

CHAPTER FIVE

DIFFICULT CONVERSATIONS WITH CLIENTS

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JULIE K. FOWLER is admitted to practice in Washington State and the United States District Court for the Western District of Washington. She received her BA in Law & Justice and German from Central Washington University and her law degree from New England Law.

Ms. Fowler opened her solo law practice in 2000 after passing the bar exam. Ms. Fowler's primary practice areas are family law, estate planning and business transactions. Her office is located in Bellevue, WA where she has the privilege of sharing office space with her dad and brother, neither of whom are attorneys.

Ms. Fowler is a member of the Washington State Bar Association (past Chair and Trustee of the Solo and Small Practice Section) and American Bar Association. Ms. Fowler is past President of the East King County Bar Association, and past Trustee of the King County Bar Association YLD.

Ms. Fowler has published articles in the ABA's GPSolo Magazine and the King County Bar Bulletin. Ms. Fowler has presented CLE's for the Washington State Bar Association and Wyoming State Bar Association and other local bar associations. Ms. Fowler has spoken on panels for Seattle University School of Law and University of Washington School of Law. Ms. Fowler has also presented CE for the National Association of Insurance and Financial Advisors and has appeared on local radio programs.

Ms. Fowler received the Community Partner Award from Northwest Family Life for her work with domestic violence victims. In 2009 she received the King County Bar Association's Young Lawyers Division Outstanding Mentor Award.

MARYA M. SANTOR has nearly two decades of legal experience and founded Santor Law Firm in 2007 when she moved to Washington. Santor Law Firm has a varied client base and assists clients with family law matters, business and contract disputes, estate planning, and claims for personal injuries. Prior to moving to Washington State from Washington, D.C., she worked in-house at FINRA administering securities arbitrations. Marya started her legal career in Dallas, Texas where she practiced law in a small litigation firm. She received her Juris Doctor from Southern Methodist University School of Law and her undergraduate degree from the University of New Hampshire.

Rules of Professional Conduct

RPC 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another legal practitioner, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

[Former Rule 1.15 was renumbered and amended effective September 1, 2006; April 14, 2015.]

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the

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179 Wn.2d 84 (Wash. 2013)

312 P.3d 620

**Steve and Karen DONATELLI, a married couple,
Respondents,**

v.

**D.R. STRONG CONSULTING ENGINEERS, INC., a
Washington corporation, Petitioner.**

No. 86590-6.

Supreme Court of Washington, En Banc.

November 14, 2013

[312 P.3d 621] Michael James Bond, Attorney at
Law, Mercer Island, WA, Philip Albert Talmadge,
Talmadge/Fitzpatrick, Tukwila, WA, for Petitioner.

Justin D. Park, Romero Park PS, Bellevue, WA, for
Respondents.

FAIRHURST, J.

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¶ 1 Steve and Karen Donatelli hired D.R. Strong
Consulting Engineers Inc. to help the Donatellis

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develop their real property. Before development of the
property could be completed, however, the Donatellis
suffered substantial financial losses and lost the property
in foreclosure. The Donatellis sued D.R. Strong for
breach of contract, violation of the Consumer Protection
Act (CPA), chapter 19.86 RCW, negligence, and
negligent misrepresentation. D.R. Strong moved for
partial summary judgment on the CPA and negligence
claims. D.R. Strong argued that the negligence claims
must be dismissed under the economic loss rule because
the relationship between the parties was governed by
contract and the damages claimed by the Donatellis were
purely economic. The trial court and Court of Appeals
held that as a matter of law, the Donatellis' negligence
claims were not barred. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The Donatellis consulted with and hired D.R.
Strong to help the Donatellis develop their King County
real property into two short plats. According to Steve
Donatelli, D.R. Strong's representatives orally agreed to
help the Donatellis with the county permitting process
and to manage the project "through to [the] final

recording of the short plats." Clerk's Papers (CP) at 65. In
[312 P.3d 622] their complaint, the Donatellis alleged
that D.R. Strong agreed to:

- a. Perform the necessary surveys and analyses;
- b. Create the required plans for, *inter alia*, soil erosion,
storm water drainage;
- c. Prepare the necessary reports and County permit
applications; and
- d. Take all other actions necessary to get the short plats
recorded with King County so that Donatelli could build
houses on each lot.

CP at 2. According to the Donatellis, D.R. Strong
represented that it would be able to finish the project
within "approximately one and [one-half] years, if not
less time." CP at 4.

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¶ 3 D.R. Strong's first involvement in the project was
apparently helping the Donatellis apply for preliminary
approval for the project with King County pursuant to
King County Code 19A.08.150. King County granted
preliminary approval on October 4, 2002. In its letter
granting preliminary approval, the county noted that the "
preliminary approval is valid for a period of 60 months."
CP at 28.

¶ 4 On October 11, 2002, D.R. Strong sent the
Donatellis a written contract for engineering services
entitled "Revised Proposal for Engineering Services." CP
at 21. In the contract, D.R. Strong agreed to perform six
phases of engineering services in exchange for an
estimated fee totaling \$33,150. The contract did not
reflect whether D.R. Strong agreed to provide managerial
services or to oversee the day-to-day operation of the
project. The contract limited D.R. Strong's professional
liability to \$2,500 or its professional fee, whichever was
greater. Steve Donatelli apparently signed the contract on
October 31, 2002, although he now claims that he did not
know what he was signing.

¶ 5 According to the Donatellis, between October
2002 and October 2007, D.R. Strong assumed a
managerial role over the project and worked closely with
other contractors, builders, and vendors involved with the
project. *See* CP at 67 (D.R. Strong "ran the daily
operations of the Project."); *id.* at 68 (D.R. Strong "
[was] running the show."). Although in the written
contract D.R. Strong estimated its fee would be \$33,150,
D.R. Strong allegedly charged the Donatellis "
approximately \$120,000 in costs and fees" over the
course of the project. CP at 2.

¶ 6 In October 2007, the preliminary approval

expired and the project was still not complete. The expiration of the preliminary approval came as a complete surprise to the Donatellis. According to Steve Donatelli, employees of D.R. Strong "apologized many times, said that they screwed up, and that they would make everything right." CP at 67. D.R. Strong began the process of obtaining a new preliminary approval for the project. Before D.R. Strong could obtain a

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new preliminary approval, however, the Donatellis suffered substantial financial losses and eventually lost the property in foreclosure.

¶ 7 The Donatellis sued D.R. Strong, claiming damages in excess of \$1.5 million and alleging breach of contract, CPA violations, negligence, and negligent misrepresentation. D.R. Strong moved for partial summary judgment on the CPA, negligence, and negligent misrepresentation claims. D.R. Strong argued that the economic loss rule barred the Donatellis' negligence claims. The trial court denied summary judgment on the two negligence claims but granted summary judgment on the CPA claims. The trial court found that "professional negligence claims can be stated even in the context of a contractual relationship." CP at 95.

¶ 8 The Court of Appeals affirmed, 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. *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 163 Wash.App. 436, 443, 261 P.3d 664 (2011). We granted D.R. Strong's petition for review. *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 173 Wash.2d 1025, 272 P.3d 851 (2012).

