IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	)	
IN	)	
AFFILIATED FM INSURANCE COMPANY, a Rhode Island corporation,	)	No. 82738-9
Plaintiff-Appellant,	)	
v.	)	EN BANC
LTK CONSULTING SERVICES, INC., a Pennsylvania corporation,	)	Filed November 4, 2010
Defendant-Appellee.	)	

FAIRHURST, J. — A fire ignited on the Seattle Monorail System's (Seattle Monorail) blue train in 2004. The monorail's private operating company, Seattle Monorail Services (SMS), suffered millions of dollars in losses. The question presented is whether SMS, which does not own the Seattle Monorail, can bring a tort action against LTK Consulting Services, Inc., an engineering firm that worked on monorail maintenance before the fire, for negligently causing the fire. LTK

assumes, for the sake of argument in its motion for summary judgment, that the cause of the fire was the train's faulty grounding system, the design of which LTK had itself suggested. LTK argues, however, that SMS's damages are purely economic losses stemming from repair costs, which SMS was contractually obligated to pay, and from business interruption. LTK believes that SMS's tort claims for such damages are barred under Washington tort law. We disagree. By undertaking professional engineering services, LTK bore a tort law duty of reasonable care encompassing safety risks of physical damage to SMS's property interests in the monorail. Hence, SMS's subrogee, Affiliated FM Insurance Company (AFM), may bring a claim of negligence against LTK for LTK's tortious injury of those interests.

I. FACTUAL AND PROCEDURAL HISTORY

A. The fire

The Seattle Monorail is the elevated transportation system that connects Seattle Center with downtown Seattle, Washington. One day in May 2004, after leaving the Seattle Center Station with a load of passengers, the monorail blue train caught fire. The fire started beneath the floor of the passenger compartment of the train's front two cars, but the fire soon pierced the floor and engulfed the seating in both front passenger cars. Smoke from the fire spread to all four blue train cars. On

the other monorail track, the red train stopped alongside the blue train, helping passengers escape. The red train was damaged by smoke. The cause of the fire was later found to be electrical: a shaft in the monorail's blue train motor had disintegrated, colliding with an electrically charged collector shoe.

B. SMS and the monorail concession agreement

Ten years before the fire, in 1994, the city of Seattle (City) entered a monorail concession agreement with SMS. The agreement granted rights to SMS related to the operation of the monorail:

> The City hereby grants to [SMS] . . . the concession right and privilege to maintain and exclusively operate the Monorail System including the facilities, personal property and equipment, together with the right to use and occupy the areas, described in this section, all subject to the conditions and requirements set forth in this Agreement.

Excerpt of Record (ER) 030, Ex. 1, § III.A. The agreement permitted SMS to run concession stands and required SMS to collect fares according to an agreed schedule. In exchange for these rights, SMS promised to pay "concession fees and charges" to the City. ER 034, Ex. 1, § V.A.

The agreement allocated responsibility among SMS and the City for maintaining the monorail. ER 053-074, Ex. 1, § XI.A-N. LTK and AFM agree that SMS bore the responsibility for emergency maintenance. ER 395. The agreement required SMS to grant the City "access to the Monorail System at all reasonable

times to inspect the same and to make any repair, improvement, alteration or addition thereto of any property owned by or under control of the City." ER 095, Ex. 1, § XIX.A. To the extent "reasonably required" for such repairs or improvements, the agreement permitted the City to "interfere with the conduct of the business and operations of [SMS]." *Id.* § XIX.B.

The agreement also required SMS to carry an insurance "policy for fire and extended coverage, upset, collision and overturn, vandalism, malicious mischief, and other perils commonly included in the special coverage form," with the City designated as the loss payee. ER 081-082, Ex. 1, § XVII.A.1. In the event of damage from a fire for which SMS was not responsible, the agreement gave SMS the right to suspend payments to the City or terminate the agreement altogether, depending on the severity of the damage. ER 097, Ex. 1, § XXII.B-C.

C. LTK works on the monorail

The City contracted with LTK in 1999 "to examine the Monorail system and recommend repairs." Resp. Br. of LTK at 3. LTK completed its contractual obligations by 2002. The agreement between the parties is not before us, but we understand that SMS was not a party to the contract.

D. After the fire, AFM becomes involved

SMS and the City amended their agreement after the fire to allocate the costs

and responsibilities for repairing the fire and smoke damage to the monorail. ER 349-50. SMS's insurer, AFM, paid $3,267,861 to SMS and was subrogated to SMS's rights against LTK. Asserting those rights now, AFM seeks to recover damages from LTK for SMS's losses.

