IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LINDA EASTWOOD, dba DOUBLE KK FARM, Petitioner, v. HORSE HARBOR FOUNDATION, INC., a Washington corporation; MAURICE ALLEN WARREN, a single person; and KATHERINE DALING and MICHAEL DALING, a husband and wife, and the marital community composed thereof, Respondents.	)	No. 81977-7 EN BANC Filed November 4, 2010

FAIRHURST, J. — Since the 1800s, lessors of real property in Washington have been able to recover damages for the tort of waste. In this case, however, the Court of Appeals interpreted our jurisprudence on the economic loss rule and concluded that lessor Linda Eastwood was limited to contractual remedies for the

damage done to her horse farm by lessee Horse Harbor Foundation, Inc. *See Eastwood v. Horse Harbor Found., Inc.*, noted at 144 Wn. App. 1009, 2008 WL 1801332. The Court of Appeals also held that Horse Harbor's employee and board directors could not be individually liable for breach of contract. We reverse. The availability of a tort remedy depends on the existence of a tort duty arising independently of a contract's privately negotiated terms, not on whether an injury can be labeled an economic loss. Because the duty to not cause waste is a tort duty independent from a lease's covenants, Eastwood had a cause of action for waste, and the trial court properly concluded she may recover tort damages from Horse Harbor's employee and two of its board directors.

I. FACTUAL AND PROCEDURAL HISTORY

Eastwood owns the Double KK Farm horse farm in Poulsbo, Washington. Horse Harbor, a nonprofit organization incorporated in 1997 under the Washington Nonprofit Corporation Act, chapter 24.03 RCW, cares for abused and abandoned horses. Maurice Allen Warren is Horse Harbor's paid manager, and Katherine and Michael Daling were two of Horse Harbor's corporate directors.

Eastwood and Horse Harbor entered into a lease for a portion of the Double KK, with covenants obligating Horse Harbor to maintain the farm and to return it to Eastwood in good condition. Eastwood accepted a rental rate below fair market

value in exchange for Horse Harbor's pledge to maintain the property. But "there was a broad, persistent, and systemic failure" to maintain the leasehold, according to the trial court. Clerk's Papers (CP) at 131. After moving 15 to 16 horses to the farm, Horse Harbor permitted manure and urine to accumulate, and the Kitsap County Health District cited Horse Harbor for unlawful burning of solid waste and improper management of horse manure. Horse Harbor also failed to keep the farm and its improvements properly drained, resulting in pools of standing water and accumulating mud. Other maintenance problems included broken fencing, a damaged riding arena floor, and the horses chewing wood surfaces.

Members of Horse Harbor's board of directors, including the Dalings, had the opportunity to observe the farm's condition. The board received written complaints and a video from Eastwood documenting maintenance issues. The Dalings visited the Double KK frequently. At one point, the board took a walking tour of the Double KK and then met to discuss the growing dispute and the legal ramifications. At the meeting, six people were present, including Warren and the Dalings. The board took no action.

Eastwood sued for breach of lease, the commission of waste, and negligent breach of a duty to not cause physical damage to the leasehold. She named Horse Harbor, Warren, and the Dalings as defendants. Following a bench trial, the trial

court found Horse Harbor committed waste and breached the lease covenant to maintain the leasehold. The court found Warren and the Dalings were grossly negligent and therefore individually liable for the damage they proximately caused. At no point did the court or the parties raise the economic loss rule.

On appeal, Horse Harbor, Warren, and the Dalings argued that the trial court erred by finding that their conduct rose to the level of gross negligence. They retried the case, rehashing the trial testimony and exhibits. They also argued that Horse Harbor's corporate form protected Warren and the Dalings from being held individually liable. At no point did they cite the economic loss rule.

The Court of Appeals did not address Eastwood's claim for waste or cite the waste statute, RCW 64.12.020, which gives a lessor a right of action for damages if the lessee commits waste. *See Eastwood*, 2008 WL 1801332. On its own motion and without argument, the court cited *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), our most recent case discussing the economic loss rule, a doctrine that has attempted to describe the dividing line between the law of torts and the law of contracts.