II. ISSUES

A. Did the trial court properly deny summary judgment as to the Donatellis' negligence claim when there were [312 P.3d 623] genuine issues of material fact regarding the scope of D.R. Strong's contractual obligations to the Donatellis?

B. Did the trial court properly deny summary judgment as to the Donatellis' negligent misrepresentation claim when the Donatellis alleged D.R. Strong misrepresented the time and expense necessary to complete the project and such representations induced the Donatellis to contract with D.R. Strong?

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III. STANDARD OF REVIEW

¶ 9 Typically, we review an order on summary judgment de novo, engaging in the same inquiry as the trial court. *Mohr v. Grantham*, 172 Wash.2d 844, 859,

262 P.3d 490 (2011). Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c). In this case, the trial court did not consider whether there were genuine issues of material fact underlying D.R. Strong's motion for summary judgment because the motion presented a purely legal question—does the economic loss rule bar the Donatellis from bringing claims of negligence and negligent misrepresentation against D.R. Strong? We review alleged errors of law de novo. *Jongeward v. BNSF Ry.*, 174 Wash.2d 586, 592, 278 P.3d 157 (2012) (citing *State v. Breazeale*, 144 Wash.2d 829, 837, 31 P.3d 1155 (2001)). To the extent we consider factual issues in this case, we consider all facts and reasonable inferences in the light most favorable to the Donatellis, the nonmoving party. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wash.2d 471, 484, 258 P.3d 676 (2011).

IV. ANALYSIS

¶ 10 The question D.R. Strong presented before the trial court and the Court of Appeals was whether the economic loss rule barred the Donatellis' negligence and negligent misrepresentation claims against D.R. Strong. Both the trial court and the Court of Appeals found, as a matter of law, that the Donatellis' negligence claims should not be dismissed. We agree.

¶ 11 Regarding the Donatellis' negligence claim, it is unclear from the record what professional obligations D.R. Strong assumed toward the Donatellis based on oral representations, the written contract, and D.R. Strong's affirmative conduct. Regarding the Donatellis' negligent misrepresentation

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claim, we find the duty to avoid misrepresentations that induce a party to enter into a contract arise independently of the contract. Because D.R. Strong's duty to avoid negligent misrepresentation arose independently of the contract, the independent duty doctrine does not bar the Donatellis' negligent misrepresentation claim.

A. Negligence

¶ 12 The Court of Appeals found that the independent duty doctrine did not bar the Donatellis' claim for negligence. We agree but find that the independent duty doctrine cannot apply to this case because the record does not establish the scope of D.R. Strong and the Donatellis' contractual duties.

¶ 13 Historically, Washington applied the economic loss rule to bar a plaintiff from recovering tort damages when the defendant's duty to the plaintiff was governed by contract and the plaintiff suffered only economic damages. *Alejandro v. Bull*, 159 Wash.2d 674, 683, 153 P.3d 864 (2007). The economic loss rule "attempted to describe the dividing line between the law of torts and the

law of contracts." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash.2d 380, 385, 241 P.3d 1256(2010).

¶ 14 In *Eastwood*, a majority of this court concluded that the term "economic loss rule" was a misnomer and renamed the rule the "independent duty doctrine" to more accurately describe how this court determines whether one contracting party can seek tort remedies against another party to the contract. The independent duty doctrine continues to "'maintain the boundary between torts and contract" in the place of the economic loss rule. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wash.2d 157, 165, 273 P.3d 965 (2012) (quoting *Eastwood*, 170 Wash.2d at 416, 241 P.3d 1256 (Chambers, J., concurring)). The court has limited the application [312 P.3d 624] of the independent duty doctrine to a "narrow class of cases ... claims arising out of construction on real property and real property sales." *Elcon*, 174 Wash.2d at 165, 273 P.3d 965.

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¶ 15 Under the independent duty doctrine, "[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." *Eastwood*, 170 Wash.2d at 389, 241 P.3d 1256. The analytical framework provided by the independent duty doctrine is only applicable when the terms of the contract are established by the record. To determine whether a duty arises *independently* of the contract, we must first know what duties have been assumed by the parties *within* the contract. If a contract term (such as a term defining the scope of the parties' contractual duties) is ambiguous, the trial court must ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990). "Contract interpretation is normally a question of fact for the fact-finder." *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wash.App. 641, 654, 266 P.3d 229 (2011).

¶ 16 This case makes obvious the inability of the independent duty doctrine to provide an analytical framework when the scope of contractual duties are in dispute. Generally, "the foundation of any liability analysis for ... design professional[s] rests in contract." ARCHITECT AND ENGINEER LIABILITY: CLAIMS AGAINST DESIGN PROFESSIONALS § 1.05, at 7 (Kevin R. Sido ed., 3d ed.2006). In a contract, design professionals and their clients can allocate risks and ensure against "expected liability exposure." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 826-27, 881 P.2d 986 (1994).

¶ 17 But design professionals also owe duties to their clients and the public to act with reasonable care, which can sometimes give rise to a tort duty independent of the contract. See *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wash.2d 442, 461, 243 P.3d 521 (2010) (Engineers have an independent duty to "use reasonable care ... with respect to risks of physical

damages to [physical property]."); *Jarrard v. Seifert*, 22 Wash.App. 476, 479, 591 P.2d 809 (1979) (engineers undertaking engineering services in this state have a common law duty of

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reasonable care); Murray H. Wright & Edward E. Nicholas, III, *The Collision of Tort and Contract in the Construction Industry*, 21 U. RICH. L.REV.. 457, 464 (1986-87) (" [D]esign professionals owe a tort duty to the general public to take reasonable care to avoid causing foreseeable personal injuries or property damage." (citing RESTATEMENT (SECOND) OF TORTS § 324A (1965))).

¶ 18 Regardless of whether a client's claim is framed as a breach of contract or a tort claim, however, "the first step in analyzing a professional malpractice claim is to determine the scope of the professional obligations." ARCHITECT AND ENGINEER LIABILITY, *supra*, § 501[E], at 94. The scope of engineers' professional obligations should be set forth in written contracts between engineers and their clients. See *id.* (recommending that contracts between design professionals and their clients contain detailed descriptions of the scope of the professionals' services). A contract may assume an engineer's common law duty to act with reasonable care. See *Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wash.2d 1, 10, 750 P.2d 245 (1988) ("The scope of an engineer's common law duty of care extends at least as far as the duties assumed by him in the contract with the owner."). Engineers may also assume additional professional obligations by their "affirmative conduct." *Id.*

¶ 19 In this case, the record does not establish the scope of D.R. Strong's professional obligations to the Donatellis. The Donatellis allege that D.R. Strong orally promised to manage the short plat project and oversee the work of other subcontractors involved with the project.[1] The Donatellis also allege that D.R. Strong promised to take [312 P.3d 625] care of the necessary paperwork and permitting processes. D.R. Strong, however,

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seems to argue that it only agreed to provide the six phases of engineering services outlined in the written contract.[2]

¶ 20 It is also unclear whether D.R. Strong assumed additional duties to the Donatellis by virtue of its affirmative conduct. From the affidavits provided by the Donatellis, it appears that at least two contractors involved with the project agree that D.R. Strong oversaw work performed by at least some subcontractors. According to the Donatellis' general contractor, D.R. Strong would "advise and direct [the contractor's] efforts in fixing day-to-day problems." CP at 84. Another subcontractor hired by the Donatellis stated that D.R.

and the remedies, if any, should be limited to contractual remedies. The Donatellis do not assert property damage or personal injury, the kind of harm that should be remedied outside the contractual arrangement.

