempted to alleviate confusion by abandoning the economic loss rule's focus on the type of loss suffered.[10] Instead, the independent duty doctrine asks, "whether the injury is traceable [] to a breach of a tort law duty of care arising independently of the contract."[11] In practice, the independent duty doctrine inquiry essentially mirrors Washington State's traditional tort analysis, which determines whether a tort duty is owed and when liability attaches regardless of a contract.[12]

The independent duty doctrine's traditional tort inquiry naturally opposes the economic loss rule's focus on contract remedies—resulting in confusion.[13] For example, the economic loss rule "defaults to *contract* remedies where both [tort and contract remedies] are available,"[14] while the independent duty doctrine "defaults to *tort* remedies" and bars tort remedies in only a narrow set of circumstances.[15] Thus, by leaving intact the economic loss rule's jurisprudence, the Washington State Supreme

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'commercial loss,' . . . because personal injuries and especially property losses are economic losses, too—they destroy values which can be and are monetized. . . ."); Wash. Water Power Co. v. Graybar Elec. Co., 112 Wash. 2d 847, 861 n.10, 774 P.2d 1199, 1208 n.10 (1989).

6. R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1789 (2000).

7. *Eastwood*, 170 Wash. 2d at 398, 241 P.3d at 1266.

8. *Id.*

9. *See* Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wash. 2d 442, 450, 243 P.3d 521, 526 n.3 (2010) ("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."). This assertion was made by a lead opinion that garnered a majority of the votes in result only. *Id.* However, later independent duty doctrine cases and opinions accept this assertion as a holding and treat it as part of the doctrine. *See, e.g.*, Donatelli v. D.R. Strong Consulting Eng'rs, Inc., 179 Wash. 2d 84, 104, 312 P.3d 620, 630 (2013) (Madsen, J., dissenting) (finding economic loss rule cases undisturbed under the new doctrine per the majority's direction in *Affiliated FM*).

10. *Eastwood*, 170 Wash. 2d at 387–88, 241 P.3d at 1261.

11. *Id.* at 394, 241 P.3d at 1264.

12. *Id.* at 406, 241 P.3d at 1270 (Madsen, J., concurring).

13. *See* Elcon Constr., Inc. v. E. Wash. Univ., 174 Wash. 2d 157, 175, 273 P.3d 965, 974 (2012) (Madsen, J., concurring).

14. *Id.* at 172, 273 P.3d at 973.

15. *Id.*

Court asked courts to maintain inherently opposite principles in their application of the new doctrine. Consequently, litigants[16] and other courts[17] have struggled to apply and interpret the independent duty doctrine.

This Comment argues that the maintenance of the economic loss rule, in the face of the introduction of the independent duty doctrine, fuels rather than alleviates confusion in Washington State. Part I provides a descriptive background of the economic loss rule and the development of the independent duty doctrine in Washington State. Part II introduces key cases that have applied the independent duty doctrine and uses the tort of negligent misrepresentation to illustrate how the doctrines handle situations of overlapping contract and tort law. Part III details the challenges litigants and courts have faced when applying the independent duty doctrine. Part IV argues that rather than continuing to balance these two distinct rules, the Washington State Supreme Court should formally discontinue the economic loss rule and its jurisprudence and reframe the independent duty doctrine's analysis around when a tort duty can be assumed within a contract.

I. THE WASHINGTON STATE SUPREME COURT DEVELOPED THE INDEPENDENT DUTY DOCTRINE TO CLARIFY THE ECONOMIC LOSS RULE

A. The Economic Loss Rule was Intended to Define the Boundary Between Contract Law and Tort Law

The origins of the economic loss rule date back to the nineteenth century.[18] Historically, when injured plaintiffs have been unable to recover in contract due to issues such as "lack of privity, [or the]

16. *See, e.g.*, Reading Hosp. v. Anglepoint Grp., Inc., No. C15-0251-JCC, 2015 WL 13145347, at *3 n.1 (W.D. Wash. May 26, 2015) (finding Microsoft's counsel's attempts to apply economic loss rule reasoning and "misreads" of the Washington State Supreme Court's independent duty doctrine as allowing tort remedies in circumstances where it actually limits tort remedies).

17. *See* Pac. Boring, Inc. v. Staheli Trenchless Consultants, Inc., 138 F. Supp. 3d 1156, 1167 (W.D. Wash. 2015), *aff'd*, 708 F. App'x 324 (9th Cir. 2017) (barring a tort claim under the independent duty doctrine while citing cases and analysis under the economic loss regime).

18. *See* Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891, 897–98 (1989) (providing an in-depth discussion of the history of the economic loss rule). Some commentators have incorrectly suggested the economic loss rule emerged during the rise of products liability. *See, e.g.*, Benjamin J. McDonnell, *Finding a Contract in the "Muddle": Tracing the Source of Design Professionals' Liability in the Construction Context Under Washington's Independent Duty Doctrine*, 48 GONZ. L. REV. 627, 632 (2012) ("The development of the economic loss rule begins with product liability law."); Barton, *supra* note 6, at 1794 ("The economic loss rule is a judicially created doctrine, first articulated by the California Supreme Court in *Seely v. White Motor Co.*").

unavailability of punitive damages . . . resourceful lawyers have sought to recover in tort."[19] In an attempt to limit this practice and prevent tort law from creeping into contract law, judges developed the economic loss rule.[20]

Products liability law played a central role in the development of economic loss rule jurisprudence.[21] In Washington State, early products liability cases established the economic loss rule's emphasis on the type of harm suffered.[22] This line of cases distinguished "economic loss from physical harm or property damage."[23] Washington courts subsequently applied this distinction to other contexts and extended the economic loss rule beyond products liability, denying tort claims for economic losses in construction and real property.[24] The public policy concept of protecting the public through tort law versus protecting private parties' agreements undergirded these developments.[25]

Protecting contract law from the encroachment of tort law drove the development of the economic loss rule.[26] The rule restricts parties to contract remedies in cases where, because of the nature of their damages, the existing contract provides the "proper" remedy.[27] This is because "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement."[28] Rather, it concerns "obligations imposed by law, rather than by bargain."[29]

Tort law is meant to protect members of society from damaging behaviors by others and to encourage products that are safe, or at least not "unreasonably" dangerous to the public.[30] As a social policy, tort law promotes the efficient allocation of resources by creating incentives for

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19. Barrett, *supra* note 18, at 898.

20. *See* Jeffrey L. Goodman et al., *A Guide to Understanding the Economic Loss Doctrine*, 67 DRAKE L. REV. 1, 4 n.14 (2019) ("It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort." (quoting E. River S.S. Corp. v. Transamerica Deleval, Inc., 476 U.S. 858, 866 (1986))).

21. *See* Barrett, *supra* note 18, at 911.

22. *See, e.g.*, Stuart v. Coldwell Banker Commercial Grp., Inc., 109 Wash. 2d 406, 420, 745 P.2d 1284, 1291 (1987).

23. *Id.*

24. *See* Alejandre v. Bull, 159 Wash. 2d 674, 687, 153 P.3d 864, 870 (2007) (detailing the development of the economic loss rule in Washington State); McDonnell, *supra* note 18.

25. Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 407–08, 241 P.3d 1256, 1271 (2010) (Alexander, J. & Chambers, J., concurring).

26. Jackowski v. Borchelt, 174 Wash. 2d 720, 730, 278 P.3d 1100, 1105 (2012).

27. *Alejandre*, 159 Wash. 2d at 681–82, 153 P.3d at 867–68 (citing Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist., 124 Wash. 2d 816, 822, 881 P.2d 986, 990 (1994)).