E. The lawsuit

AFM brought suit against LTK in King County Superior Court in November 2006, claiming that LTK was negligent "in changing the electrical ground system for the Blue and Red Trains." ER 003, Compl. ¶ 4.2. AFM alleges that as part of LTK's contract with the City, "LTK Engineering recommended that the grounding system for the Blue and Red Trains that made up the Seattle Monorail System be changed." ER 002, Compl. ¶ 3.1.

LTK removed the suit to the United States District Court for the Western District of Washington and moved for summary judgment. LTK denied that it suggested changes to the trains' grounding system or that these changes were implemented, but for purposes of argument on summary judgment, assumes "that it recommended changes to the City, that those changes were implemented, and that their implementation resulted in a condition where the fault that occurred as a result of the drive shaft disintegration was not prevented." ER 384 n.2 (Def.'s Mot. for Summ. J.). However, LTK argued that SMS's losses were purely economic and that

it was not liable in tort for economic losses, at least in this circumstance where it was not in contractual privity with SMS. The losses were purely economic, in LTK's view, because they stemmed from business interruptions and SMS's contractual obligations to repair the City's monorail trains, and SMS did not have a property interest in the Seattle Monorail. The district court granted LTK's motion for summary judgment and denied AFM's motion for reconsideration.

AFM appealed to the United States Court of Appeals for the Ninth Circuit, which certified the following question for this court's review:

> 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 FM Ins. Co. v. LTK Consulting Servs., Inc., 556 F.3d 920, 922 (2009). The Ninth Circuit indicated it will "affirm the district court's grant of summary judgment in favor of LTK" if we "decide[] the economic loss rule, or some other rule, bars such a suit in tort." *Id*. We accepted the certified question pursuant to the Federal Court Local Law Certificate Procedure Act, chapter 2.60 RCW, and RAP 16.16.

II. ANALYSIS

The federal district court concluded that SMS's injury was "outside the

bounds of tort recovery" because it was "strictly economic--i.e., business interruption and the cost of repairing the damaged train." *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 2007 WL 2156593, at *4 (W.D. Wash.). In so holding, the court relied on a doctrine of Washington law that we have previously termed the "economic loss rule," which is "a doctrine that has attempted to describe the dividing line between the law of torts and the law of contracts." *Eastwood v. Horse Harbor Found.*, No. 81977-7, slip op. at 4 (Wash. Nov. 4, 2010). However, as we said of the state Court of Appeals in *Eastwood*, the federal district court's "broad reading of this court's jurisprudence on the economic loss rule, while perhaps understandable, is not correct." *Id.* at 7-8. In *Eastwood*, we recognized two perils to treating this doctrine as a bright-line "rule of general application" that holds "any time there is an economic loss, there can never be recovery in tort." *Id.* at 8. "First, it pulls too many types of injuries into its orbit" because the definitions of economic injuries are broad and malleable. *Id.*[1] Second, "[e]conomic losses are sometimes

[1]The concurrence/dissent does not successfully articulate a consistent, logical rule for narrowing the sweep of the definition. First, the concurrence/dissent argues that harm is never an economic loss within the meaning of the economic loss rule unless the plaintiff and the defendant had a contract or unless the parties were contractors on the same construction job. *See* concurrence/dissent at 4, 8. But in *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), an economic loss case, neither condition was present. The defendant was the builder-seller of a condominium complex, and the plaintiff was the homeowners association, which represented many subsequent purchasers who were not in contractual privity with the defendant. *Id.* at 411. The concurrence/dissent has no answer for *Stuart*. Other jurisdictions have also found an economic loss even when the parties were not in contractual privity. *See, e.g.*, *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 413, 573

recoverable in tort, even if they arise from contractual relationships." *Id*. For these reasons, we concluded that "[t]he term 'economic loss rule' has proven to be a misnomer." *Id.*

In a case like this one, where a court applying Washington law is called to "distinguish between claims where a plaintiff is limited to contract remedies and cases where recovery in tort may be available," *id.* at 9, the court's task is not to superficially classify the plaintiff's injury as economic or noneconomic. Rather, the court must apply the principle of Washington law that is best termed the independent duty doctrine. *See id.* at 27. Under this 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." *Id.* at 10. Using "ordinary tort principles," the court

N.W.2d 842 (1998) ("[W]e conclude that the economic loss doctrine precludes a commercial purchaser from recovering in tort from a manufacturer for solely economic losses, regardless of whether privity of contract exists between the parties.").