[312 P.3d 628] ¶ 35 These first two grounds are within the scope of the issue raised by D.R. Strong when it sought discretionary review of the trial court's denial of summary judgment on its negligence and negligent misrepresentation claims.

¶ 36 Third, and regardless of any other analysis, the plaintiffs' tort claims are precluded by the limitation of professional liability in the parties' contract. The professional liability limitation applies by its terms to "any injury or loss on account of any error, omission, or other professional negligence." Clerk's Papers (CP) at 26 (emphasis added). The contract expressly limits D.R. Strong's "liability to the Client ... arising out of the performance of [its] professional services." *Id.* (emphasis added). This liability limitation applies to all professional services regardless of whether they are set out in the written agreement. Giving effect to the parties' express contractual agreement to limit D.R. Strong's liability resolves the negligence and negligent misrepresentation claims.[1]

¶ 37 While this third basis is not argued it can be determined as a matter of law based on settled principles of contract law and the record, which includes the written contract that was brought to the attention of the trial court. The provision limiting professional liability unambiguously limits liability arising out of D.R. Strong's performance of its professional services.

¶ 38 I strongly disagree with the majority's sua sponte creation of an issue that inflates this litigation without any meaningful consequence to the case. This court could effectively and fairly answer the question whether partial summary

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judgment should have been granted on the negligence and negligent misrepresentation claims without delaying this case to resolve the unnecessary question posed by the majority.

Analysis

¶ 39 The majority alone raises the issue of the scope of D.R. Strong's professional services, believing this to be necessary in order to decide whether the Donatellis' negligence and negligent misrepresentation claims can go forward. As noted, this is not an issue raised by the parties; none of the appellate briefing filed by either party in this court or in the Court of Appeals raises or argues the issue the majority now finds dispositive of this review. Generally, we do not reach issues not raised by the parties. *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 348 n. 8, 103 P.3d 773 (2004); *State v. Taylor*, 150

Wash.2d 599, 603 n. 2, 80 P.3d 605 (2003).

¶ 40 The court does have "inherent authority to consider issues not raised by the parties if necessary to reach a proper decision." *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 176 Wash.2d 662, 671, 295 P.3d 231 (2013) (quoting *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wash.2d 424, 429, 759 P.2d 427 (1988)). The key is that the authority exists to reach a correct and fitting resolution of the case. But here the majority's consideration of the issue it raises does not lead to a proper decision, and in fact the opposite is true.

¶ 41 First, whether the scope of professional services goes beyond the written contract makes no difference, either to the three grounds I propose that would properly resolve this case or to the question of whether the "independent duty doctrine" applies here, the latter being the question the majority says it cannot answer. Second, because there are valid bases on which to fully resolve the negligence and negligent misrepresentation claims, it is needless to extend

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this litigation. Third, the majority's approach is unfair to the parties.

¶ 42 This case involves a contract for engineering services. The Donatellis do not assert claims for physical harm to persons or property. Rather, their asserted negligence claims are based on the failure to complete the project as contracted for. This being the case, precedent dictates that their remedies are contractual. In *Berschauer/Phillips*, a general contractor who had been awarded the construction contract for school renovation and construction asserted direct and assigned [312 P.3d 629] tort claims against the architect and structural engineer, claiming that the plans were inaccurate and defective and this negligence led to construction delays and cost overruns. The contractor had also been assigned the school district's contract claims against the architect.

¶ 43 This court held that "the economic loss rule does not allow a general contractor to recover purely economic damages from a design professional in tort." 124 Wash.2d at 833, 881 P.2d 986. The court recognized that in the design-construction industry contractual arrangements are made based on expected liability exposure. The court explained that its holding ensures that the allocation of risk and determination of potential liability in the future is what the parties bargain for by contract. *Id.* at 826, 881 P.2d 986. "A bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary. We preserve the incentive to adequately self-protect during the bargaining process." *Id.* at 827, 881 P.2d 986.

¶ 44 Here, the subject matter is preparing

engineering plans and related services for development of the Donatellis' land into two short plats, similar to the design professionals' obligations in *Berschauer/Phillips*. There is no meaningful difference between the services in the two cases, nor are the tort claims different in any meaningful way. In both cases, the tort claims rest on alleged delay and excess costs.

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¶ 45 Further, the parties' contract reflects exactly the kind of risk distribution addressed in *Berschauer/Phillips*, with D.R. Strong expressly contracting to adequately "self-protect" through a contractual limitation of professional liability, in addition to the contractual terms setting out the parties' obligations under the contract. The parties' contract expressly limits liability to the amount of fees paid, while permitting the Donatellis to secure waiver of this limit by paying an additional amount, which they did not do.[2] The parties expressly allocated the risks associated with the subject of their contractual relationship.

¶ 46 The injury or harm involved in *Berschauer/Phillips* and the injury or harm alleged in the present case is of the same kind, i.e., increased construction costs and loss of expectation interests under the contract, the kind of harm or injury for which contract remedies are more appropriate.

¶ 47 In contrast, and as we have recognized, tort law traditionally provides remedies for injuries classified as physical harm. *Stuart v. Coldwell Banker Commercial Grp.*, 109 Wash.2d 406, 420, 745 P.2d 1284 (1987) (citing WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 101, at 665 (4th ed.1971)); see RESTATEMENT (THIRD) OF TORTS § 1 (2000) ("Issues And Causes Of Action addressed By This Restatement" : "This Restatement ... applies to all claims (including

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lawsuits and settlements) for death, personal injury (including emotional distress or consortium), or physical damage to tangible property."). [3] Neither

[312 P.3d 630] *Berschauer/Phillips* nor the present case involves harm or injury to persons or physical damage to property.

¶ 48 This case is legally indistinguishable from *Berschauer/Phillips*.

¶ 49 The majority maintains, however, that the ultimate issue that has to be resolved is whether the tort claims are permissible under the independent duty doctrine, explaining that the economic loss doctrine analysis used in *Berschauer/Phillips* is no longer the appropriate analysis. The majority reiterates the statement from the lead opinion in *Eastwood v. Horse Harbor*

Foundation, Inc., 170 Wash.2d 380, 387, 241 P.3d 1256 (2010), that the term " ' economic loss rule' was a misnomer." Majority at 623.