28. *Id.* at 682, 153 P.3d at 868 (quoting Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995)).

29. Stuart v. Coldwell Banker Commercial Grp., Inc., 109 Wash. 2d 406, 420, 745 P.2d 1284, 1291 (1987).

30. *Id.*

people and companies to take cost-justified precautions.[31] Generally, tort law's goal is to restore the plaintiff to the position they were in prior to the defendant's harmful conduct.[32] "[T]ort duties arise to protect individuals unable to protect themselves from the unscrupulous actions of others and irrespective of the existence of a contract."[33]

In contrast, contract law protects "society's interest in [the] performance of promises."[34] It provides a set of rules to govern bargains between private individuals. [35] Contract law remedies protect the parties' expectation interests by returning the injured party to the economic position they[36] would have been in had the other party properly performed the bargained for promise.[37]

The economic loss rule was meant to be a bright-line rule to maintain the separate purposes of tort and contract law.[38] Contract law encourages parties to bargain for their own distribution of risk.[39] By limiting the availability of tort remedies, the economic loss rule is supposed to protect the integrity of the bargaining process.[40] It is also meant to assure contracted parties greater "certainty" and "predictability" by delineating the specific risks they assume through agreement.[41]

The economic loss rule is meant to preserve that certainty.[42] Tort liability is much less predictable than contract liability, and without limits like the economic loss rule, it can result in open-ended liability.[43] It has long been suggested that the expansion of tort liability—to include economic damages—would expose parties "to a liability in an indeterminate amount for an indeterminate time to an indeterminate

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31. Scott Hershovitz, *What Does Tort Law Do? What Can it Do?*, 47 VAL. L. REV. 99, 100 (2012).

32. *Alejandre*, 159 Wash. 2d at 682, 153 P.3d at 868.

33. Barton, *supra* note 6, at 1797.

34. *Alejandre*, 159 Wash. 2d at 682, 153 P.3d at 868.

35. *Stuart*, 109 Wash. 2d at 420–21, 745 P.2d at 1291–92.

36. *Washington Law Review* uses "they" and "their" as a single pronoun to avoid gender-specific language.

37. *Alejandre*, 159 Wash. 2d at 682, 153 P.3d at 868 (citing *Stuart*, 109 Wash. 2d at 420–21, 745 P.2d at 1291–92).

38. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist., 124 Wash. 2d 816, 826, 881 P.2d 986, 992 (1994).

39. *Alejandre*, 159 Wash. 2d at 682, 153 P.3d at 868; *see also* Daanen & Janssen, Inc. v. Cedarapids, Inc., 573 N.W.2d 842 (Wis. 1998).

40. *Berschauer/Phillips*, 124 Wash. 2d at 826, 881 P.2d at 992.

41. *Id.*

42. Barton, *supra* note 6, at 1797; *see also Berschauer/Phillips*, 124 Wash. 2d at 826, 881 P.2d at 992 (upholding the economic loss rule "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").

43. *Berschauer/Phillips*, 124 Wash. 2d at 826, 881 P.2d at 992; *see also* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 71 (1982).

class."[44] Additionally, the economic loss rule ensures that a party who fails to adequately cover their risk in the contract cannot "bring a cause of action in tort to recover benefits they were unable to obtain in contractual negotiations."[45] Given the specific purpose served by contract law, courts developed the economic loss rule to preserve contract remedies and categorically restrict the availability of tort remedies.

Every jurisdiction in the United States applies some form of the economic loss rule.[46] The majority of states follow a strict application of the economic loss rule, "which prohibits a plaintiff from recovering purely economic damages in tort without exception."[47] Under this rule, if a plaintiff suffers only economic damages, they are limited to contractual remedies.[48]

A minority of states follow what has been described as "the intermediate rule."[49] The intermediate rule is substantially similar to the strict economic loss rule but permits exceptions in a variety of circumstances.[50] The intermediate rule is not uniform; exceptions vary across jurisdictions.[51] There are three main forms of the intermediate rule: (1) the dangerous defect exception that "allows recovery of economic damages under tort causes of action when a product defect creates an unreasonable danger or damages itself in a sudden and unforeseeable manner";[52] (2) the disappointed expectations test that is similar to the dangerous defect exception, but only requires that the damage be unforeseeable;[53] and (3) the independent duty doctrine that requires a duty to exist independent of the contract in order for a plaintiff to bring a successful tort action.[54] These three forms of the intermediate rule, and the various other less common exceptions, have been criticized for complicating the economic loss rule.[55] Under these exceptions, the

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44. *Berschauer/Phillips*, 124 Wash. 2d at 826, 881 P.2d at 992 (quoting Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441, 444 (N.Y. 1931)).

45. *Id*. at 827*,* 881 P.2d at 992–99; *see also* Stuart v. Coldwell Banker Commercial Grp., Inc., 109 Wash. 2d 406, 418, 745 P.2d 1284, 1290 (1987).

46. Goodman et al., *supra* note 20, at 7.

47. *Id.* at 16.

48. *Id.* at 16–17.

49. *Id.* at 27 (finding seventeen jurisdictions that follow what they describe as the intermediate rule).

50. *Id.*

51. *Id.*

52. *Id.* at 27–28.

53. *Id.* at 29–30.

54. *Id.* at 31.

55. *Id.* at 56 (citing Lesiak v. Cent. Valley AG Coop., Inc., 808 N.W.2d 67, 80 (Neb. 2012)); *see also* Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster that Ate Commercial Torts*, 69 FLA. B.J. 34, 34 (1995) ("[J]udges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss doctrine.").

economic loss rule becomes much more nuanced and can no longer be described as a bright-line rule.

B. By Adopting the Independent Duty Doctrine, the Washington State Supreme Court Effectively Overrode the Purpose of the Economic Loss Rule

In November 2010, the Washington State Supreme Court adopted the independent duty doctrine.[56] The independent duty doctrine abandons the economic loss rule's focus on the type of harm suffered and instead asks "whether the injury is traceable [] to a breach of a tort law duty of care arising independently of the contract."[57]

In its initial announcement, the court did not characterize the independent duty doctrine as a new rule or even an exception to the economic loss rule, but rather as a renaming of the economic loss rule.[58] The court's stated purpose was to orient the economic loss rule away from its focus on the type of harm suffered.[59] This section describes the first cases that announced the independent doctrine and details the theoretical tensions that immediately surrounded the court's attempt to apply both rules.

1. In Eastwood v. Horse Harbor Foundation, Inc.*, the Court Announced the Independent Duty Doctrine and Shifted the Rule's Focus Towards Tort Law*

In *Eastwood v. Horse Harbor Foundation, Inc.*,[60] the Washington State Supreme Court announced the independent duty doctrine.[61] In deciding the case, the court was unanimous in result only.[62] Justice Fairhurst authored the lead opinion, signed by two justices; Justices Alexander and Chambers co-authored a concurrence, signed by three justices; and Justice Madsen authored a concurrence in result only, signed by one justice.[63] While distinct, Justice Fairhurst's lead opinion and Justices Alexander and Chambers's concurrence both supported the announcement of the independent duty doctrine and its application in *Eastwood*.[64] They

56. Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 398, 241 P.3d 1256, 1266 (2010).
57. *Id.* at 394, 241 P.3d at 1264.
58. *Id.* at 406, 241 P.3d at 1270 (Alexander, J. & Chambers, J., concurring).
59. *Id.*
60. 170 Wash. 2d 380, 398, 241 P.3d 1256 (2010).
61. *Id.* at 398, 241 P.3d at 1256.
62. *Id.*
63. *Id.*
64. *Id.* at 383, 241 P.3d at 1259; *id.* at 406, 241 P.3d at 1270 (Alexander, J. & Chambers, J., concurring).

