No. 82738-9

CHAMBERS, J. (concurring) — I agree with the lead opinion in result and would answer the certified question in the affirmative. This court has long recognized that engineers have a duty to exercise reasonable skill and judgment in performing engineering services. We have never held that engineers do not have a cognizable duty in tort, and I agree we should not so hold today. And I would not reexamine that duty just because the defendant has raised the independent duty doctrine as a defense to a tort claim. The lead opinion's approach suggests that this court is going to reexamine every tort duty established by common law or statute in the face of a claim that the independent duty doctrine bars the claim. While, I agree with the lead opinion's result, I would treat this case like an ordinary tort case and resolve it based upon our established tort precedent.

The Seattle Monorail System takes passengers between downtown Seattle and the Seattle Center. Seattle Monorail Services Joint Venture (SMS) operates the monorail under a concession agreement with the city of Seattle. Among other terms, SMS agreed to provide emergency maintenance and to bring trains back into service following an accident. LTK Consulting Services, Inc. (LTK) contracted with the city to provide engineering services relating to examining and recommending repairs to the monorail system. At least for the purposes of the certified question, there is no contractual

relationship between SMS and LTK. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 556 F.3d 920, 922 (2009).

A fire damaged the blue and red trains of the monorail. SMS suffered millions of dollars in damages. Affiliated FM Insurance Co. (Affiliated), SMS's insurer, paid for damages caused by the fire. Then, standing in the shoes of SMS as its subrogee, Affiliated brought this negligence action against LTK. Affiliated contends that as part of its work, LTK recommended removing an electrical grounding system from the monorail that would have prevented the fire. Affiliated contends that this advice was negligent and that such negligence was a proximate cause of the fire and subsequent damage to its insured.

We largely clarified this court's independent duty jurisprudence in *Eastwood v. Horse Harbor Found.,* No. 81977-7 (Wash. Nov. 4, 2010). This case is, in my view, a straightforward claim of professional negligence. Professionals, including engineers, owe a duty to "exercise the degree of skill, care, and learning possessed by members of their profession in the community." 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 15.51, at 504-05 (3d ed. 2006). The only issue is whether LTK owed that duty to SMS as a concessionaire. I agree with the lead opinion that it did. This case does not implicate in any way the independent duty doctrine, formerly known as the economic loss rule. *Eastwood,* slip op. at 22. The term "economic loss rule" was a misnomer. *Id.* As I note in *Eastwood,* "[u]nfortunately, the imprecise use of the term

'economic loss rule' by this court led many to erroneously conclude that it was a rule of general application that precluded recovery in tort of virtually any harm that could be measured in dollars if a business relationship also existed between the parties." *Eastwood* concurrence at 4. In *Eastwood*, we took the opportunity to clarify that the economic loss rule had been read too broadly by lower courts, adopted the term "independent duty" rule in its stead, and explained that the independent duty doctrine focused on the duty owed rather than any particular kind of damage suffered.

This case arose before our decision in *Eastwood* could be announced. Recognizing the confusion in our jurisprudence before *Eastwood*, the United States Court of Appeals for the Ninth Circuit certified the following question to this court:

> May party A (here, SMS, whose rights are asserted in subrogation by AFM), who has a contractual right to operate commercially and extensively on property owned by non-party B (here, the City of Seattle), sue party C (here, LTK) in tort for damage to that property, when A(SMS) and C(LTK) are not in privity of contract?

Affiliated, 556 F.3d at 922. Ultimately, the question certified is one of duty. The lead opinion properly notes that engineers have long had a common law "'duty to exercise reasonable engineering skill and judgment.'" Lead opinion at 15 (quoting *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.,* 70 Wn. App. 360, 366, 853 P.2d 484 (1993)). Yet LTK argues that it owed no duty to SMS because SMS's losses were essentially economic. This argument is precisely the argument that we dispatched in *Eastwood*. Given that, the

answer to the certified question is a straightforward yes. I would not reassess the policy behind the common law duty of engineers to exercise reasonable engineering skill and judgment. I concur with the lead opinion in result.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson

Justice Richard B. Sanders

Justice Debra L. Stephens