The Court of Appeals characterized Eastwood's claims as economic losses because they "result[ed] from [Horse Harbor's] actions that led to damages and breach of the lease agreement." *Eastwood*, 2008 WL 1801332, at *2. Based on

these circumstances, the court held the economic loss rule applied and limited Eastwood to recovery only for breach of lease, and Warren and the Dalings could not be individually liable for the damages. *Id.* at *2-*3. The Court of Appeals denied Eastwood's motion for reconsideration.

We granted Eastwood's petition for review. *Eastwood v. Horse Harbor Found., Inc.*, 165 Wn.2d 1016, 199 P.3d 411 (2009).[1]

II. ISSUES

A. When a lessee breaches a lease covenant requiring the lessee to repair and maintain the leased property, is the lessor limited to contract remedies, or may the lessor also recover for the tort of waste?

B. Are employees of a lessee liable for the waste they cause?

C. Does RCW 4.24.264 insulate the directors of a lessee nonprofit corporation from liability for permitting waste that rises to the level of gross negligence?

D. Is Eastwood entitled to attorney fees?

III. ANALYSIS

A. When a lessee breaches a lease covenant requiring the lessee to repair and maintain the leased property, is the lessor limited to contract remedies, or may the lessor also recover for the tort of waste?

"Waste is a tort." William Woodfall, The Law of Landlord and Tenant 469

[1]Horse Harbor did not appear before us. But Warren and the Dalings did, arguing in favor of affirming the Court of Appeals.

(6th ed. 1822). Arising in the context of a lease for real property, waste is a breach of the lessee's duty to avoid "an unreasonable and improper use" of the leasehold and "to treat the premises in such a manner that no harm be done to them, and that the estate may revert to those having the reversionary interest, without material deterioration." *Moore v. Twin City Ice & Cold Storage Co.*, 92 Wash. 608, 611, 159 P. 779 (1916). Only damage rising to the level of "substantial injury" is considered waste. *Id.* A lessor thus has a right to the reversionary interest in the property remaining free from substantial material injury. Rights and remedies go together, and a statutory remedy for waste has been available to lessors in Washington since the first territorial assembly enacted one in 1854. *See* Laws of 1854, XLIV, § 403. The current landlord-tenant waste statute, RCW 64.12.020, provides, "If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages."

A lease is a contract as well as a conveyance of a property interest, and the tort law duty to not cause waste is usually supplemented by a lease covenant allocating responsibility for repairs between the lessor and the lessee. *See* 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 6.39, at 367 (2d ed. 2004) ("A well drafted lease will make

provision for repairs, creating a contractual duty for either the landlord or tenant to make repairs or apportioning repair duties between the parties."). When a lessee breaches such lease provisions and consequently harms the property, the issue is whether the lessor's injury is only an economic loss remediable under the law of contracts or whether it is also the tort of "waste" within the meaning of RCW 64.12.020. Stated another way, can a breach of lease simultaneously be a breach of a tort duty that arises independently of the lease's terms? We hold it can because an independent tort duty can overlap with a contractual obligation.

1. *The "economic loss rule"*

In reaching the opposite conclusion, the Court of Appeals picked several statements from *Alejandre* to support its analysis. *Alejandre* defined an economic loss as an injury in a contractual relationship "where the parties could or should have allocated the risk of loss, or had the opportunity to do so." 159 Wn.2d at 687. The lease between Eastwood and Horse Harbor actually allocated the risk of the property falling into disrepair, as the lease assigned most responsibilities for maintenance to Horse Harbor. The Court of Appeals thought the breach of this contractual arrangement was therefore an economic loss under *Alejandre*. The court also noted the statements from *Alejandre* that "the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship

exists and the losses are economic losses," and "[i]f the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims." *Id.* at 683. Seeing both a contractual relationship and an economic loss, the Court of Appeals believed that *Alejandre* therefore compelled a holding that Eastwood's only remedy was a recovery for breach of lease. *Eastwood*, 2008 WL 1801332, at *2. The Court of Appeals' broad reading of this court's jurisprudence on the economic loss rule, while perhaps understandable, is not correct.