similarly discussed the doctrine not as a new rule, but as an extension of the economic loss rule.[65]

The facts in *Eastwood* were as follows. Eastwood owned a horse farm in Poulsbo, Washington and Horse Harbor Foundation was a nonprofit that cared for "abused and abandoned horses."[66] Horse Harbor Foundation leased Eastwood's horse farm property,[67] but failed to maintain the property in a passable condition as required by the parties' lease agreement.[68] Consequently, Eastwood sued Horse Harbor Foundation for breach of lease and the tort of waste.[69] Horse Harbor Foundation raised the economic loss rule as a defense, but the Washington State Court of Appeals "[o]n its own motion and without argument" relied on the economic loss rule to decide the case.[70] The Washington State Supreme Court thus took the opportunity to review and clarify the economic loss rule.[71]

In analyzing whether Eastwood's recovery was limited by the lease agreement, the lead opinion first outlined the failings of the economic loss rule, reasoning that any injury can be monetized and categorized as an "economic loss."[72] Additionally, the court stated that "[t]he term 'economic loss rule' has proved to be a misnomer. It gives the impression that . . . any time there is an economic loss, there can never be recovery in tort."[73] Following this critique, the lead opinion declined to apply the economic loss rule and instead introduced the independent duty doctrine.[74]

Announcing the new doctrine, the court held that "[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."[75] Under the independent duty doctrine, a plaintiff can recover economic losses in tort, even where there is a contract, if the injury resulted from the "breaching [of] an independent and concurrent tort duty."[76] To determine whether an independent duty

65. *Id.* at 387–88, 241 P.3d at 1261 (majority opinion); *id.* at 406, 241 P.3d at 1270 (Alexander, J. & Chambers, J., concurring).

66. *Id.* at 383, 241 P.3d at 1259 (majority opinion).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 384–85, 241 P.3d at 1259–60.

71. *Id.* at 387–88, 241 P.3d at 1261.

72. *Id.* at 388, 241 P.3d at 1261.

73. *Id.* at 388–89, 241 P.3d at 1261.

74. *Id.*

75. *Id.* at 392, 241 P.3d at 1261–62.

76. *Id.* at 394, 241 P.3d at 1264.

existed, the court applied ordinary tort principles.[77] Just as in a traditional tort analysis, once the court finds a duty existed outside the contract, the plaintiff can recover only if they can establish proximate causation.[78]

Ultimately, the court held that Eastwood could bring a claim for the tort of waste, in addition to her contract claims, against Horse Harbor Foundation.[79] "[T]he 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."[80] Applying the tort theory, the lead opinion concluded there was "ample evidence" that Horse Harbor Foundation breached its duty to not cause waste and that its conduct was the proximate cause of the damage to the property.[81] Thus, Eastwood was able to recover in tort law despite the parties' lease agreement.[82]

Justice Madsen's concurrence agreed in result only. Rather than find an independent duty, she argued for an exception to the economic loss rule that would prevent its application to bar statutory causes of action, such as the tort of waste.[83] She characterized the newly announced independent duty doctrine as "confusing" and asserted that "[t]he lead opinion incorrectly states a general rule of law that does not accord with our cases on the economic loss rule."[84] Justice Madsen's comments were prescient in identifying the incompatibility of the two approaches, particularly the challenge of reconciling economic loss rule cases with the independent duty doctrine approach.[85]

The introduction of the independent duty doctrine reshaped the landscape established under the economic loss rule.[86] While not formally abrogating the economic loss rule, *Eastwood* represents a significant shift away from the court's previous deference to contract law.[87] The parties in *Eastwood* had a lease agreement and the conduct at issue related to Horse Harbor Foundation's obligations under the lease.[88] However, because the court found the tort of waste was a duty that existed independent of the agreement, Eastwood was not limited to contract remedies as they likely

77. *Id.* at 392, 241 P.3d at 1263
78. *Id.* at 399, 241 P.3d at 1267.
79. *Id.*
80. *Id.*
81. *Id.* at 400, 241 P.3d at 1267.
82. *Id.* at 402, 241 P.3d at 1268.
83. *Id.* at 406, 404, 241 P.3d at 1269, 1270 (Madsen, J., concurring).
84. *Id.* at 406, 241 P.3d at 1270.
85. *See infra* Part II (describing these challenges).
86. *Eastwood*, 170 Wash. 2d at 388–89, 241 P.3d at 1261.
87. *Id.* at 389, 241 P.3d at 1262.
88. *Id.* at 384, 241 P.3d at 1259.

would have been under the economic loss rule. Justice Fairhurst's lead opinion and Justices Alexander and Chambers's concurrence were clear that the independent duty doctrine was conceived of as an extension of the economic loss rule.[89] However, their opinions provide no guidance on how parties and courts should reconcile the differences between the two rules.

2. *In* Affiliated FM Insurance Co. v. LTK Consulting Services, Inc. *the Washington State Supreme Court Applied the Independent Duty Doctrine and Narrowed the Economic Loss Rule*

The same day the court announced the independent duty doctrine in *Eastwood*, it applied the doctrine in *Affiliated FM Insurance Co. v. LTK Consulting Services, Inc.*[90] Unfortunately, the court fractured again, publishing a 2-4-3 lead opinion, concurrence, and dissent.[91] Justice Fairhurst wrote the lead opinion signed by one other justice.[92] Despite not earning signatures from a majority of the justices, later independent duty doctrine cases cite the lead opinion for the critical proposition that the independent duty doctrine does not overrule cases decided under the economic loss rule.[93] Justice Chambers authored a concurrence and Justice Madsen authored a concurrence and a dissent.[94]

Affiliated FM was a federal case involving the aftermath of a 2004 Seattle Monorail fire.[95] The fire substantially damaged the monorail and resulted in the evacuation of 150 passengers.[96] The City of Seattle had a concession agreement with Seattle Monorail Services (SMS), a private company, to maintain and run the monorail and a separate contract with LTK Consulting Services, Inc. (LTK), another private company, to

89. *Id.* at 393–94, 241 P.3d at 1264; *id.* at 406, 241 P.3d at 1270 (Alexander, J. & Chambers, J., concurring).

90. Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wash. 2d 442, 444, 243 P.3d 521, 523 (2010).

91. *Id.* at 461, 463, 476, 243 P.3d at 532, 533, 540; *see also* Rachael Clark, Comment, *Piecing Together Precedent: Fragmented Decisions from the Washington State Supreme Court*, 94 WASH. L. REV. 1989, 2018 (2019) (describing how the Washington State Supreme Court counts votes and discussing the specific problem of identifying *Affiliated FM*'s lead opinion).

92. *Affiliated FM*, 170 Wash. 2d at 443, 243 P.3d at 523.

93. Donatelli v. D.R. Strong Consulting Eng'rs, Inc., 179 Wash. 2d 84, 104, 312 P.3d 620, 630 (2013) (Madsen, J., dissenting).

94. *Affiliated FM.*, 170 Wash. 2d at 461, 243 P.3d at 532 (Chambers, J., concurring); *id.* at 463, 243 P.3d at 533 (Madsen, C.J., concurring & dissenting).

95. *Affiliated FM*, 170 Wash. 2d at 443, 243 P.3d at 523.