¶ 50 However, in *Affiliated FM Insurance Co. v. LTK Consulting Services*, 170 Wash.2d 442, 450 n. 3, 243 P.3d 521 (2010), the lead opinion stated that the decisions in *Eastwood* and *Affiliated FM* "leave intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances." Thus, in *Eastwood* and *Affiliated FM* the court did not purport to change the fundamental underpinnings of our precedent but instead embarked on an effort to clarify prior case law and provide what the court thought to be a clearer approach for deciding when tort claims may be pursued, notwithstanding the fact that the parties' dealings arise from their contractual relationship. See majority at 623. *Eastwood* and *Affiliated FM* indicate that if circumstances are the same, the same result should be obtained under the independent duty doctrine as would have been obtained prior to these decisions. We held

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in *Berschauer/Phillips* that tort remedies are not available in the present circumstances and therefore *Berschauer/Phillips* should control on the issue whether tort duties may be pursued. Thus, this case can be decided on the basis that under *Berschauer/Phillips* the tort claims asserted by the Donatellis cannot be pursued.

¶ 51 As a second method for resolving this case, the court could use it to correct the court's recent analysis for deciding whether a contracting party can pursue tort claims arising out of the parties' contractual relationship. The "independent duty doctrine," unlike the economic loss rule, suffers from a significant defect in that it springs from the wrong analytical starting point. The analysis under this doctrine implicitly begins with the question, why not allow tort remedies?—starting, and ending, with what tort duties might be found. But when the parties' relationship is contractual, the more important questions are whether the dispute or claim is within the scope of the contract and if so why allow any remedies outside the contract? At the same time, the nature of the risk of harm is an integral part of the inquiry, as the court recognized in *Berschauer/Phillips* and in the lead opinion in *Affiliated FM*. Personal injury and physical damage to property are not risks traditionally remedied by contract and indeed the opposite is true.

¶ 52 In these respects, therefore, the 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. These basic concepts have been core principles of the economic loss rule, as the court said in *Alejandro v. Bull*, 159 Wash.2d

[T]he 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. If the economic loss rule applies, the party will be held to contract remedies,

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regardless of how the plaintiff characterizes the claims.... The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property.

¶ 53 Importantly, as the majority explains in the present case, this distinction in the type of loss is retained under the independent duty analysis when contracts for engineering and other design professional services are involved. The independent duty analysis applies when the design professional's obligation is to avoid causing foreseeable personal injuries or property damage. Majority at 624 (explaining case law).

[312 P.3d 631] ¶ 54 The complaint here alleges a breach of contract cause of action, asserting that D.R. Strong breached the contract by "failing to complete the Project in a timely, competent and cost effective manner." CP at 3. Significantly, the negligence claims are virtually identical. The complaint alleges that D.R. Strong was negligent in failing "to complete the Project in a timely, competent and cost effective manner" by allegedly taking too long on the project, charging more than originally quoted, and redoing work. *Id.* at 4. And the complaint alleges that D.R. Strong negligently misrepresented the amount of time and cost to complete the work, the representations were false when made, and the Donatellis justifiably relied on the misrepresentations. *Id.* at 4-5. Thus, whether couched as a contract breach or a negligence claim, 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.

¶ 55 Ultimately, this case involves a straightforward claim of breach of contract, despite the Donatellis' efforts to show actionable negligence. The remedies for this breach are contractual.

¶ 56 Finally, the court can decide this case by giving effect to the professional liability limitation in the contract.

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Whether the claims here sound in contract or tort, they fall within this liability provision. A limitation of liability is a permissible allocation of risk of negligent acts or omissions; there is no requirement that it apply to contractually based liability alone. *See, e.g., Am. Nursery*

Prods., Inc. v. Indian Wells Orchards, 115 Wash.2d 217, 230, 797 P.2d 477 (1990) (generally, "a party to a contract can limit liability for damages resulting from negligence").

¶ 57 Moreover, giving effect to a limitation of professional liability provision in a contract for professional design services effectuates the parties' bargained-for allocation of risks:

Permitting recovery in tort against a design professional solely for commercial loss in the construction context often frustrates the parties' bargained for risk-arrangement and, consequently, their corresponding economic expectations. For example, tort recovery may allow a party to recover damages that were otherwise limited or excluded under the contract. The difference between recovery in tort or contract under these circumstances may amount to millions of dollars. In other words, tort remedies rewrite the contract by reallocating the risk of loss, potentially giving a windfall to the party who prevails under a tort theory for remedies otherwise limited or unavailable under the contract.

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, 664-65 (2012-2013) (footnotes omitted).

¶ 58 When reviewing a decision on a motion for summary judgment, "[a] question of contract interpretation may be determined as a matter of law if it does not turn on the 'credibility of extrinsic evidence or ... a choice among reasonable inferences to be drawn from extrinsic evidence.'" *Kofmehl v. Baseline Lake, LLC*, 177 Wash.2d 584, 594, 305 P.3d 230 (2013) (quoting *Berg v. Hudesman*, 115 Wash.2d 657, 668, 801 P.2d 222 (1990) (quoting RESTATEMENT (SECOND) OF CONTRACT § 212 (1981))).

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¶ 59 The contract provision states, in a paragraph headed "LIMITATIONS OF PROFESSIONAL LIABILITY," "For any injury or loss on account of any error, omission, or other professional negligence, the Client agrees to limit DRS and/or its professional employees' liability to the Client and to all agents, contractors, and subcontractors arising out of the performance of our professional services." CP at 26 (emphasis added). When interpreting contracts, words are generally given their ordinary meaning and the parties' mutual intent is effectuated. *City of Tacoma v. City of Bonney Lake*, 173 Wash.2d 584, 590, 269 P.3d 1017 (2012). "'[A]ny' means 'every' and 'all.'" *State v. Sutherby*, 165 Wash.2d 870, 881, 204 P.3d 916 (2009); *State v. Westling*, 145 Wash.2d 607, 611, 40 P.3d 669 (2002). The limitation of liability provision is clear in encompassing professional liability arising from negligently performed professional services

and should be enforced.

[312 P.3d 632] ¶ 60 The negligent misrepresentation claim should not be treated any differently than the other negligence claims. Both involve alleged failure to perform the engineering services in a cost-effective and timely manner. In the case of the misrepresentation claim, the alleged negligence concerns an alleged failure to accurately represent the *professional services*, i.e., how long they would take and what they would cost, thus falling within the limitation of professional liability provision.[4]

¶ 61 The next question that must be resolved is whether the written contract provision is enforceable. Although this question requires attention to several legal principles, in the end summary judgment standards, settled contract law principles, and evidence in writing in the record dictate that the liability limitation is enforceable notwithstanding the

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possible existence of oral terms for additional services not set out in the parties' written contract or assumption of professional services not set out in the written contract.

¶ 62 On review of a denial summary judgment the court engages *de novo* in the same inquiry as the trial court. *Kofmehl*, 177 Wash.2d at 594, 305 P.3d 230. All of the facts and inferences therefrom are construed in favor of the nonmoving party. *Id.* Summary judgment is improper if there is a genuine issue as to a material fact, shown by pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. CR 56(c).