Second, the concurrence/dissent attempts to recast *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), arguing that "the economic loss rule is implicated when the parties are in a contractual relationship and could or should have negotiated allocation of risks associated with the subject matter of their agreement," concurrence/dissent at 4, and argues that "[t]here is no reasonable basis for thinking that SMS should have or could have protected itself through contractual risk allocation from any alleged breach by LTK Consulting of LTK Consulting's contract with the City," concurrence/dissent at 13. Even by the concurrence/dissent's own standard, its conclusion is incorrect. The subject matter of the contract was the operation of the Seattle Monorail, and surely maintenance issues and the risks of mechanical or electrical failure are associated with that. Further, SMS agreed by contract to obtain fire insurance, and, having obtained the exclusive right to operate the Seattle Monorail, SMS could have negotiated the exclusive right to contract for engineering and other repair services. Cases like this one can be resolved only by analyzing the duties and the risks of harm involved.

decides as a matter of law whether the defendant was under an independent tort duty. *Id.* at 9. In the law of negligence, a duty of care "is defined as 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985) (quoting William L. Prosser, Handbook of the Law of Torts § 53, at 331 (3d ed. 1964)). The duty of care question implicates three main issues--"its existence, its measure, and its scope." Dan B. Dobbs, The Law of Torts § 226, at 578 (2000).[2] So the duty question breaks down into three inquiries: Does an obligation exist? What is the measure of care required? To whom and with respect to what risks is the obligation owed?

To decide if the law imposes a duty of care, and to determine the duty's measure and scope, we weigh "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)). (Hereinafter, we will call these considerations "the duty considerations.") "The concept of duty is a

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[2]See also *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002), where we explained that the issues are not only whether a person "owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed. The answer to the second question defines the class protected by the duty and the answer to the third question defines the standard of care." (Citation omitted.)

reflection of all those considerations of public policy which lead the law to conclude that a 'plaintiff's interests are entitled to legal protection against the defendant's conduct.'" *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (quoting W. Page Keeton, et al., Prosser and Keeton on Torts § 53, at 357 (5th ed. 1984)). Using our judgment, we balance the interests at stake. *See, e.g.*, *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976) (balancing the interests and holding that the defendant owed the plaintiff "a duty to avoid the negligent infliction of mental distress").[3]

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[3]The concurrence/dissent asserts that the independent duty inquiry is "a wholesale rejection of our prior cases" and is "little more than this court's ad hoc determination of whether a duty should lie." Concurrence/dissent at 1. Neither accusation is correct. Our decisions in this case and in *Eastwood* leave intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances. It is the concurrence/dissent that wishes to reject this court's cases. First, the concurrence/dissent suggests that tortfeasors can be automatically absolved of their tort liability when their misconduct breaches both a contract and a tort duty. Concurrence/dissent at 1 n.1. This view conflicts directly with the long standing rule that a contract can limit a party's liability for breaching a tort duty only if the contract includes a conspicuous exculpatory clause that does not violate public policy. *See Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 490, 492, 834 P.2d 6 (1992). Washington law has never permitted a tortfeasor to escape tort liability for wrongful conduct just because a contract exists. "We will not overrule such binding precedent sub silentio." *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999).

Second, the concurrence/dissent argues that a tort remedy is not available when (1) the plaintiff's damages are economic, and (2) the parties are in contractual privity or are contractors on the same construction job. *See* concurrence/dissent at 4, 8. As we established in *Eastwood*, however,

> [e]conomic 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.*

LTK seems to put at issue every aspect of its tort duty--the existence, measure, and scope. LTK argues, "LTK's duty of care was created by its contract with the City, and that contract created no independent duty to avoid SMS' or AFM's economic loss." Resp. Br. of LTK at 29.

A. Does an engineering firm undertaking engineering services assume a tort law duty of reasonable care independent of its contractual obligations?

At issue first is the existence of a duty of care independent of LTK's contract with the City. Viewed within the framework of our duty analysis, the question is

> *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). . . . 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.

Eastwood, slip op. at 8-9 (citation omitted). The concurrence/dissent's formulation of the economic loss rule would implicitly nullify these causes of action.