96. Alyssa Burrows, *Fire Halts the Seattle Monorail's "Blue Train" and Passengers are Evacuated on May 31, 2004*, HISTORYLINK (July 10, 2005), http://www.historylink.org/File/7369 [https://perma.cc/37BM-4XRV].

recommend repairs.[97] Adding yet another layer, SMS had purchased fire insurance through Affiliated FM Insurance Company (AFM Insurance).[98]

Ultimately, AFM Insurance sued LTK for negligence in its repair work, even though SMS and LTK were not in privity of contract because LTK was a contractor of the monorail operator, SMS.[99] The litigation concerned which company should be liable for the damage to the monorail system.[100]

A federal district court applied the economic loss rule finding that because SMS's losses were "purely economic," LTK was not liable in tort to SMS; therefore, the district court granted LTK summary judgment.[101] On appeal, the Ninth Circuit certified the following question to the Washington State Supreme Court: "May party A . . . who has a contractual right to operate commercially and extensively on property owned by non-party B . . . sue party C . . . in tort for damage to that property, when A . . . and C . . . are not in privity of contract[?]"[102] Writing the lead opinion, Justice Fairhurst used this opportunity to apply the independent duty doctrine announced in *Eastwood*.[103]

To apply the independent duty doctrine, the court first had to determine if a duty was owed.[104] Oddly, in this case, the question was not whether a duty was owed independent of the contract, because the parties did not have a contract.[105] The lead opinion separated the tort "duty question" into three inquires: "Does an obligation exist? What is the measure of care required? To whom and with respect to what risks is the obligation owed?"[106]

In considering whether a duty was owed, the opinion also considered the interests at hand in each remedy.[107] A contract remedy, or lack thereof in this case, would maintain the parties' expectation interests; and a tort remedy would serve the policy interest of safety of persons and property from physical injury.[108] The lead opinion recognized that each remedy drives different incentives, noting that "[t]ort liability would force negligent engineers to internalize the costs of their unreasonable conduct,

97. *Affiliated FM*, 170 Wash. 2d at 445, 243 P.3d at 523–24.

98. *Id.* at 445, 243 P.3d at 524.

99. *Id.* at 445, 243 P.3d at 523–24.

100. *Id.* at 446, 243 P.3d at 524.

101. *Id.* at 446–47, 243 P.3d at 524.

102. *See* McDonnell, *supra* note 18, at 650 (citing *Affiliated FM*, 170 Wash. 2d at 447, 243 P.3d at 525).

103. *Affiliated FM*, 170 Wash. 2d at 442, 243 P.3d at 523.

104. *Id.* at 449, 243 P.3d at 526.

105. *Id.* at 444–46, 243 P.3d at 523–24 (describing the facts).

106. *Id.* at 449, 243 P.3d at 526.

107. *Id.* at 452, 243 P.3d at 527–28.

108. *Id.*

making them more likely to take due care."[109] Justice Fairhurst also acknowledged that the recognition of a duty in the case of economic harm increases liability and costs overall, but concluded that considerations of public safety outweighed those risks.[110] Ultimately, the lead opinion found that LTK owed a duty of care independent of its contract with the City of Seattle and permitted AFM Insurance to sue for negligence.[111]

Justice Fairhurst also clarified that the newly restyled independent duty doctrine did not overrule cases determined under the economic loss rule.[112] Despite earning the majority in result only, future independent duty doctrine cases cite to this proposition in the lead opinion as decided.[113] Thus, the lead opinion's preservation of economic loss rule cases has been incorporated into the doctrine and has contributed to the on-going struggle over how to define it.

The concurrence, authored by Justice Chambers and earning three additional votes, agreed in result only.[114] He argued that the case should be treated "like an ordinary tort case" that did not implicate the independent duty doctrine and found it well-established in existing tort law that professionals owe a duty to exercise the degree of care established as reasonable in their professional community.[115]

The dissent, authored by Justice Madsen, essentially agreed with the concurrence that the case should have been resolved in tort alone, and found that, because there was no contract between the parties, the economic loss rule did not apply.[116] Still, the dissent took the opportunity to strongly reject the independent duty doctrine analysis and relied on economic loss rule principles in its reasoning, ignoring the court's decision in *Eastwood*.[117]

The court's split decision illustrates the tension that immediately surrounded the independent duty doctrine in Washington State. Rather than provide a clear example, *Affiliated FM* exposed divisions within the court over issues such as when the doctrine applies and how to define its relationship to tort law. The lead opinion's finding that the economic loss rule cases are still good law under the independent duty doctrine exacerbated these tensions.

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109. *Id.* at 453, 243 P.3d at 528.

110. *Id.*

111. *Id.* at 460–61, 243 P.3d at 532.

112. *Id.* at 450, 243 P.3d at 526 n.3.

113. Donatelli v. D.R. Strong Consulting Eng'rs, Inc., 179 Wash. 2d 84, 104, 312 P.3d 620, 630 (2013) (Madsen, J., dissenting).

114. *Affiliated FM.*, 170 Wash. 2d at 461–62, 243 P.3d at 532 (Chambers, J., concurring).

115. *Id.*

116. *Id.* at 476, 243 P.3d at 539 (Madsen, C.J., concurring in part and dissenting in part).

117. *Id.* at 464–69, 243 P.3d at 533–35 (Madsen, C.J., concurring in part and dissenting in part).

II. THE WASHINGTON STATE SUPREME COURT'S RECOGNITION OF THE TORT OF NEGLIGENT MISREPRESENTATION UNDER THE INDEPENDENT DUTY DOCTRINE DEMONSTRATES ITS INCOMPATIBILITY WITH THE ECONOMIC LOSS RULE

Despite the Washington State Supreme Court's direction that the independent duty doctrine is simply an extension of the economic loss rule, in practice, the rules demonstrate marked differences. This is especially true when the court has grappled with whether to recognize tort claims that were barred under the economic loss rule.

The independent duty doctrine changed the court's framework for recognizing new tort claims.[118] The economic loss rule recognized tort claims in only a limited set of circumstances.[119] Conversely, the independent duty doctrine starts with the assumption that tort claims are valid and only limits them in a narrow set of circumstances.[120] In *Elcon Construction, Inc. v. Eastern Washington University*,[121] the court held that the independent duty doctrine would apply to prevent tort claims in only a "narrow" class of cases—specifically, claims arising out of construction and real estate.[122] The court based its limitation on *Eastwood's* direction "not to apply the doctrine to tort remedies 'unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise.'"[123]

The court's treatment of the tort of negligent misrepresentation under the independent duty doctrine is one example of how the doctrine differs from the economic loss rule. Historically, many states have struggled with how the economic loss rule applies to claims of fraud such as negligent misrepresentation.[124] This section illustrates these differences and struggles in Washington State by describing how the court treated the tort of negligent misrepresentation under the economic loss rule and its current treatment under the independent duty doctrine.

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118. *Donatelli*, 179 Wash. 2d at 105, 312 P.3d at 632 (Madsen, J., dissenting).

119. Alejandre v. Bull, 159 Wash. 2d 674, 683–84, 153 P.3d 864, 868 (2007).

120. Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 387, 241 P.3d 1256, 1261 (2010); Terence Scanlan, *A View Five Years from* Eastwood *and* Affiliated FM*: Washington's Transition from Economic Loss Doctrine to Independent Duty Doctrine*, SKELLENGER BENDER, P.S. (Nov. 10, 2015), http://www.skellengerbender.com/wp-content/uploads/2017/10/2015-11-10-WA_s-Transition-from-ELD-to-Independent-Duty-Doctrine.pdf [https://perma.cc/JXM5-YGPQ].

121. 174 Wash. 2d 157, 273 P.3d 965 (2012).