¶ 63 In general, when reviewing a decision on a motion for summary judgment, an appellate court is to consider only the evidence and issues called to the attention of the trial court. RAP 9.12. A reviewing court can decide whether a motion for summary judgment should be granted on an issue not decided by the trial court if the issue is supported by the record and is within the pleadings and proof. *Plein v. Lackey*, 149 Wash.2d 214, 222, 67 P.3d 1061 (2003). The questions whether the Donatellis' tort claims may be asserted or whether only contract remedies may be pursued were before the trial court. D.R. Strong submitted the written contract for the trial court's consideration when deciding the motion for partial summary judgment, and it was thus called to the attention of the trial court. This brings the contract within the scope of materials that may be considered on review. *See, e.g., Mithoug v. Apollo Radio of Spokane*, 128 Wash.2d 460, 909 P.2d 291 (1996); *cf.* CR 56(c) (referring to "the pleadings, depositions, answers to interrogatories, and admissions *on file*, together with the affidavits, if any" (emphasis added)).

¶ 64 As explained, on appellate review the Donatellis plainly have not argued the issue that is

decided by the majority relating to possible oral terms of the parties' contract. They do, however, allege in their amended complaint that an oral agreement was entered into in "October of 2002." CP at 2. Since they do not refer to a written

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agreement in the amended complaint, the implication from the complaint alone is that the parties' contract is oral. As indicated, however, D.R. Strong submitted the parties' written agreement and an accompanying cover letter, together appended as exhibit 1 to a declaration that the order on the motion for partial summary judgment identifies as having been considered by the trial court. The cover letter is dated October 11, 2002, and identifies itself as concerning the "Proposal For Engineering Services [for] Two-Short Plats [of] Lots 2 & 3, Blk. 5, Jordan's Acre Gardens Addition." *Id.* at 20. In this letter, D.R. Strong informed Mr. Donatelli that it was pleased to provide "this revised proposal for engineering services for the" short plat project, telling him that if he "wish[ed]" to proceed with this project work, "he should "sign and return" the proposal to D.R. Strong "as confirmation that [he has] read these terms and as [D.R. Strong's] authorization to proceed." *Id.*

[312 P.3d 633] ¶ 65 The written contract is titled, in large font on four lines centered near the top of the page, with considerable blank space on either side, a "REVISED PROPOSAL FOR ENGINEERING SERVICES." *Id.* at 21. Mr. Donatelli both signed this written contract and dated it "10/31/02" below D.R. Strong's president's signature of October 11, 2002. *Id.* at 25.

¶ 66 In other words, Mr. Donatelli signed the written contract on the very last day of the very same month in which the amended complaint asserts an oral agreement was entered into.

¶ 67 Moreover, when Mr. Donatelli was asked if he had a written agreement with D.R. Strong for services, he testified, "I believe so, yeah." *Id.* at 10 (Donatelli dep. at 24). When shown a copy of the contract he also testified that as far as he knew, which he explained to mean as far as he could remember, it was the agreement he had with D.R. Strong. He agreed he had signed the written agreement and dated it October 31, 2002, and testified that he negotiated the scope of the services in the contract. After he explained

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that he wanted D.R. Strong to perform services to obtain a recorded short plat, he was asked if the written contract described all of the paperwork he wanted D.R. Strong to prepare. He testified that "if there was [sic] any other things needed for the short plat to be recorded then ... they would add additional services to achieve [his] goal."

Id. at 11 (Donatelli dep. at 28-29).

¶ 68 The written agreement contemplates the possibility of such additional services to those in the contract. Under the heading "PROPOSAL WORK," the contract states that

[c]orrections or revisions that come as a result of the County's or the Client's inclusion of new concepts, requirements, unpublished policies and procedures, or previously undiscovered issues are not included in this scope of work. If these types of corrections or revisions are requested, they will be addressed as Additional Services as described below.

Id. at 21. The provision in the contract about additional services states that "[i]ssues may arise during the project review by the various agencies which may not have been included in the above scope of work, and in such case would require the Client's additional authorization in order to proceed." *Id.* at 23.

¶ 69 From the record, the only reasonable conclusion that can be drawn is that if there was an oral agreement for additional services, it was either subsumed by the written contract, it modified the written agreement, or it would be additional to the written contract as Donatelli's deposition testimony and the written contract contemplated might occur. Absolutely nothing in the record suggests that any oral contract replaced the written contract.

¶ 70 On summary judgment, "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Hartley v. State*, 103 Wash.2d 768, 775, 698 P.2d 77 (1985); *accord P.E. Sys., LLC v. CPI Corp.*, 176 Wash.2d 198, 207, 289 P.3d 638 (2012). Considering all the evidence submitted, there is no genuine issue of

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material fact on the question of whether the parties had a written contract. *See, e.g., White v. State*, 131 Wash.2d 1, 17, 929 P.2d 396 (1997) (the appellate court can examine the record and determine on its de novo review that evidence submitted does not create a genuine issue of material fact). [5] Reasonable [312 P.3d 634] MINDS Cannot differ that the written terms are at the least part of the parties' agreement, even if not the entire agreement. Indeed, the majority does not suggest that the parties entered only into an oral agreement.

¶ 71 Mr. Donatelli now maintains, however, that he signed the contract without knowing what he signed and says that the written contract does not reflect the parties' agreement. He also claims he paid far more than the fee stated in the written contract.[6]

¶ 72 The record shows that Mr. Donatelli is nonetheless bound by the contract he signed. First,

individuals voluntarily signing a written contract without reading it are

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deemed to have manifested assent to its terms. "One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand." *Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 381, 745 P.2d 37 (1987) (quoting *Nat'l Bank of Wash. v. Equity Investors*, 81 Wash.2d 886, 913, 506 P.2d 20 (1973)). "The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs." *Nat'l Bank*, 81 Wash.2d at 912-13, 506 P.2d 20.

¶ 73 Under the circumstances here, Mr. Donatelli must be deemed to have assented to the contract that he signed. Although the Donatellis contend that D.R. Strong negligently misrepresented the costs and time of their services and they entered into a contract with D.R. Strong in reliance on these misrepresentations, negligent misrepresentation does not require an intentional act or omission, unlike the defenses to contract formation mentioned in *Skagit Bank* and *National Bank* (fraud, deceit, and coercion). *See generally* 26 WILLISTON ON CONTRACTS § 69:4 (4th ed.) (database updated May 2013) (fraud as rendering a transaction void or voidable); *id.* § 69:11 (fraud with regard to future promises or actions).

¶ 74 More importantly, the Donatellis do not claim that there is no enforceable contract because of negligent misrepresentation—in fact, they clearly maintain that an enforceable contract does exist. In their amended complaint they seek at least \$1.5 million for breach of contract and they do not seek any remedies of the kind that would follow if the contract were to be found unenforceable.

¶ 75 Thus, this case falls within the rule of *Skagit State Bank* and similar cases. Nothing in the record suggests that Mr. Donatelli lacked the ability to read and understand the written contract or that his signature was involuntary. Thus, Mr. Donatelli's signature on the written contract on October 31, 2002, shows assent to the terms of the written contract regardless of his present assertions.

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¶ 76 Because reasonable minds cannot differ from the evidence in the record that the written contract is at the least part of the parties' agreement and that its terms are binding, the next question is whether any possible oral terms could modify the written contract, and more specifically and importantly, whether an oral term could exist that would alter the professional liability limitation

in the written contract.