As discussed fully in *Eastwood*, slip op. at 9-17, the connection between a plaintiff's injury and the defendant's tort duties has always been at the core of our analysis. By focusing the court's attention on this ordinary tort question of whether the defendant was under an independent tort duty, we have simply restated what has always been there. The concurrence/dissent itself cites two foreign cases that recognize the key inquiry is whether the injury flows only from a breach of a contractual obligation, or whether a tort duty was breached simultaneously. *See Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995) (stating that "the economic loss doctrine . . . prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows *only from a contract*" (emphasis added)); *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1271 (M.D. Pa. 1990) (noting that "tort law is not intended to compensate parties for losses suffered as result of a breach of duties assumed *only by agreement*;" "to recover in tort a plaintiff must allege facts showing a breach of some duty imposed *by law*"). For ages, common law courts have defined tort duties, so we do not share the concurrence/dissent's pessimism about the independent duty analysis.

this: Do the duty considerations dictate that engineers who provide services be required by law to use reasonable care? An initial policy consideration is the usefulness of private ordering. We assume private parties can best order their own relationships by contract. The law of contracts is designed to protect contracting parties' expectation interests and to provide incentives for "parties to negotiate toward the risk distribution that is desired or customary." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 827, 881 P.2d 986 (1994). In contrast, "tort law is a superfluous and inapt tool for resolving purely commercial disputes." *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990). If aggrieved parties to a contract could bring tort claims whenever a contract dispute arose, "certainty and predictability in allocating risk would decrease and impede future business activity." *Berschauer/Phillips*, 124 Wn.2d at 826.

In *Berschauer/Phillips*, we considered how this preference for private ordering affects an engineer's obligations under the law of torts. In that case, the general contractor for a school construction project sued three defendants for negligence--the project's architect, structural engineering company, and construction inspector. *Id*. at 819-20. 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.* We held that "the economic loss rule does not allow a general contractor to recover purely economic damages in tort from a design professional." *Id.* at 823. Our overriding concerns were protecting all of the parties' contractual expectancies and giving an incentive to negotiate risk. *Id.* at 826-27. In the context of complex multiparty transactions, at least, the preference for private ordering suggests that an engineer does not operate under extracontractual tort obligations.

But this case reminds us that a fire can ignite as a result of an engineer's work, imperiling people and property. An interest we must consider is the safety of persons and property from physical injury, an interest that the law of torts protects vigorously. *See* Dobbs, *supra*, § 1, at 3 ("Legal rules give the greatest protection to physical security of persons and property."). The record before us does not indicate whether any passengers on the monorail were injured or if the fire caused damage to property beyond the Seattle Monorail. But the parties agree that the fire caused damage to the monorail trains themselves. And, in Washington, it is common knowledge that the monorail trains carry thousands of people every year between Seattle Center and downtown Seattle. A fire on these trains is a severe safety risk, highlighting the interest in safety that is at stake when engineers do their work.

Imposing a duty of care on engineers could be an effective way to guard

against unreasonable curtailments of the safety interest in freedom from physical injuries. Because engineers occupy a position of control, they are in the best position to prevent harm caused by their work. Tort liability would force negligent engineers to internalize the costs of their unreasonable conduct, making them more likely to take due care. Further, engineers have ample training, education, and experience, and can use their professional judgment about the design needs of a particular project. By deterring unreasonable behavior before it occurs and placing responsibility in the hands of the persons who can best mitigate the risks, a duty of reasonable care could reduce the overall social costs.

We recognize that some economic considerations militate in favor of holding that an engineer in LTK's shoes is not under a duty of care. Engineers provide socially beneficial services. If tort claims against them were to be layered on top of the breach of contract suits that they already face, the costs of engineering services would likely increase. Although engineers could probably mitigate their risk exposure with malpractice insurance, they might pass along the increased costs of doing business to their clients. And the liability for some accidents could prove so costly that engineering companies go out of business. Society as a whole could incur more costs and could have fewer engineers willing to take on the risks of liability.

On balance, however, we think engineers who undertake engineering services

in this state are under a duty of reasonable care. The interest in safety is significant. Although *Berschauer/Phillips* makes engineers not liable in tort for some classes of harm, extending that case to all classes of harm and all classes of people would be unjust. Even in a calamity, an innocent party who never had the opportunity to negotiate the risk of harm would be forced to bear the costs of a careless engineer's work.