The term "economic loss rule" has proved to be a misnomer. It gives the impression that this is a rule of general application and any time there is an economic loss, there can never be recovery in tort. This impression is too broad for two reasons. First, it pulls too many types of injuries into its orbit. When a contractual relationship exists between the parties, any harm arising from that relationship can be deemed an economic loss for which the law of tort never provides a remedy. Further, any injury that can be monetized can be thought of as an economic loss presumptively excludable under the rule because the legislature has defined "'[e]conomic damages'" as "objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of

employment, and loss of business or employment opportunities." RCW 4.56.250(1)(a).

Second, and most importantly, the broad application of the economic loss rule does not accord with our cases. Economic losses are sometimes recoverable in tort, even if they arise from contractual relationships. For instance, we recognize the torts of intentional and wrongful interference with another's contractual relations or business expectancies, *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314, 322 (1992); wrongful discharge in violation of public policy, *Smith v. Bates Technical College*, 139 Wn.2d 793, 803-04, 991 P.2d 1135 (2000); failure of an insurer to act in good faith, *American States Insurance Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 469, 78 P.3d 1266 (2003); fraudulent concealment, *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960); fraudulent misrepresentation, *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969); negligent misrepresentation, *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 825, 959 P.2d 651 (1998); breach of an agent's fiduciary duty to act in good faith, *Moon v. Phipps*, 67 Wn.2d 948, 956, 411 P.2d 157 (1966); and negligent real estate appraisal, *Schaaf v. Highfield*, 127 Wn.2d 17, 27, 896 P.2d 665 (1995). "We will not overrule such binding precedent sub silentio." *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049, 1056 (1999). Thus, the fact that an

injury is an economic loss or the parties also have a contractual relationship is not an adequate ground, by itself, for holding that a plaintiff is limited to contract remedies.

2. *The rule is merely a case-by-case question of whether there is an independent tort duty*

The question is how a court can distinguish between claims where a plaintiff is limited to contract remedies and cases where recovery in tort may be available. A review of our cases on the economic loss rule shows that ordinary tort principles have always resolved this question. An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent tort duty of care, and "'[t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.'" *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation marks omitted) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994)); *see also Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, No. 82738-9, at 7-8 (Wash. Nov. 4, 2010). Where this court has stated that the economic loss rule applies, what we have meant is that considerations of common sense, justice, policy, and precedent in a particular set of circumstances led us to the legal

conclusion that the defendant did not owe a duty. When no independent tort duty exists, tort does not provide a remedy.

For example, *Alejandre v. Bull* involved a real estate sales contract, and the Alejandres (buyers) complained that Bull (seller) failed to tell them about a defect in the home's septic tank. 159 Wn.2d at 677. The Alejandres sued for negligent misrepresentation, and so the issue was whether Bull owed them a "duty of care under the *Restatement (Second) of Torts* § 552 (1977)," which is the duty to use ordinary care in obtaining or communicating information during a transaction. 159 Wn.2d at 686.

Although we couched our analysis in terms of looking for an "exception" to the economic loss rule, the core issue was whether Bull, as the home seller, was under a tort duty independent of the contract's terms. The contract between Bull and the Alejandres contained ample disclosures about the home, the Alejandres agreed that "'[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion,'" *id.* at 678 (alteration in original) (quoting ex. 4), the Alejandres acknowledged "their duty to 'pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation,'" *id.* at 679 (quoting ex. 5), and the Alejandres had their own inspection done. With significant information communicated about the home in the

course of contractual negotiations, Bull had no independent tort duty to obtain or communicate even more information during a transaction. The contract sufficed, and the Alejandres' negligent misrepresentation claim did not survive. We recognized, however, that Bull's independent duty to not commit fraud persisted, and we would have allowed the Alejandres to sue for fraudulent concealment if they had offered enough evidence to support that tort claim. *Id.* at 689-90.