¶ 77 Initially, the majority leaves the incorrect impression that the only relevant bar to oral contract terms would be a merger or integration clause in the written contract, which the majority does not find. Majority at 625 n. 2. But whether a contract is fully integrated or not does not depend on whether there is a written merger or integration [312 P.3d 635] clause in the contract. A written contract can be fully integrated without a merger or integration clause—the lack of such a clause in the parties' written agreement has little if any significance.[7]

¶ 78 Thus, *if* it were necessary to decide whether the written contract is integrated, additional extrinsic evidence would be admissible to determine if the contract is fully integrated. But it is *unnecessary* to decide whether the contract is fully integrated. This is because in either case the parol evidence rule precludes giving effect to any oral term that would be inconsistent with or would change the professional liability limitation.

¶ 79 Although extrinsic evidence can always be submitted when interpretation of existing terms is at issue,[8]

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different rules apply when the question is admissibility of extrinsic evidence to add to or modify terms of a written contract. Under the parol evidence rule, if the written contract is fully integrated, i.e., is a final and complete expression of the parties' agreement, parol (extrinsic) evidence is *not* admissible to add to, subtract from, or alter the terms of the contract—period. *DePhillips v. Zolt Constr. Co.*, 136 Wash.2d 26, 32, 959 P.2d 1104 (1998). If, on the other hand, the written contract is not fully integrated but instead is partially integrated, parol evidence can be admitted to prove additional terms not included in the writing subject to the rule that such evidence *is not* admissible to prove additional terms that are *inconsistent with or would change* the written terms. *Id.* at 32-33, 959 P.2d 1104 ("[w]here a partially integrated contract is involved, parol evidence may be used to prove the terms not included in the writing, provided, of course, that the additional terms are not inconsistent with the written terms" (footnote omitted) (citing *Emrich*, 105 Wash.2d at 556, 716 P.2d 863)).

¶ 80 Thus, regardless of whether the written contract here is fully or partially integrated, extrinsic evidence of any oral terms is not admissible to prove terms inconsistent with the written contract or that would change the written terms.

¶ 81 The parties' written contract contains the explicit limitation of professional liability, as explained. Evidence of oral terms is inadmissible to prove any contract term that conflicts with the professional liability

limitation in the written contract, regardless of whether the written contract is fully integrated. Accordingly, the professional liability provision applies and prevents the Donatellis from going

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forward on their negligence and negligent misrepresentation claims.[9]

¶ 82 As explained, the court could decide the summary judgment question on any, or all, of the three grounds I have discussed above. The three bases I propose, separately or together, resolve this case and dictate that summary judgment should have been granted in D.R. Strong's favor. Moreover, resolving the issue of whether the negligence and negligent misrepresentation claims can go forward will avoid unnecessary expense and time for the parties, counsel, and the judicial system.

¶ 83 But if the court is not inclined to use any of these grounds to resolve this discretionary review, it still should not require the parties to engage in a meaningless factual inquiry on remand. Even under the majority's analysis for when the "independent duty doctrine" applies, it makes no difference in [312 P.3d 636] this case whether the professional services arose solely under the written contract or whether services were added by oral agreement or D.R. Strong's conduct. As noted, the majority explains that engineering services can in some instances give rise to a tort duty independent of the contract because design professionals, including civil engineers, have an independent duty to use reasonable care with respect to personal injuries and physical damage to property. Majority at 624.

¶ 84 Here, however, the negligence claims concern the Donatellis' inability to develop their property and sell residential lots on the short platted property as they planned to do, allegedly because costs and delay in D.R. Strong's professional services resulted in failure to develop the property before the 2007 economic collapse. These claims asserting costs and delay do not involve personal injuries or property damage. Thus, *whatever* the source of D.R. Strong's professional obligations, whether under the

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written contract, additional oral terms, or by assumption, the alleged failure to carry out them out does not implicate the independent duty doctrine. The factual inquiry the majority demands does not concern an issue of *material fact*. Summary judgment is not precluded because of the factual question the majority identifies. CR 56(c).

¶ 85 The trial court, however, is likely to reasonably conclude that remand for this factual determination would not have been directed unless it matters. If on remand additional services are established, how is the

trial court to proceed when this court's cases indicate that the independent duty doctrine does not apply to professional services unless personal injury or property damage is asserted?

¶ 86 There is no reason to add to this litigation by remanding for a factual determination of the scope of possible additional services orally contracted for or assumed by D.R. Strong. The majority's decision is an unfair resolution of this case. As noted, neither party addresses the issue the majority finds compelling, either in briefing at the Court of Appeals or this court. The court lacks argument or authority that D.R. Strong itself might have submitted had it known this was going to be an issue. As demonstrated by this dissent, D.R. Strong would have had a number of compelling arguments available to show that summary judgment is appropriate on the negligence and negligent misrepresentation claims, notwithstanding the question whether some professional services were agreed to or assumed.

¶ 87 Litigation is time consuming and costly, and this is certainly true when professional design and construction contract matters are at issue. It is not fair to extend this litigation on a basis so fraught with pitfalls when there are other grounds to resolve the propriety of the trial court's order denying summary judgment. The negligence and negligent misrepresentation claims should have been dismissed as a matter of law, for any or all of the following reasons: under existing precedent, in particular, *Berschauer/Phillips*, the tort claims should not go forward because they do not

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involve personal injury or damage to property; the claims asserted arise from the contract and contract remedies alone are implicated and appropriate—no personal injury or property damage is alleged; and the professional liability limitation in the written contract bars the negligence claims under settled contract principles that show the provision is enforceable and applies to the negligence and negligent misrepresentation claims. Finally, even under the independent duty approach, no independent tort duties are implicated and proof of additional professional services would not alter this conclusion.

Conclusion

¶ 88 This case is legally indistinguishable from *Berschauer/Phillips* and, as in that case, the Donatellis' tort claims here should not be allowed against the design professional engineering firm, defendant D.R. Strong. All of the claims asserted by the Donatellis arise out of the contract, and no personal injuries or physical damage to property is asserted.

¶ 89 The majority's extended discussion of the "independent duty doctrine" is unnecessary. It fails to preserve the distinction between contract and tort when

the subject [312 P.3d 637] matter and nature of the plaintiffs' claims and the alleged injuries or harm fall within their contractual relationship.

¶ 90 The limitation of liability provision in the contract should be enforced. It covers both the negligent misrepresentation claim and the professional negligence claim, as both concern the professional duties under the written contract.

¶ 91 I would hold that the trial court erred when it denied D.R. Strong's motion for summary judgment on the negligence claims. The negligence claims are not permissible under our precedent, and they are not allowable under the

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limitation of professional liability provision in the parties' contract.

CHARLES K. WIGGINS, JAMES M. JOHNSON,
and CHARLES W. JOHNSON, Justices.

Notes:

[1] " The interpretation of an oral contract is generally not appropriate for summary judgment because the existence of an oral contract and its terms usually depends on the credibility of witnesses testifying to specific fact-based dealings which, if believed, would establish a contract and the contract's terms." *Spradlin Rock Prods.*, 164 Wash.App. at 655, 266 P.3d 229.