Although we have not held so specifically until now, we think engineers' common law duty of care has long been acknowledged in this state.[4] For example, in *Seattle Western Industries, Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 10, 750 P.2d 245 (1988), implicitly recognizing the duty exists, we held that the scope of the "engineer's common law duty of care" is not necessarily always limited to the engineer's contractual obligations. The Court of Appeals has explicitly recognized a common law duty of care, holding in *G.W. Construction Corp. v. Professional Service Industries, Inc.*, 70 Wn. App. 360, 366, 853 P.2d 484 (1993), that the defendant engineer performing an inspection under contract had an independent "duty to exercise reasonable engineering skill and judgment." Nationally, it is the same. *See, e.g.*, Jay M. Feinman, Professional Liability to Third Parties § 11.3.1, at

[4]Nothing we say should be understood to mean that every tort duty of care should be reexamined upon a claim that a person has only contractual remedies for an injury. Rather, we inquire into the duty question here because this court has never explicitly held before that such a duty exists.

228 (2000) ("Most courts have extended liability to architects and engineers by applying the ordinary law of negligence."); 4 Stuart M. Speiser et al., The American Law of Torts § 15:117, at 852 (1987) ("It is well settled, in the modern law, that architects or engineers may be subject to liability for property loss or damage resulting from defective designs, specifications, plans, drawings, supervision and administration, and the like.").

We are aware of the economic drawbacks of the dangers of creating "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441 (1931). Still, we think economic concerns about liability run amok are overstated and can be addressed through conventional concepts of the measure and scope of a duty of care.

B. What is the measure of an engineer's duty of care?

A duty of care is necessarily limited to the level of care that is reasonable in the particular circumstances. In these circumstances--an engineer providing professional services--the usual measure of care, ordinary care, is not sensitive enough to the technical aspects of an engineer's professional responsibilities. What is reasonable care should be measured against what a reasonably prudent engineer would do. A higher degree of care, such as utmost care, would make engineers

insurers and expose them to an intolerably high risk of liability. As Professor DeWolf and Mr. Allen note, "an engineer does not and cannot insure or in any sense guarantee a satisfactory result." 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 15.51, at 505 (3d ed. 2006). Requiring utmost care would be unduly burdensome. We therefore hold the measure of reasonable care for an engineer undertaking engineering services is the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances. *Cf.* RCW 7.70.040(1) (defining the measure of care for health care providers).

We now turn to the scope of the duty of care.

C. Does the scope of an engineering firm's duty of care encompass companies in SMS's position and the class of harms like the ones suffered by SMS?

By scope, we mean that a duty of care encompasses classes of harm and classes of persons. *See* Dobbs, *supra*, § 182, at 450 ("[D]uty rules are classically categorical and abstract; they cover a class or category of cases."). A duty's scope involves a question of law. *See, e.g.*, *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 475 n.3, 951 P.2d 749 (1998). This is necessarily a judgment built on the duty considerations, and so the reasons for recognizing that a class of people or risks of harm is within the scope of a duty are often the same reasons for

recognizing a duty of care in the first instance.

1. *Does an engineer's duty of care extend to the class of harm suffered by SMS?*

LTK argues it had no obligation with respect to risks of harm to the business expectancies of third parties. LTK argues that SMS was in a position to negotiate better contract terms with the City, but SMS accepted the risk that the City could hire an engineer whose negligence would cause extensive property damage to the monorail and business losses. LTK suggests that SMS made a deal, and we should hold SMS to its bargain. As LTK has framed it, the issue is whether the duty of care assumed by an engineering firm extends to the business expectancies of a company with a commercial interest in the property on which the engineering firm worked. However, the question here is whether an engineer's duty of care extends to safety risks of physical damage to the property on which the engineer works. We hold it does. As we have already observed, the harm in this case exemplifies the safety-insurance concerns that are at the foundation of tort law. A fire broke out suddenly on the Seattle Monorail's blue train, endangering people and causing extensive physical damage to property. Given the safety interest that justifies imposing a duty of care on engineers, LTK was obligated to act as a reasonably prudent engineer would with respect to safety risks of physical damage.