122. *Id.* at 165, 273 P.3d at 969.

123. *Id.* at 165, 273 P.3d at 970 (quoting *Eastwood*, 170 Wash. 2d at 417, 241 P.3d at 1256).

124. *See* Barton, *supra* note 6, at 1790 (discussing the history of various states' treatment of claims arising out of a defendant's fraudulent conduct under the economic loss rule).

Washington recognizes the tort of negligent misrepresentation and largely follows the elements identified in the Restatement (Second) of Torts § 552(1) approach.[125] Under this rule, liability for negligent misrepresentation extends only to defendants who are "manifestly aware" of how the information they supplied will be used.[126] Whether the defendant owed a duty to the plaintiff to not misrepresent information is a question of law.[127]

Prior to the introduction of the independent duty doctrine, the economic loss rule typically prevented negligent misrepresentation claims where the parties had a contract.[128] For example, in *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*,[129] the Washington State Supreme Court applied the economic loss rule and barred a general contractor from asserting a negligent misrepresentation claim against design professionals.[130] The court's reasoning focused on the "beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated."[131] Similarly, in *Alejandre v. Bull*,[132] the buyer and seller had a contract limiting liability and disclaiming risk.[133] Under the agreement, new home buyers were barred from asserting a negligent misrepresentation claim against the seller.[134] In this case, the court expressed both a willingness to apply the economic loss rule to bar negligent misrepresentation claims against sophisticated and unsophisticated parties where a contract existed, while acknowledging that circumstances of unconscionability could still control the result.[135]

After the independent duty doctrine replaced the economic loss rule, the Washington State Supreme Court shifted its treatment of negligent

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125. Donatelli v. D.R. Strong Consulting Eng'rs, Inc., 179 Wash. 2d 84, 95, 312 P.3d 620, 625 (2013); RESTATEMENT (SECOND) OF TORTS § 552(1) (AM. LAW INST. 1977).

126. 16A DAVID K. WOLF & KELLER W. ALLEN, WASHINGTON PRACTICE SERIES: TORT LAW & PRACTICE § 19:12 (4th ed. 2019) (Negligent Misrepresentation).

127. *Id.*

128. *Id.*; *see also* Alejandre v. Bull, 159 Wash. 2d 674, 153 P.3d 864 (2007) (holding the economic loss rule barred plaintiff's negligent misrepresentation claim); Griffith v. Centex Real Estate Corp., 93 Wash. App. 202, 969 P.2d 486 (1998), *as amended on denial of recons*. (Dec. 14, 1998) (holding the economic loss rule barred plaintiff's negligent misrepresentation claim).

129. 124 Wash. 2d 816, 881 P.2d 986 (1994).

130. *Id.* at 833, 881 P.2d at 996.

131. *Id.* at 828, 881 P.2d at 993.

132. 159 Wash. 2d 674, 153 P.3d 864 (2007).

133. *Id.* at 678, 153 P.3d at 866.

134. *Id.* at 682, 153 P.3d at 865.

135. *See id.* at 689, 153 P.3d at 871 ("If there is significant disparity in bargaining power, likely accompanied by some other contractual infirmity, then there may be an issue as to enforceability of the contract—a different question from whether tort remedies should be available.").

misrepresentation tort claims.[136] In *Donatelli v. D.R. Strong Consulting Engineers, Inc.*,[137] a narrow majority of the court led by Justice Fairhurst found that "a negligent misrepresentation claim might exist 'to the extent the duty to not commit negligent misrepresentation is independent of the contract.'"[138] This case was decided in 2013, three years after the court adopted the independent duty doctrine and declared that economic loss rule cases still applied.[139] *Donatelli*, described below, represents a major departure from economic loss rule cases, which had barred negligent misrepresentation claims in similar contexts.[140]

A. The Donatelli *Majority: The Evolving Independent Duty Doctrine and Its Relationship to the Tort of Negligent Misrepresentation*

In *Donatelli*, the Washington State Supreme Court directly addressed a negligent misrepresentation claim under the independent duty doctrine.[141] The Donatellis owned property in King County and hired D.R. Strong as their engineer to develop the property.[142] The parties signed a written contract that outlined D.R. Strong's primary duties and limited D.R. Strong's professional liability to $2,500 or the amount of professional fees charged to the Donatellis.[143]

D.R. Strong procured preliminary approval for the project with King County but failed to obtain final approval.[144] Thus, the sixty-day preliminary approval expired before the project was complete.[145] The Donatellis lost the property in foreclosure before D.R. Strong could obtain new approvals from the county.[146]

The Donatellis sued D.R. Strong for breach of contract, professional negligence, negligent misrepresentation, and violations of Washington's Consumer Protection Act.[147] They claimed damages in excess of $1.5 million.[148] D.R. Strong moved for partial summary judgment arguing that Washington's economic loss rule barred the Donatellis' negligence and

136. *See* Donatelli v. D.R. Strong Consulting Eng'rs, Inc., 179 Wash. 2d 84, 95, 312 P.3d 620, 625 (2013).
137. 179 Wash. 2d 84, 312 P.3d 620 (2013).
138. *Id.* at 96, 312 P.3d at 626.
139. *Id.*
140. *See id.* at 88, 312 P.3d at 622 (discussing the parties' written contract).
141. *Id.* at 90, 312 P.3d at 623.
142. *Id.* at 87, 312 P.3d at 621.
143. *Id.* at 88, 312 P.3d at 622; *id.* at 108, 312 P.3d at 631 (Madsen, J., dissenting).
144. *Id.* at 88, 312 P.3d at 622 (majority opinion).
145. *Id.*
146. *Id.* at 89, 312 P.3d at 622.
147. *Id.*
148. *Id.*

negligent misrepresentation claims because the claims arose out of the contract and could be classified as economic losses.[149] The trial court and court of appeals denied the motion, holding that "the independent duty doctrine did not bar the Donatellis from bringing negligence claims against D.R. Strong because professional engineers owe duties to their client independent of any contractual relationship."[150] A narrow majority of the Washington State Supreme Court affirmed.[151] Justice Fairhurst authored the majority opinion joined by four other justices.[152]

In discussing the negligence claim, Justice Fairhurst laid out a critical requirement of the independent duty doctrine analysis asserting that "[t]he analytical framework provided by the independent duty doctrine is only applicable when the terms of the contract are established by the record."[153] The majority considered the record "unclear," despite a written and signed contract between the parties, because the Donatellis alleged D.R. Strong's oral representations and affirmative conduct expanded the scope of the contract.[154]

The majority opinion refused to dismiss the Donatellis' negligent misrepresentation action because she found the Donatellis were fraudulently induced to enter into the contract by D.R. Strong's promises of a limited project scope, timeline, and fees.[155] The court held that "the duty to avoid misrepresentations that induce a party to enter into a contract arise independently of the contract."[156] Because D.R. Strong's duty to avoid negligent misrepresentation arose independent of the contract, the court permitted the Donatellis' negligent misrepresentation claim to stand.[157]

This holding rejected the economic loss rule approach, which likely would have precluded these tort actions because the causes of action arose out of the contract and the Donatellis suffered only economic losses. This difference is notable because the previous independent duty doctrine opinions were clear that the independent duty doctrine was not a rejection, but a renaming, of the economic loss rule and its cases.[158]

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149. *Id.*

150. *Id.* at 90, 312 P.3d at 622.

151. *Id.* at 98, 312 P.3d at 627.

152. *Id.*; *id.* at 119, 312 P.3d at 637 (Madsen, J., dissenting).

153. *Id.* at 92, 312 P.3d at 624 (majority opinion).