In *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 819-20, 881 P.2d 986 (1994), the general contractor for a school construction project sued the architect, structural engineering company, and construction inspector for negligence. As a result of the defendants' inadequate design plans and faulty inspection work, the contractor claimed that it spent more money than expected and also endured delays in construction, with $3.8 million in losses. *Id.* at 819. The contractor conceded these were economic losses. *Id.* But we did not automatically dismiss the contractor's claims. Rather, we carefully weighed the public policy considerations to decide whether the defendants owed an independent tort duty to avoid the contractor's risk of economic loss. *See id.* at 826-28. We held that the general contractor could not sue in tort to recover damages for lost profits. *Id.* at 826. The contractor's losses were the increased costs of doing business. We reasoned, as a policy matter, that if design professionals were under a

tort duty to avoid a risk of increased business costs, the construction industry could not rely on the risk allocations in their contracts and would have an insufficient incentive to negotiate risk. The case might have been different if a structure had collapsed.

In *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990), plaintiff condominium owners claimed fraudulent concealment, negligent construction, and negligent design. Fraudulent concealment in a real estate transaction is a cause of action that has long been recognized in Washington. *Perkins v. Marsh*, 179 Wash. 362, 367-68, 37 P.2d 689 (1934). Independent of the obligations in a lease or a residential real estate sales contract, the vendor or lessor has an affirmative duty to "disclose material facts," of which the vendor or seller has knowledge, and which are "not readily observable upon reasonable inspection by the purchaser" or lessee. *Hughes v. Stusser*, 68 Wn.2d 707, 711, 415 P.2d 89 (1966); *see also Obde*, 56 Wn.2d at 452. Thus, it is a well-rooted tort duty that arises independently of the contract, and we recognized in *Atherton* that the plaintiffs could pursue their fraud claim. 115 Wn.2d at 525-26.[2] As for the plaintiffs' claim of negligent construction,

[2]This is the same affirmative duty to disclose material facts, of which the seller has knowledge, that would have been the basis for the Alejandres' fraud claim in *Alejandre* had they offered enough evidence. This is a slightly different, though potentially overlapping, duty from the duty of ordinary care that can be the basis for a negligent misrepresentation claim.

however, we held they could not recover, because the defendant builder did not owe an independent tort duty to avoid defects in construction quality. *Id.* at 526. Similarly, we rejected the plaintiffs' claim for negligent design against the architect because they failed to show that the architect "breached any duty of care and that such breach was the proximate cause of the alleged damages." *Id.* at 534 n.17.

In *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987), we decided whether plaintiffs could recover damages in tort for construction defects in a condominium complex. *Id.* We recognized that original purchasers could recover damages from the condominium builder-vendor for breach of an implied warranty of habitability under the law of contracts. *Id.* at 421. But, with an eye toward public policy considerations, we refused to recognize a tort duty to avoid defects in quality, lest builder-vendors "become the guarantors of the complete satisfaction of future purchasers." *Id*. We cautioned, however, that when a court considers whether recovery in tort is permissible, "the determinative factor should not be the items for which damages are sought, such as repair costs." *Id.* at 420. The ultimate question was whether the builder-vendor was under an independent tort duty to avoid the condominium owners' injury, and we concluded not.

The economic loss rule in Washington was heavily influenced by the United

States Supreme Court opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), and that case also rests on the proposition that an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. In *East River*, the plaintiff ship-chartering companies alleged that the defendant shipbuilder sold them oil supertankers with defective turbines, and they sought to recover under a strict liability theory of tort, with damages for the cost of repairs as well as the revenues lost when the tankers were not working. *Id.* at 861. The defendant argued that the plaintiffs were limited to their contract damages. Under products liability, the manufacturer is strictly liable "where a product 'reasonably certain to place life and limb in peril,' distributed without reinspection, causes bodily injury." *Id.* at 866 (quoting *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050 (1916)). The court noted a manufacturer is liable in tort for product defects "because 'public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.'" *Id.* (quoting *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P.2d 436 (1944) (Traynor, J., concurring)). "For similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage." *Id.* at 867. The question

arose "whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, *independent of any contractual obligation*." *Id.* (emphasis added).