[2] Conspicuously absent from the written contract is any type of merger or integration clause providing that the written contract supersedes any prior agreements between the parties. Such a clause would tend to diminish the likelihood of the Donatellis establishing the existence of an oral contract. See ARCHITECT AND ENGINEER LIABILITY, *supra*, at 8 (" A written agreement with a ' merger clause' or an ' integration clause' can prevent the opposite side from attempting to explain or embellish contractual terms.").

[3] A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiffs reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

Ross v. Kirner, 162 Wash.2d 493, 499, 172 P.3d 701 (2007) (citing *Lawyers Title Ins. Corp. v. Baik*, 147

Wash.2d 536, 545, 55 P.3d 619 (2002)).

[4] Since *Jackowski*, the Court of Appeals has correctly applied the independent duty doctrine to conclude that a trial court should not "automatically dismiss" a plaintiff's negligent misrepresentation claim "based solely on the existence of a contract between [the parties]." *Key Dev. Inv., LLC v. Port of Tacoma*, 173 Wash.App. 1, 24, 292 P.3d 833 (2013) (holding that the independent duty doctrine did not bar a property owner's negligent misrepresentation claim against a potential buyer of property when the trial court made no findings regarding whether the buyer's alleged duties arose independently of the contract).

[1] As explained below, any oral terms in conflict with the limitation of liability provision cannot be given effect.

[2] The contract states:

LIMITATIONS OF PROFESSIONAL LIABILITY: DRS' [(D.R. Strong's)] findings, recommendations, specifications, or professional opinions will be presented, within the limits prescribed by the Client [(the Donatellis)], after being prepared in accordance with generally accepted professional engineering and surveying practice. DRS makes no other warranty, either expressed or implied. For any injury or loss on account of any error, omission, or other professional negligence, the Client agrees to limit DRS and/or its professional employees' liability to the Client and to all agents, contractors, and subcontractors arising out of the performance of our professional services, such that the total aggregate liability to all those named shall not exceed \$2,500, or our fee, whichever is greater. In the event the Client does not wish to limit our professional liability to this sum, we shall waive this limitation upon the Client's written request made at the time of the initial authorization on a given project, provided that the Client agrees to pay for this waiver an additional 5% of our total fee or \$500, whichever is greater. CP at 26.

[3] See also RCW 4.22.070(1), a provision of the 1986 tort reform act, which requires the trier of fact to "determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages," including "the claimant or person suffering personal injury or incurring property damage," with an exception not relevant here. (Emphasis added.)

[4] The Donatellis' negligent misrepresentation claim is not a claim that no valid contract was formed. Indeed, they assert a cause of action for breach of contract, which is only possible when an enforceable contract exists. Thus, whether a negligent misrepresentation claim could ever be a possible ground for claiming that no valid contract was formed is not in question that must be considered in the present case. This matter is addressed below.

[5] The majority mistakenly says that D.R. Strong "

seems to argue that it only agreed to provide the six phases of engineering services outlined in the written contract." Majority at 625. This is clearly not the case. First, as discussed in this opinion, the possibility of additional services was expressly addressed in the contract and according to Donatelli's testimony, was discussed during negotiations. Additional services are, in fact, listed in the contract as the seventh phase ("Phase 700", CP at 23). In addition, the written contract was entered after the county issued a preliminary short plat approval letter on October 4, 2002. From evidence in the record of communications between the county and D.R. Strong, it is apparent that D.R. Strong provided professional services in obtaining this preliminary plat approval.

The present dispute concerns the final engineering plans, sewer and water main extension designs, construction phase services and final plat map necessary to short plat the two parcels—matters covered by the written contract. See *Id.* at 20. It may concern additional services assumed, agreed upon orally and allowed for by the written contract. The dispute does not concern whatever services were rendered in obtaining preliminary approval. Thus, the source of any obligation for such services is an irrelevant question on this discretionary review.

[6] The written contract shows that D.R. Strong's services were not promised for a flat fee. The first two phases, concerning final engineering plans and the sanitary sewer and water main extension, are for stated flat amounts, but the next four phases are for "Time & Material" and two of these expressly add that the amounts listed are estimates ("Est."). *Id.* at 23. The contract contains a schedule of charges that lists hourly rates for various persons providing services, for example, a principal engineer's services are listed at "\$130/Hour." *Id.* at 26. In short, the written contract contemplates both the possibility that D.R. Strong's fees might be higher than estimates provided.

[7] To make the "preliminary determination whether the parties intended the written document to be an integration of their agreement, which is a question of fact, the trial court must hear all relevant, extrinsic evidence, oral or written." *Emrich v. Connell*, 105 Wash.2d 551, 556, 716 P.2d 863 (1986); see also *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wash.2d 568, 579, 998 P.2d 305 (2000).

[8] See *Berg v. Hudesman*, 115 Wash.2d 657, 669, 801 P.2d 222 (1990) (quoting *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wash.2d 337, 348-49, 147 P.2d 310 (1944)); see also, e.g., *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wash.2d 565, 570, 919 P.2d 594 (1996). However, "use of parol, or extrinsic, evidence as an aid to interpretation does not convert a written contract into a partly oral, partly written contract." *DePhillips v. Zolt Constr. Co.*, 136 Wash.2d 26, 32, 959 P.2d 1104 (1998).

[9] Although the professional liability provision states that the Donatellis could waive the liability limitation if they paid the greater of 5 percent of the professional fee or \$500—a nominal amount—they did not do so.

March 3, 2017

Client

Re: SCSC # 12-3-45678-9

Dear Client:

I am withdrawing as your attorney immediately for the above entitled Family law case. My Notice of Withdrawal is enclosed. Following entry of the ex parte restraining order I specifically and repeatedly told you not to contact Opposing party about the order. Today, I learned from Opposing Party that you called him immediately after you left my presence. I notified you yesterday that there could be consequences to you for obtaining a restraining order and then contacting the person you sought court protection from. I dropped all of my responsibilities yesterday to assist you in obtaining that restraining order in order to protect your safety and the safety of your children. I did so in good faith, and advised you in good faith, how to proceed after entry of the order. You acted against my advice and may have irreparably harmed your restraining order case. You also were dishonest with me in our interactions yesterday. I do not believe that I can ethically or competently continue to represent you in your family law case.

The restraining order is set for hearing on March 14, 2017 at 9:00 am. If you intend to keep that hearing you will need to confirm the hearing on March 11, between 9am-12pm, by calling 425-388-3587. If you do not confirm the hearing it will be stricken and your temporary restraining order will end on March 14. All of the appropriate paperwork has been filed with the court and served on Opposing Party. We will send you conformed copies once we receive them from the courier and the process server.

In order to finalize your legal separation you will need to complete a Decree of Legal Separation, Findings of Facts and Conclusions of Law, Parenting Plan and Order of Child Support. All of these forms can be found online at www.forms.wa.gov/forms. You will also need to complete the parenting seminar "For Kids Sake" offered through the Snohomish County Superior Court.

This concludes my services to you in the matter of your dissolution and this letter shall serve to formally advise you of my disengagement as your attorney in this matter. I am closing my files for this particular case and am removing it from the active-files list. I will issue you a final invoice and refund you any money left from your advance fee deposit. If you prefer, I can issue the check to another attorney.

