No. 81977-7

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

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

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

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 Feb. 4, 2008) (unpublished).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

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

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

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

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

The lead opinion incorrectly

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

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

The lead opinion incorrectly states a

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

I concur in the result.

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

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

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Gerry L. Alexander