The court deemed the plaintiffs' loss an economic loss because "the injury suffered--the failure of the product to function properly--is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." *Id.* at 868.

But the court did not simplistically rest its holding on its finding that the plaintiffs' losses were economic losses. Although the law of contracts applied, the court also inquired whether there was a tort duty independent of any contractual terms. As a policy matter, the court preferred warranty law's "built-in limitation on liability" and sought to protect a manufacturer from worrying about "the expectations of persons downstream who may encounter its product." *Id.* at 874. Based on these considerations, the court "h[eld] that a manufacturer in a commercial relationship has no duty under either a negligence or a strict products-liability theory to prevent a product from injuring itself." *Id.* at 871.

In sum, the economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract.[3] In some circumstances, a plaintiff's alleged harm is

nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise. In other circumstances, however, the harm is simultaneously the result of the defendant breaching an independent and concurrent tort duty. Thus, while the harm can be described as an economic loss, it is more than that: it is an injury remediable in tort.[4] The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract. The court defines the duty of care and the risks of harm falling within the duty's scope. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

Other states use the same approach. *See, e.g.*, *Tommy L. Griffith Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995) ("A breach of a duty arising independently of any contract duties between

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[3]Of course, we do not disturb "[t]he general rule . . . that a party to a contract can limit liability for damages resulting from negligence." *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 797 P.2d 477 (1990). "Exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced." *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992). An "inconspicuous" exculpatory clause is unenforceable. *Id.* at 492.

[4]Conceiving of harm as potentially both an economic loss resulting from a contract breach and an injury resulting from a tort is akin to concluding, for example, that a citizen's injury is the result of the government's breaching both a statutory obligation and a constitutional provision. When a court says, "the economic loss rule applies," the court is simply articulating a conclusion that, in a particular set of circumstances, the law of contracts is the only source of a defendant's obligations and no tort duty exists.

the parties . . . may support a tort action."); *Congregation of Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill. 2d 137, 636 N.E.2d 503, 514, 201 Ill. Dec. 71 (1994) ("Where a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty."); *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992) ("A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship."). In fact, we agree with the Supreme Court of Colorado's belief "that a more accurate designation of what is commonly termed the 'economic loss rule' would be the 'independent duty rule.'" *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1262 n.8 (Col. 2000).

Although we find clarity in thinking of the problem in terms of an independent duty, we see potential difficulty, when a defendant has obligations under both the contract terms and an independent tort duty, in distinguishing between a harm that implicates only the contract and a harm that implicates the independent duty as well. It is a factual question of proximate causation. As a matter of law, the court defines the duty of care and the risks of harm falling within the duty's scope. *Sheikh*, 156 Wn.2d at 448. As a matter of fact, the jury decides whether the plaintiff's injury was within the scope of the risks of harm, which the court has held the defendant owed a duty of care to avoid. *Rikstad v. Holmberg*, 76 Wn.2d 265, 270, 456 P.2d 355

(1969).

In deciding whether a reasonable juror could find causation, an analytical tool that a court can use is the risk-of-harm approach utilized in *Stuart* and our product liability cases. In *Stuart*, we concluded that a condominium builder did not owe a duty to avoid a risk of economic loss, which we defined as a mere defect in the bargained-for quality. 109 Wn.2d at 420. But we implied that the builder had an independent duty to avoid unreasonable risks of harm to persons and other property. *Id.* at 420-21. To decide whether the plaintiffs' injury fell outside the scope of risks covered by the tort duty, we analyzed "interrelated factors such as [1] the nature of the defect, [2] the type of risk, and [3] the manner in which the injury arose." *Id.* at 421. Applying this risk-of-harm test, we concluded, "The nature of the defect here was that the decks and walkways were not of the quality desired by the buyers. The 'injury' or damage suffered was that the decks themselves deteriorated, not through accident or violent occurrence, but through exposure to the weather." *Id.* Thus, there was no factual question whether the injury was caused by a breach of the duty to avoid risks of physical harm to persons or other property.

