No. 81977-7

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

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

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

(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. *Nutragenetics, 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, reneging 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).

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

(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

redress plaintiffs' contractual disappointments. *Id*. at 868. The *East River* court mentioned the phase "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

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

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.

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.

(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

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.

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

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