When a defendant is under a duty of care with respect to certain risks of harm and admits breach, as LTK assumes here, "the connection between the breach and the plaintiff's injury becomes a factual question of proximate cause." *Eastwood*, slip op. at 24. The court decides whether a reasonable juror could conclude that "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." *Id.* at 18. Here, we have held an engineer, such as LTK, had a duty of care with respect to safety risks of physical damage. Because no reasonable jury would find a risk of fire fell outside the scope of LTK's duty of care, proximate causation is not disputable. The simultaneous realization of a risk of harm to SMS's business expectancy is irrelevant. By itself, a breach of LTK's tort duty with respect to safety risks is sufficient to state a claim.[5]

2. *Does an engineer's duty of care extend to the persons who have a property interest to use and occupy the property?*

A duty's scope can be limited to designated classes of persons. *See*, *e.g.*,

[5]LTK challenges our jurisdiction to review whether SMS's losses arose from a tortious risk of harm. LTK says the Ninth Circuit decided that "any loss suffered by SMS was a 'contractually-created' economic loss, not damage to its own property." Resp. Br. of LTK at 9 (quoting *Affiliated FM*, 556 F.3d at 921). Because this was a "ruling not certif[ied] for consideration," LTK believes we may not address AFM's argument that SMS's losses are merely economic. *Id.* (quoting *Affiliated FM*, 556 F.3d at 921); *see also id.* at 30 ("The Ninth Circuit did not raise those issues in its certified question."). LTK is wrong. The Ninth Circuit did not issue a "ruling" on this point; it merely described the ways the losses *could* be characterized. *See Affiliated FM*, 556 F.3d at 921. We have jurisdiction to address the issue de novo because the Ninth Circuit has asked us whether SMS has a cause of action in tort, a purely state law question, and we cannot answer the question unless we inquire into the nature of the losses.

ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 832, 959 P.2d 651 (1998). The issue is whether a duty of care respecting damage to property extends only to the persons who hold an ownership interest in that property.

LTK argues that regardless of whether SMS's property interest can be classified as a lease, a license, or some other property interest, only the owner of property can sue in tort for damage to the property. LTK's understanding of the relationship between ownership and the scope of tort duties would lead to absurd results. SMS would not be able to sue for trespass if someone occupied the monorail stations or trains without SMS's permission. SMS would not be able to sue for damages if an arsonist intentionally set the trains or stations afire. SMS would not be able to recover in a negligence suit if a truck driver on the Seattle Center grounds negligently fell asleep, lost control, and rammed into the monorail station and trains parked there. In these examples, under LTK's proposed rule, only the City, as owner, would be protected by tort law.

We reject LTK's argument and hold that the scope of an engineer's duty of care extends to the persons who hold a legally protected interest in the damaged property. "'Property' is made up of an infinite collection of 'interests' that may be held, separated, divided, transferred, restricted--combined and recombined like jack-straws." 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real

Estate: Property Law § 1.1, at 3 (2d ed. 2004). Accordingly, more than one person can "own" or "hold" an interest in property. *See id.* The law protects a wide range of property interests from harm. A license, a privilege to use property, is entitled to legal protection against interference by a third person if the license is not terminable at will or grants possession to the exclusion of the third person. Restatement of Property § 521(2)-(3) (1944).[6] An easement is a right to enter and use property for some specified purpose. 17 Stoebuck & Weaver, *supra*, § 2.1, at 80. A cousin of easements, a profit a prendré, "is the right to sever and to remove some substance from the land." *Id*. "Profits are typically to remove minerals, gravel, or timber." *Id*. Such nonpossessory interests are entitled to legal protection against "actual or threatened harm." 2 American Law of Property § 8.106, at 312 (A. James Casner, ed. 1952). The holder of a nonpossessory interest does not have to hold title to the servient estate in order to sue for damage to the nonpossessory interest. *See* 28A C.J.S. Easements § 243, at 466 (2008) ("The owner of an easement whose right has been invaded and injured or destroyed has a right of action therefor."). As this discussion shows, property interests falling well short of a full fee simple estate are worthy of legal protection.

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[6] LTK urges us to reject the *Restatement*'s view, but we have already adopted it. *See McInnes v. Kennell*, 47 Wn.2d 29, 36, 286 P.2d 713 (1955). We see no reason to abandon it now, lest a license holder who meets the requirements of § 521(2)-(3) be left without a remedy should a third party wrongfully destroy the value of the license.