Under the Washington product liability act (WPLA), chapter 7.72 RCW, a product manufacturer has a tort duty to avoid product designs and construction that are unreasonably dangerous. RCW 7.72.030. But the WPLA's definition of

"'[h]arm'" excludes "direct or consequential economic loss," RCW 7.72.010(6), leaving the law of sales contracts as the sole source of a plaintiff's remedy for economic loss. To differentiate a harm that is an "economic loss" from a harm for which damages are recoverable in tort, the risk-of-harm test determines whether the harm can reasonably be traced back to the tort duty. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 351, 831 P.2d 724 (1992); *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 866, 774 P.2d 1199, 779 P.2d 697 (1989). When a product defect results in a personal injury or damage to other property, the cause can plainly be a breach of the tort duty. When a product defect results in injury only to the product itself, however, the risk of harm must be carefully analyzed. The WPLA tort duties are implicated if a hazardous product exposes a person or property to an unreasonable risk of harm such that the safety interests of the WPLA are implicated. *Touchet Valley*, 119 Wn.2d at 353-54. For example, the sudden collapse of a grain storage building creates "a real, nonspeculative threat to persons and property" and is therefore not a mere economic loss. *Id.* at 353. Thus, the availability of a tort remedy depends on the nature of the risk that created the harm.

3. *The lack of utility in relying only on strict categories to define economic loss*

The alternative to the careful, case-by-case analysis of the independent duty would be a bright-line rule relying strictly on the three categories of injuries we have described before: (1) economic losses, (2) personal injury, and (3) property damage. *See, e.g.*, *Alejandre*, 159 Wn.2d at 684. Although these categories can be helpful, they are derived from product liability cases. They can be confusing when removed from their original context. Further, it can be unclear where economic loss ends and property damage begins, and this case provides a good example of that. Eastwood claims harm to real property. But we have held there was an economic loss in cases where the plaintiff complained of a defective septic tank, *Alejandre*, 159 Wn.2d at 685; a condominium's construction defects, *Atherton*, 115 Wn.2d at 512-13; and deteriorated walkways and decks in a condominium complex, *Stuart*, 109 Wn.2d at 421. All of these involve fixtures and therefore real property.

However, the concurrence written by Chief Justice Madsen argues that a close look at *Alejandre*, *Atherton*, and *Stuart* will reveal the line between economic loss and property damage. The concurrence states that "[i]n these cases, the damages sought were economic—consisting of the costs of repairs to correct the defects and to compensate for additional injury to the property itself caused by the defective conditions." Concurrence (Madsen, C.J.) at 4 (citation omitted). The Madsen concurrence elaborates on its definition of economic loss as the failure to

"obtain the benefit of the bargain" and observes that in *Alejandre*, *Atherton*, and *Stuart* "the purchased item failed to meet the buyer's economic expectations because of the defects." *Id.*

But it was for these same reasons that the Court of Appeals concluded Eastwood's losses are nothing more than economic losses. There was a contract in the form of a lease, and several provisions defined Eastwood's contractual expectations. In the lease, Horse Harbor pledged to "keep and maintain the leased premises and appurtenances in good and sanitary condition and repair during the term of this lease." Ex. 101, at 2. Eastwood assumed responsibility for "[m]ajor maintenance and repair of the leased premises, not due to Lessee's misuse, waste, or neglect or that of his employee, family, agent, or visitor." *Id.* Eastwood was obligated to repair any part of the leasehold "partially damaged by fire or other casualty," unless the cause was Horse Harbor's "negligence or willful act." *Id*. Under the surrender covenant, if Horse Harbor did not exercise a purchase option, Horse Harbor promised to "quit and surrender the premises . . . in as good [a] state and condition as they were at the commencement of this lease, reasonable use and wear thereof and damages by the elements excepted." *Id.* at 3. These contractual terms indicate Eastwood's expected benefit of the bargain: Horse Harbor would be responsible for most maintenance, and Eastwood would have the leasehold returned

to her in good condition. In fact, because Horse Harbor promised to maintain the farm at its own expense, Eastwood agreed to a monthly rent amount that was one-third less than the fair market value. The measure of Eastwood's losses was the cost of repairing the horse farm. Because Eastwood failed to obtain the benefit of her contractual bargain with Horse Harbor and because she sought damages in the form of the cost of repairs, Eastwood's injury was an economic loss by the Madsen concurrence's own definition. Its arguments underscore the difficulties of drawing a line between economic loss and property damage and applying product liability categories to new settings.