154. *Id.* at 91, 312 P.3d at 623.

155. *Id.* at 94, 312 P.3d at 625.

156. *Id.* at 91, 312 P.3d at 623.

157. *Id.*

158. Elcon Constr., Inc. v. E. Wash. Univ., 174 Wash. 2d 157, 165, 273 P.3d 965, 969 (2012); Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 393–94, 241 P.3d 1256, 1264 (2010).

B. The Donatelli *Dissent Highlights the Discord Between the Independent Duty Doctrine and the Economic Loss Rule, Especially the Court's Recognition of the Tort of Negligent Misrepresentation*

Donatelli v. D.R. Strong was a five-four decision.[159] The dissenting opinion, written by Justice Madsen, echoed previous dissents and concurrences she had written since *Eastwood v. Horse Harbor Foundation*.[160] The dissent unearthed the substantive and practical distinctions between the economic loss rule and the independent duty doctrine and argued for a return to the pure economic loss rule.[161]

First, the dissent asserted that the majority failed to adhere to its prior independent duty doctrine decisions, which had committed to applying existing economic loss rule jurisprudence.[162] The dissent argued the facts in *Donatelli* were indistinguishable from a previous case decided under the economic loss rule, *Berschauer/Phillips*, and thus *Berschauer/Phillips* should have controlled the outcome of *Donatelli*.[163] In *Berschauer/Phillips*, the court held that "the economic loss rule does not allow a general contractor to recover purely economic damages from a design professional in tort."[164] Since *Donatelli* similarly concerned the obligations of a design professional to a land owner, and the remedies available where a contract exists, the dissent argued the *Berschauer/Phillips*'s holding should apply.[165]

Next, Justice Madsen lodged a broader critique of the independent duty doctrine and argued for a return to the economic loss rule.[166] Her reasoning echoed the strong contract law-oriented principles that led to the economic loss rule's original development.[167] She urged that the independent duty doctrine improperly preferences tort remedies by

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159. *Donatelli*, 179 Wash. 2d at 98, 312 P.3d at 627 (Justices Owens, González, Stephens, and Chambers concurring in the majority opinion authored by Justice Fairhurst; Justice Madsen dissenting, joined by Justices Wiggins, Johnson, and Johnson).

160. *See id.* at 99, 312 P.3d at 627 (Madsen, J., dissenting); Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wash. 2d 442, 463, 243 P.3d 521, 533 (2010) (Madsen, J., concurring in part and dissenting in part); Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 402, 241 P.3d 1256, 1268 (2010) (Madsen, J., concurring).

161. *Donatelli*, 179 Wash. 2d at 99–100, 312 P.3d at 627–28.

162. *Id.* at 104, 312 P.3d at 630 (Madsen, J., dissenting).

163. *Id.* at 102, 312 P.3d at 628–29.

164. *Id.*; Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist., 124 Wash. 2d 816, 833, 881 P.2d 986, 996 (1994).

165. *Donatelli*, 179 Wash. 2d at 102, 312 P.3d at 628–29 (Madsen, J., dissenting).

166. *Id.* at 105, 312 P.3d at 630.

167. *See supra* Part I.

starting with the premise, "why not allow tort remedies?"[168] Instead, Justice Madsen argued that, when a contract governs the relationship, the more appropriate question should be: "[w]hether the dispute or claim is within the scope of the contract and if so why allow any remedies outside the contract?"[169] This inquiry necessarily leads back to the original economic loss rule's analysis and its focus on contract law and remedies.[170]

The dissent then analyzed the claims at issue, focusing on the type of loss suffered, as one would under the economic loss rule.[171] She found that, even in the complaint, the parties alleged the same facts in their breach of contract claim as in their negligence and negligent misrepresentation claims.[172] This drove Justice Madsen to conclude that "these causes of action all arise out of the contract and the alleged failure to meet contractual obligations. They involve no personal injuries or damage to property."[173] Consequently, the dissent argued, the remedies should be contractual only.[174]

Finally, the dissent reasoned that the case could have been resolved under traditional contract law principles by giving effect to the professional limitation of liability in the contract.[175] She argued that regardless of the liability at issue, contract or tort, the damages should be covered by the provision.[176]

Justice Madsen's dissent illustrates the different conclusions one reaches when applying the independent duty doctrine versus the economic loss rule and its cases. While the independent duty doctrine permits independent and concurrent duties in both contract and tort, thereby recognizing the tort of negligent misrepresentation, the economic loss rule would have limited the contracting parties to contractual remedies only.

168. *Donatelli*, 179 Wash. 2d at 105, 312 P.3d at 630 (Madsen, J., dissenting).

169. *Id.*

170. *Id.* at 105–06, 312 P.3d at 630 ("[T]he economic loss rule, unlike the 'independent duty doctrine' as explained by the majority, more appropriately focuses on the parties' contractual relationship and asks what is covered by the contract, and treats personal injury and physical harm as appropriately remedied in tort.").

171. *Id.*

172. *Id.* at 106, 312 P.3d at 631.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 107, 312 P.3d at 631.

C. *Attorneys Representing Large Commercial Parties Share Justice Madsen's Concerns that the Independent Duty Doctrine is a Departure from, Not an Extension of, the Economic Loss Rule*

Justice Madsen is not alone in her critique of the independent duty doctrine and advocacy for the former economic loss rule.[177] Proponents of the economic loss rule insist the rule is essential to preserving the role of contract in society because it provides a bright line rule that permits recovery in tort only when the losses are non-economic.[178] They argue the independent duty doctrine has exposed their commercial clients to unpredictable liabilities.[179] These same critics argue strong contract doctrines drive economic growth by guaranteeing commercial parties' greater certainty because contracts allow parties to manage their own risk.[180] This approach is most efficacious in the commercial arena where sophisticated parties can fairly negotiate agreements and expect to be held to those agreements regardless of the outcome.[181]

The *Donatelli* majority and dissenting opinions, and commentators' critiques of the doctrine, illustrate the ongoing tension between the two rules. The opposite driving principles and deference to contract law versus tort law result in different treatment of torts such as negligent misrepresentation. This issue is exacerbated by the court's decision to establish a new doctrine without officially abrogating the previous rule. Recognizing the tort of negligent misrepresentation in *Donatelli* not only frustrates contract purists like Justice Madsen, but also fuels confusion as lower courts and federal district courts struggle to define the outer limits of the new doctrine and its relationship to the economic loss rule.[182]

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177. *See* Paul R. Cressman, Jr., *More Confusion Over Independent Duty Doctrine – Washington Supreme Court Deeply Divided*, AHLERS CRESSMAN & SLEIGHT PLLC (Dec. 12, 2013), https://www.acslawyers.com/more-confusion-over-independent-duty-doctrine-washington-supreme-court-deeply-divided/ [https://perma.cc/U97Z-5XM3]; Brian Esler, *Washington Supreme Court Announces the Death of Contracts:* Donatelli v. D.R. Strong Consulting Eng'rs, Inc., MILLER NASH GRAHAM & DUNN LLP (Nov. 18, 2013), http://www.millernash.com/washington-supreme-court-announces-the-death-of-contracts-donatelli-v-dr-strong-consulting-engineers-inc-11-18-20131/ [https://perma.cc/V3FX-XC5R]; Scanlan, *supra* note 120.

178. Elcon Constr., Inc. v. E. Wash. Univ., 174 Wash. 2d 157, 175, 273 P.3d 965, 974 (2012) (Madsen, J., concurring).

179. *See* Esler, *supra* note 177.