In this case, we do not need to label SMS's property interest as a lease, a license, a profit, or an easement. It is plain that the City granted to SMS "the concession right and privilege to maintain and exclusively operate the Monorail System including the facilities, personal property and equipment, together with the *right to use and occupy* the areas, described in this section." ER 030, Ex. 1, § III.A (emphasis added). These are property interests in using and possessing the Seattle Monorail, and thus SMS was within the scope of LTK's duty of care.[7] To be sure, the City reserved "access to the Monorail System at all reasonable times to inspect the same and to make any repair, improvement, alteration or addition thereto of any property owned by or under control of the City." ER 095, Ex. 1, § XIX.A. But a "landlord's retention of the right to enter, inspect and repair is not inconsistent with a full surrender of possession to the tenant." 49 Am. Jur. 2d Landlord and Tenant § 386 (2006).

Still, LTK asks us to view the agreement through the prism of contract. LTK argues that "SMS' obligation to pay some of the repair cost . . . was a commercial

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[7]The property interest created by an instrument poses a mixed question of law and fact. The parties' intent is a question of fact, and the legal effect of their intent is a question of law. *See, e.g.*, *Veach v. Culp*, 92 Wn.2d 570, 599 P.2d 526 (1979) (railroad right-of-way deed); *Barnett v. Lincoln*, 162 Wash. 613, 617, 299 P. 392 (1931) (lease). When reasonable minds could reach but one conclusion on the factual issue, the court may decide the issue as a matter of law. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973-74, 948 P.2d 1264 (1997). We do so here.

obligation it undertook by contract, not the reflection of any ownership interest in the damaged property." Resp. Br. of LTK at 17. In a narrow sense, this is true. In Washington, commercial leases usually contain a "contractual duty for either the landlord or tenant to make repairs or apportioning repair duties between the parties." 17 Stoebuck & Weaver, *supra*, § 6.39, at 367.

But SMS's property interest derives not from the repair provisions, but from section III.A of the agreement, which granted the "*right and privilege to maintain and exclusively* operate the Monorail System including the facilities, personal property and equipment, together with the *right to use and occupy* the areas, described in this section." ER 030, Ex. 1, § III.A (emphasis added). That the City conveyed these enumerated property interests in a contract is unexceptional, because almost all property interests must be conveyed in writing. Oftentimes, these writings include contractual obligations that define the relationship between the parties with an interest in the property and allocate responsibilities among them for caring for the property. *See*, *e.g.*, 17 Stoebuck & Weaver, *supra*, § 6.4, at 316 ("[T]he act of leasing land is a conveyance, a transfer of an estate, and the various conventional undertakings that are practically always made, including the covenant to pay rent, are contractual promises."). Despite LTK's attempts to portray SMS's rights differently, SMS is not a simple third-party contractor hired by the City to

maintain the monorail whenever necessary.

Because LTK's duty of care extended to SMS as holder of the property interests in using and possessing the Seattle Monorail, AFM properly seeks damages for the harm to property interests of SMS. Standing in SMS's shoes, AFM may claim the damages necessary to return SMS as nearly as possible to the position it would have been in, and any claimed damages for SMS's lost profits might be recoverable as damages consequential to LTK's negligence. *See* 16 DeWolf & Allen, *supra*, §§ 5.3-5.4, 5.9, at 174-77, 186.[8]

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[8]The scope of LTK's duty of care is an issue certified to us, contrary to the concurrence/dissent's argument. Concurrence/dissent at 13-14 n.5. Further, we must inquire into the duty's scope, rather than simply hold that an independent duty exists, as the concurrence by Justice Chambers prefers. *See* concurrence at 3-4. The Ninth Circuit broadly phrased its certified question, and the Ninth Circuit indicated that the resolution of LTK's motion for summary judgment turns entirely on our answer to the question whether "a party with a contractual right to operate commercially and extensively on another's property may bring a suit in tort against a third party for damage to that property." *Affiliated FM*, 556 F.3d at 922. As the Ninth Circuit recognized, "this important question of Washington tort law is not entirely settled and involves matters of policy best left to state resolution." *Id.* This court, therefore, must address the scope of LTK's duty of care, and not punt the issue back to the federal courts.

III. CONCLUSION

Applying the independent duty doctrine here, we hold that SMS may sue LTK for negligence. LTK, by undertaking engineering services, assumed a duty of reasonable care. This obligation required LTK to use reasonable care, as we have defined it, with respect to risks of physical damage to the monorail. SMS enjoyed legally protected interests in the monorail, and LTK's duty encompassed these interests. By subrogation to SMS's rights, AFM may pursue a claim for negligence against LTK. Consistent with this opinion, the answer to the Ninth Circuit's certified question is yes.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Justice Susan Owens