4. *The duty to not cause waste is a duty that arises independently of the lease covenants*

Having described what we now will call the independent duty doctrine, we next must decide whether the duty to not cause waste arises independently of the contract. An early American authority described the duty to not cause waste as an obligation the tenant owes even if the lease covenants say nothing about the issue: "Independently of any express agreement, the law imposes upon every tenant, whether for life or for years, an obligation to treat the premises in such a manner, that no substantial injury shall be done to them." John N. Taylor, A Treatise on the American Law of Landlord and Tenant § 343, at 261 (6th ed. 1873) (emphasis

added). This duty not to cause waste has long been recognized in Washington. *See McLeod v. Ellis*, 2 Wash. 117, 120, 26 P. 76 (1891).

Still, Warren and the Dalings argue that it is novel for a landlord to recover damages under theories of both breach of lease and the tort of waste. But in Washington, we have already allowed a plaintiff landlord to recover under both theories. *See, e.g.*, *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 726 P.2d 8 (1986). In *Fisher Properties*, the lease included a covenant where the lessee promised to, "'at its own expense, make and do all repairs of all kinds, both inside and outside the demised premises . . . and keep the same in good order and repair.'" *Id.* at 829 (quoting lease at ¶ 8). This same covenant also mentioned waste expressly: "'The Lessee agrees that it will not permit or suffer any waste, damage or injury to the said building or premises.'" *Id*. (quoting lease at ¶ 8). Still, we permitted the plaintiff lessor to recover for both breach of the lease and waste. *Id*. at 854-55. We hold the duty to not cause waste is a tort duty that arises independently of a lease agreement and an aggrieved lessor may pursue damages concurrently under theories of tort and breach of lease. *Accord Vollertsen v. Lamb*, 302 Or. 489, 508, 732 P.2d 486 (1987). Eastwood thus had a right of action to recover tort damages under RCW 64.12.020.[5]

[5]The concurrence written by Chief Justice Madsen posits that our analysis to this point is unnecessary and that we need not say more than: "the economic loss doctrine cannot be applied to

Because we conclude there existed both a contractual obligation under the lease terms and an independent tort duty, an issue arises whether Eastwood's alleged harm was traceable, as a factual matter, to the independent tort duty. Once the independent duty is held to exist as a matter of law, the connection between the breach and the plaintiff's injury becomes a factual question of proximate cause. After the bench trial in this case, the trial court found that Warren and the Dalings breached their tort duty not to cause waste and that this tortious conduct was the proximate cause of some of the damage to the horse farm. CP at 133 ("This gross negligence resulted in waste and damage to plaintiff's farm and they are liable for the damage it proximately caused."). We think there was ample evidence in the record from which the trial court could reasonably find proximate causation.

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bar a statutory cause of action." Concurrence (Madsen, C.J.) at 3. The Madsen concurrence is correct that we cannot use a common law doctrine to abolish a statutory cause of action. But this view accounts for only half of the equation in this case. RCW 64.12.020, by its terms, gives a remedy for waste, not other sorts of injuries. Thus, when a plaintiff brings an action under RCW 64.12.020, an issue is whether the plaintiff's injury is waste within the meaning of the statute. Eastwood claims her damages are for waste, whereas Warren and the Dalings, following the Court of Appeals' analysis, insist that Eastwood's injury is merely an economic loss in the sense that she lost the benefit of a contractual bargain. As in all cases involving the economic loss rule, we cannot resolve these competing claims without looking to the legal duties breached by Horse Harbor, Warren, and the Dalings. Further, RCW 64.12.020 simply provides a right of action for an aggrieved plaintiff. The plaintiff's substantive right, however, is one defined at common law.