180. *See Donatelli*, 179 Wash. 2d at 104, 312 P.3d at 630 (Madsen, J., dissenting); *see also id.*; Cressman, *supra* note 177; Scanlan, *supra* note 120.

181. Barton, *supra* note 6, at 1789.

182. *See infra* Part III.

III. THE WASHINGTON STATE SUPREME COURT'S MAINTENANCE OF THE ECONOMIC LOSS RULE HAS CONFUSED LITIGANTS AND OTHER COURTS APPLYING THE INDEPENDENT DUTY DOCTRINE

The Washington State Supreme Court's series of fractured opinions since the introduction of the independent duty doctrine and its inconsistent treatment of economic loss rule jurisprudence has resulted in the misapplication of the doctrine by litigants and other courts.[183]

The first major point of confusion surrounds when the independent duty doctrine bars tort remedies. In *Elcon Construction, Inc. v. Eastern Washington University*, the Washington State Supreme Court determined that the doctrine applied only "to a narrow class of cases, primarily limiting its application to claims arising out of construction on real property and real property sales."[184] The court was attempting to clarify that the independent duty doctrine only bars tort remedies in limited areas—construction on real property and real property sales—but otherwise allows tort remedies in all other contexts.[185] Despite this decree, litigants have misconstrued the Washington State Supreme Court's directions to stand for the opposite principle.

Litigants and other courts have incorrectly held or argued that the independent duty doctrine bars tort remedies in all contexts except construction on real property and real property sales. For example, in *Reading Hospital v. Anglepoint Group, Inc.*,[186] a federal district court chided Microsoft's counsel for misreading the doctrine.[187] "Microsoft misreads . . . the independent duty doctrine [as] *allow*[ing] tort remedies stemming from contract disputes only in cases involving construction on real property and real property sales."[188] It is illuminating that even presumably sophisticated counsel was unable to understand and apply the basics of Washington's independent duty doctrine. Unfortunately, courts have fallen prey to the same misreading.

Litigants have also confused the mechanics of the independent duty doctrine. *Seattle-Tacoma International Taxi Association v. Kochar*[189] involved a dispute between an airport taxi association and taxi drivers.[190]

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183. *Id.*

184. Elcon Constr., Inc. v. E. Wash. Univ., 174 Wash. 2d 157, 165, 273 P.3d 965, 969 (2012).

185. *Id.*

186. No. C15-0251-JCC, 2015 WL 13145347 (W.D. Wash. May 26, 2015).

187. *See id.* at *3 n.1.

188. *Id.*

189. No. 70843-1-I, 2014 WL 7340248 (Wash. Ct. App. 2014).

190. *Id.* at *1.

The association induced the taxi drivers to join its organization and pay up to $20,000 in initiation fees by affirmatively representing that the association would retain its contract with the airport, which it later lost.[191] After the taxi drivers refused to pay the remaining balance of the fees due, the association sued the drivers for breach of contract.[192] The drivers counterclaimed for negligent misrepresentation among other causes of action.[193] After losing at the trial court, on appeal counsel for the taxi association argued that the independent duty doctrine barred the taxi drivers' negligent misrepresentation claim.[194] The court ultimately dismissed the claim because it did not arise out of "construction on real property and real property sales."[195] However, the fact that the association relied on the independent duty doctrine in the first place, demonstrates the perplexing relationship between the independent duty doctrine and the economic loss rule. Under the economic loss rule this may have been a successful defense for the association. The taxi drivers suffered purely economic losses and historically the court applied the economic loss rule to bar negligent representation claims.[196] But what the association missed, is that the independent duty doctrine triggers a totally different analysis than the economic loss rule. The independent duty doctrine would not have barred the taxi drivers claim *per se*. Rather, it would have triggered a separate inquiry and asked whether the taxi association "[had] an independent duty to avoid negligent misrepresentation."[197] As *Donatelli* demonstrated, this inquiry could have easily led to liability for the association based on the negligent misrepresentation claims.

These missteps likely derive from the different nature of the two rules. Generally, when the economic loss rule applies, it bars tort claims; but when the independent duty doctrine applies, it permits tort claims by finding an independent duty.[198] Despite these differences, because the court conceived the independent duty doctrine as an extension of the economic loss rule, it still "bars" claims in the same contexts as the economic loss rule. Some litigants and courts have missed this nuance. This is likely because the court did not officially reject the economic loss

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at *6 (quoting Elcon Constr., Inc. v. E. Wash. Univ., 174 Wash. 2d 157, 165, 273 P.3d 965, 969 (2012)).

196. *See* Alejandre v. Bull, 159 Wash. 2d 674, 689, 153 P.3d 864, 871 (2007) (finding the economic loss rule precluded a negligent misrepresentation claim).

197. *Seattle-Tacoma Int'l Taxi Ass'n*, 2014 WL 7340248, at *6.

198. Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 416–17, 241 P.3d 1256, 1276 (2010) (Alexander, J. & Chambers, J., concurring).

rule when it adopted the independent duty doctrine. Instead, they merely inserted the new term despite the rules' differences.[199]

Another area of confusion has been the extent to which cases decided under the economic loss rule still apply under the independent duty doctrine. In *Affiliated FM*, the lead opinion stated, "[o]ur 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."[200] Despite this pronouncement, courts diverged in their willingness to follow economic loss rule jurisprudence. Courts' varied treatment of the duties owed by design and engineering professionals highlights this challenge.

For example, in *Pacific Boring, Inc. v. Staheli Trenchless Consultants, Inc.*,[201] a federal district court held that a general contractor did not owe a professional duty of care to its subcontractor in an engineering context.[202] The case concerned unexpected soil conditions at a sewer line project.[203] In analyzing the duties owed, the court declined to follow the more recent independent duty doctrine case, *Affiliated FM*, which had carved out a source of liability for engineers.[204] Instead, the court found the facts more akin to *Berschauer/Phillips*, an older economic loss rule case that found design professionals did not owe a duty independent of the parties' contract.[205]

This is compared to *Donatelli v. D.R. Strong* and *Pointe at Westport Harbor Homeowners' Association v. Engineers Northwest, Inc.*,[206] both of which concerned professional duties owed by engineers.[207] In these cases, the Washington State Supreme Court and the court of appeals of Washington, Division Two, explicitly followed *Affiliated FM* and declined to follow *Berschauer/Phillips*.[208] Of course, these cases had some factual differences from *Pacific Boring, Inc.*; but ultimately, they all concerned professional duties owed by engineers in the construction industry and applied the relevant caselaw differently.

These examples highlight the unpredictability of the independent duty doctrine when considered alongside economic loss rule cases. Each of

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199. *Id.* at 406, 241 P.3d at 1270.

200. Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wash. 2d 442, 450 n.3, 243 P.3d 521, 526 (2010).

201. 138 F. Supp. 3d 1156 (W.D. Wash. 2015), *aff'd*, 708 F. App'x 324 (9th Cir. 2017).

202. *Id.* at 1167.

203. *Id.* at 1159.

204. *Id.* at 1167.

205. *Id.*

206. 193 Wash. App. 695, 376 P.3d 1158 (2016).

207. *Id.*

208. Pointe at Westport Harbor Homeowners' Ass'n v. Eng'rs Nw., Inc., 193 Wash. App. 695, 376 P.3d 1158 (2016); Donatelli v. D.R. Strong Consulting Eng'rs, Inc., 179 Wash. 2d 84, 95, 312 P.3d 620, 625 (2013).

these cases concerned the duties design professionals owed in commercial contexts, but had different outcomes based on how the court treated and distinguished past cases decided under the economic loss rule versus the independent duty doctrine. The result is a hyper-fact-specific inquiry as to when design professionals owe duties. This uncertainty prevents the development of a cohesive and predictable body of law under the new doctrine.