Sample Disengagement Letter when Client Actions has Made Representation Difficult.

I have returned to you all original documents except the legal zoom file. I will mail that to your home address or forward it to an attorney at your instruction. I have provided you with copies of all documents filed on your behalf. If you believe I am still in possession of an original document you provided me, or that you do not have copies of all of the court filed documents, please let me know immediately so that I may search the files for them prior to final closure of the file. If it becomes necessary to retrieve the file or research it for documents or information after it is formally closed, there may be a closed-file retrieval charge depending on the prevailing charges at the time. Accordingly, it may save you time and money to double check your files and let me know if there is a problem within 30 days, at which time the file will be formally closed. After five years, your file may be destroyed without further notice to you. It is important that you pick up any thing you want or need from the file or notify me in writing as to where you want documents sent.

I wish you all the best going forward. Please let me know if you would like me to forward either your family law case file and/or your civil case file to a new lawyer.

Very truly yours,

Julie K. Fowler

Enc:

Can you answer yes to any of these questions?

Why are you staying on the case?

Are you afraid of your client?

IS the case keeping you up at night?

Are you afraid of opposing counsel?

If you are avoiding opposing counsel and/or your client, consider why that is?

Have you asked another attorney about the issues in the case?

Do you hate your client but they have a legitimate cause of action?

You really like your client, but your client hasn't paid you in a while?

Are you worried about a bar complaint?

Are you worried the judge is going to rip into you personally at your next hearing?

Do you dread email/phone call or correspondence from your client or opposing counsel?

Are you afraid to withdraw as counsel? Why?

If so:

1. Assess your objectivity in the case
2. Assess your effectiveness in the case
3. Assess your motives
4. Assess your behavior and conduct
5. Assess the effect the case is having on you
6. Withdraw



Difficult Conversations with Clients

MARYA M. SANTOR, JD. AND JULIE K. FOWLER, JD.



Avoiding Difficult Conversations

- ▶ Avoid Difficult Clients

Avoiding Difficult Conversations

- ▶ Avoid Difficult Clients
- ▶ Setting reasonable expectations of the case (reasonable outcome) RPC 3.1

Avoiding Difficult Conversations

RPC 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Avoiding Difficult Conversations

MERITORIOUS CLAIMS AND CONTENTIONS CONT.

RPC 3.1 Comment 2 ...What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions....

Avoiding Difficult Conversations

RPC 1.4 (b) COMMUNICATION

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Avoiding Difficult Conversations

- ▶ Avoid Difficult Clients
- ▶ Setting reasonable expectations of the case (assessing reasonable outcome) (RPC 3.1)
- ▶ Setting reasonable boundaries with the client/opposing counsel

Avoiding Difficult Conversations

- ▶ Avoid Difficult Clients
- ▶ Setting reasonable expectations of the case
- ▶ Setting reasonable boundaries with the client/opposing counsel
- ▶ Setting reasonable fee expectations

Types of Difficult Conversations

- ▶ When a client fires you – RPC 1.16 Comments (4,5,6)

Types of Difficult Conversations

CLIENT TERMINATED REPRESENTATION

RPC 1.16 Comment [4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Types of Difficult Conversations

TERMINATING APPOINTED COUNSEL

RPC 1.16 Comment [5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

Types of Difficult Conversations

CLIENT WITH DIMINISHED CAPACITY TERMINATING REPRESENTATION

RPC 1.16 Comment [6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Types of Difficult Conversations

- ▶ When a client fires you – RPC 1.16 Comments (4,5,6)
- ▶ Losing a hearing – if you think you'll lose, but have to try, prepare the client

Types of Difficult Conversations

- ▶ When a client fires you
- ▶ Losing a hearing – if you think you'll lose, but have to try, prepare the client
- ▶ What to do if a client threatens a bar complaint

Types of Difficult Conversations

- ▶ When a client fires you
- ▶ Losing a hearing – if you think you'll lose, but have to try, prepare the client
- ▶ What to do if a client threatens a bar complaint
- ▶ What to do if you receive a bar complaint

Types of Difficult Conversations

- ▶ When a client fires you
- ▶ Losing a hearing – if you think you'll lose, but have to try, prepare the client
- ▶ What to do if a client threatens a bar complaint
- ▶ What to do if you receive a bar complaint from an existing client
- ▶ What to say when you don't know what to do for the client



Preparing for Difficult Conversations

- ▶ Don't speak or email when you are emotional



Preparing for Difficult Conversations

- ▶ Don't speak or email when you are emotional
- ▶ Don't put the client conversation off (RPC 1.4)

Preparing for Difficult Conversations

- ▶ Don't speak or email when you're emotional
- ▶ Don't put the client conversation off (RPC 1.4)
- ▶ Don't avoid the client (RPC 1.4)

Preparing for Difficult Conversations

RPC 1.4 (a) COMMUNICATION

A lawyer shall; (1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Preparing for Difficult Conversations

COMMUNICATION CONT.

RPC 1.4 Comment [4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Preparing for Difficult Conversations

COMMUNICATION CONT.

RPC 1.4 Comment [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.

Preparing for Difficult Conversations

- ▶ Don't speak or email when you're emotional
- ▶ Don't put the client conversation off (RPC 1.4)
- ▶ Don't avoid the client (RPC 1.4)
- ▶ Regarding a fee dispute – review your bills and fee agreement

Preparing for Difficult Conversations

- ▶ Don't speak or email when you're emotional
- ▶ Don't put the client conversation off (RPC 1.4)
- ▶ Don't avoid the client (RPC 1.4)
- ▶ Regarding a fee dispute – review your bills and fee agreement
- ▶ Regarding a services dispute – review the case, correspondence, and billing



Having Difficult Conversations

- ▶ Listen to the client



Having Difficult Conversations

- ▶ Listen to the client
- ▶ Set up a time for the difficult conversation

Having Difficult Conversations

- ▶ Listen to the client
- ▶ Set up a time for the conversation
- ▶ Be honest

Having Difficult Conversations

- ▶ Listen to the client
- ▶ Set up a time for the conversation
- ▶ Be honest
- ▶ Own anything you handle poorly

Having Difficult Conversations

- ▶ Listen to the client
- ▶ Set up a time for the conversation
- ▶ Be honest
- ▶ Own anything you handle poorly
- ▶ Be prepared with options to resolve the issue

How to get out of a bad case

- ▶ Withdrawing

How to get out of a bad case – RPC 1.16

RPC 1.16 (b)

- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.

How to get out of a bad case – RPC 1.16

RPC 1.16 DECLINING OR TERMINATING REPRESENTATION

Comment [7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

How to get out of a bad case – RPC 1.16

RPC 1.16 DECLINING OR TERMINATING REPRESENTATION

Comment [8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

How to get out of a bad case

- ▶ Withdrawing
- ▶ Referring to another attorney



How to get out of a bad case

- ▶ Withdrawing RPC 1.16 (7,8)
- ▶ Referring to another attorney
- ▶ Bringing on Co-Counsel