B. Are employees of a lessee liable for the waste they cause?

Because Eastwood's claim for waste is not barred, the question arises whether Warren can be individually liable for the waste he caused within the scope of his employment as Horse Harbor's manager. The law is well settled that "an employee who tortiously causes injury to a third person may be held personally liable to that person regardless of whether he or she committed the tort while acting within the scope of employment." 27 Am. Jur. 2d *Employment Relationship* § 409 (2004); *accord Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 754, 600 P.2d 1272 (1979) (stating that a principal and an agent "are jointly and severally liable for all damages suffered by a plaintiff who has been injured as a result of the agent's negligence"). The trial court found Warren was liable for his gross negligence in permitting waste, and the independent duty doctrine does not bar Eastwood's claim for waste. Warren may be held individually liable.

C. Does RCW 4.24.264 insulate the directors of a lessee nonprofit corporation from liability for permitting waste that rises to the level of gross negligence?

RCW 4.24.264(1) provides that "a member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes

gross negligence." The question is whether the actions or omissions of the Dalings, acting as directors of the Horse Harbor nonprofit corporation, "constitute[d] gross negligence" within the meaning of RCW 4.24.264(1).[6] The Court of Appeals held RCW 4.24.264 is a complete limitation on individual directors' liability for a nonprofit corporation's breach of contract, and only torts could meet the "gross negligence" exception. *Eastwood*, 2008 WL 1801332, at *2. According to the Court of Appeals, the trial court erred by holding the Dalings liable, because the trial court made a nonprofit corporate director "individually liable where a breach of contract rose to gross negligence." *Id.* But the trial court imposed liability on the Dalings only for gross negligence in permitting waste, not for breach of contract:

> The degree of neglect, its persistence and visibility, supports a finding that the care exercised by Kay and Michael Daling lack [sic] was substantially and appreciably greater than ordinary negligence. This gross negligence resulted in *waste* and damage to plaintiff's farm and they are liable for the damage it proximately caused.

CP at 133 (emphasis added). Because gross negligence for a tort falls squarely within the exception enumerated in RCW 4.24.264, the Dalings are individually liable for their gross negligence in permitting waste.[7]

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[6]Neither side contends that the Dalings' actions or omissions were not a "decision or failure to decide" within the meaning of the statute, and so we accept that their actions and omissions fall within the scope of the statute.

[7]Because the Dalings' liability flows from their gross negligence in permitting waste, a tort, we do not reach the issue of whether a nonprofit corporate director could ever be individually liable for the corporation's breach of contract.

D. Is Eastwood entitled to attorney fees?

Eastwood seeks attorney fees. The lease agreement provided that Horse Harbor would pay Eastwood reasonable attorney fees if Eastwood were to sue Horse Harbor to enforce her rights. Ex. 101, at 3 ("Lessee shall pay all reasonable attorneys' fees necessary to enforce Lessor's rights."). The waste statute also provides for an award of reasonable attorney fees. RCW 64.12.020. We grant Eastwood's request. *See* RAP 18.1; RCW 4.84.330; *Boyd v. Davis*, 127 Wn.2d 256, 264-65, 897 P.2d 1239 (1995).

IV. CONCLUSION

An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. Because the term "economic loss rule" inadequately captures this principle, we adopt the more apt term "independent duty doctrine." The existence of an independent duty is a question of law for courts to decide. We hold the duty to not cause waste is an obligation that arises independently of the terms of a lease covenant, and sufficient evidence supported the trial court's findings of a causal connection between Eastwood's losses and a breach of this independent duty. Thus, the Court of Appeals was mistaken to hold Eastwood could not recover tort damages for waste. Warren is individually liable

for the waste he permitted, even if within the scope of his employment. RCW 4.24.264 does not protect the Dalings from individual liability in this case. We grant Eastwood's request for attorney fees.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Justice Susan Owens

Justice James M. Johnson