The continued application of both the economic loss rule and independent duty doctrine affects litigants and other courts. Litigants have confused and incorrectly relied on the doctrine. In addition, independent duty doctrine cases have diverged in their treatment of economic loss rule cases. This pattern risks unfair outcomes for plaintiffs in Washington State and adds to an increasingly confusing body of caselaw for other courts and litigants to apply.

IV. WASHINGTON SHOULD CLARIFY THE INDEPENDENT DUTY DOCTRINE BY ABROGATING ITS ECONOMIC LOSS RULE JURISPRUDENCE

A contradictory situation has resulted from the Washington State Supreme Court's adoption of the independent duty doctrine and the series of divided opinions that have followed. While the court intended to clarify the economic loss rule, the effect has been greater confusion. In order for the independent duty doctrine to succeed, the court should divorce the independent duty doctrine from the economic loss rule and its caselaw. It should then revise the independent duty doctrine analysis by clarifying under what circumstances a duty can be assumed within a contract.

First, the Washington State Supreme Court should deliberately depart from the economic loss rule.[209] The economic loss rule is distinct from the independent duty doctrine. Its allegiance to contract law drives different outcomes than the independent duty doctrine.[210] It also partially rests on classifications of damages, economic versus noneconomic, that the independent duty doctrine rejects.[211] These differences make economic loss rule jurisprudence antagonistic to the independent duty doctrine.

Additionally, the maintenance of the economic loss rule and the independent duty doctrine have befuddled other courts and litigants applying the doctrine. This is exacerbated by cases like *Donatelli*, where

209. This shift is especially important given the *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*'s lead opinion's lack of precedential effect discussed in Part II of this Comment.

210. *See supra* Part II (discussing *Donatelli* and the tort of negligent misrepresentation).

211. Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 388, 241 P.3d 1256, 1261 (2010) (discussing the economic loss rule); *see also* Affiliated FM Ins. Co. v. LTK Consulting Servs, Inc., 170 Wash. 2d 442, 449, 243 P.3d 521, 536 (2010).

the court changed its position on the tort of negligent misrepresentation. The result is an even more tortured fact-specific doctrine than the previous economic loss rule. The court should clarify the independent duty doctrine by officially rejecting the economic loss rule.

Second, the court should clarify the independent duty doctrine analysis. This proposal does not depart from the independent duty doctrine described in *Eastwood* and its progeny.[212] Rather, it makes explicit the steps already described within those opinions and offers another way to frame the independent duty doctrine analysis.

As it stands, the role of the parties' existing contract in analyzing what remedy applies is unclear under the independent duty doctrine.[213] If the duty exists as a matter of law *and* the duty is subsumed within the contract, then what remedy applies? Will the independent duty doctrine prevent the party from accessing tort remedies? The current independent duty doctrine answers this question by asking, "whether the injury is traceable . . . to a breach of a tort law duty of care arising independently of the contract."[214] But this framing begs another question, when is a duty "independent" of the contract?

The court's current independent duty doctrine analysis does not establish a clear framework to answer this second question. The Washington State Supreme Court should reframe the analysis by leaving its substance intact, but also by providing a path to more clearly address under what circumstance the court is likely to find an "independent duty" and allow tort remedies even if the parties have a contract.

The independent duty doctrine's core question and analysis should be reframed to ask: under what circumstances can tort duties be assumed in a contract? This is a helpful reframing because, where tort duties can lawfully be assumed within a contract, only contractual remedies should apply.[215] Using this question, the court's independent duty doctrine analysis can be broken down as follows: (1) Was a duty owed, and was the duty breached?; (2) Did the parties have a contract and can the duty be assumed within a contract? If a tort duty was owed and breached as a matter of law, the injury should be remedied in tort, unless the parties had a contract and the duty can be assumed in contract.

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212. Jackowski v. Borchelt, 174 Wash. 2d 720, 730–32, 278 P.3d 1100, 1105 (2012); *Affiliated FM*, 170 Wash. 2d at 449, 243 P.3d at 526; *Eastwood*, 170 Wash. 2d at 393–94, 241 P.3d at 1264.

213. *Affiliated FM*, 170 Wash. 2d at 464 n.9, 243 P.3d at 533 (Madsen, C. J., concurring in part and dissenting in part) (suggesting that under the lead opinion's description of the independent duty doctrine "finding a tort duty is equivalent to finding an 'independent duty'" which then precludes a contractual remedy).

214. *Eastwood*, 170 Wash. 2d at 394, 241 P.3d at 1264.

215. *See* Donatelli v. D.R. Strong Consulting Eng'rs, Inc., 179 Wash. 2d 84, 116, 312 P.3d 620, 631 (2013) (Madsen, J., dissenting) (discussing contract law principles).

According to the court's current independent duty doctrine jurisprudence, whether a duty can be assumed within a contract, depends on the following factors:[216] (1) does the contract specify the obligations of the party, including the specific duty at issue; (2) what is the nature of the contract—for example, the court has said more duties may be assumed by contract in construction, real property, and real property sales than in other contexts;[217] and finally, (3) do public policy considerations militate in favor of allowing parties to contract for a private remedy or is the public better served by allowing tort remedies to be available regardless of the parties contract?[218] Answering these questions should determine when the court will allow a duty to be assumed by contract even if it also exists as a matter of law.

The court's fractured opinions, and its volleying between old economic loss rule principles and the new concept, have resulted in a messy doctrine that is difficult for litigants and lower courts to apply. The Washington State Supreme Court should abrogate the economic loss rule and clarify the independent duty doctrine by making its analysis, especially with respect to the role of the existing contracts, more explicit. This proposed reframing of the analysis does not substantively alter the independent duty doctrine. Rather, it is one example of how the court could improve the doctrine by defining what the independent duty doctrine really means for contracting parties and elevating under what circumstances a duty may be assumed in a contract or is "independent" of the contract.

CONCLUSION

The essential aims and theoretical underpinnings of the independent duty doctrine and the economic loss rule conflict. The economic loss rule "defaults to contract remedies where both are available," while the independent duty doctrine defaults to tort remedies.[219] It is misleading to litigants and lower courts to leave both rules intact and suggest they are not in fundamental tension. The Washington State Supreme Court can remedy this tension by, first, officially rejecting the economic loss rule and its cases. Additionally, the court can improve the independent duty doctrine by making its analysis more explicit. The doctrine was born amidst a divided court. This has resulted in a series of fractured opinions

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216. Notably, these are the same factors to answer whether a duty is "independent," this Comment has just reframed the analysis. *See Donatelli*, 179 Wash. 2d at 92, 312 P.3d at 624; *Eastwood*, 170 Wash. 2d at 393–94, 241 P.3d at 1264.

217. *Donatelli*, 179 Wash. 2d at 92, 312 P.3d at 623–24.

218. Elcon Constr., Inc. v. E. Wash. Univ., 174 Wash. 2d 157, 165, 273 P.3d 965, 969 (2012) (citing *Eastwood*, 170 Wash. 2d at 416, 241 P.3d at 1256 (Chambers, J., concurring)).

219. *Id.* at 172, 273 P.3d at 973 (Madsen, J., concurring).

that confusingly meander between tort and contract law without forwarding a clear analysis to be applied by litigants and other courts. The court can preserve the independent duty doctrine and improve its usefulness by moving away from the emphasis on "independent duties" and reframing the analysis around when a tort duty can be assumed by contract.