No. 83690-6

MADSEN, C.J. (concurring)—We took review of this case to address the issue whether the plaintiff is restricted to contract remedies or may also assert tort claims. I agree with the majority that we need not reach this issue because each of the tort claims asserted by Elcon Construction, Inc., fails for want of sufficient evidence of an essential element of the claim. This being the case, the majority should refrain from any discussion of the so-called "independent duty rule" because it has no bearing on the disposition of this case. We should, in this case, follow the same principle we have often applied, that is, we should decline to address issues where it is unnecessary to do so. *See e.g.*, *Wash. Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 297 n.20, 174 P.3d 1142 (2007); *Alejandre v. Bull*, 159 Wn.2d 674, 690 n.6, 153 P.3d 864 (2007); *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 569, 106 P.3d 212 (2005).

The wisdom of doing so is demonstrated by the majority's mistaken statement that the "independent duty rule" was formerly known as the "economic loss rule," as if the two are and have been the same. Majority at 1. This is not the case, and it will only add

to the confusion engendered by this new rule. The economic loss rule is unlike the "independent duty rule" that has been described in recent opinions. *E.g.*, *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010) (plurality); *Eastwood v. Horse Harbor Found., Inc*., 170 Wn.2d 380, 241 P.3d 1256 (2010) (plurality). The economic loss rule defaults to *contract* remedies where both are available. The "independent duty rule" defaults to *tort* remedies.

The economic loss rule rests on the principle that contracting parties should be limited to their contract remedies when loss potentially implicates both tort and contract relief. It is a "device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract. . . . '[E]conomic loss describes those damages falling on the contract side of "the line between tort and contract".'" *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986 (1994) (quoting *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 861 n.10, 774 P.2d 1199, 779 P.2d 697 (1989) (quoting *Pa. Glass Sand Corp. v. Caterpillar Tractor Co*., 652 F.2d 1165, 1173 (3d Cir. 1981))).

Thus, the economic loss rule presumes that both contract and tort remedies may be available, and then the rule is used to help determine whether the loss is the type that is remedial under the terms of the parties' written agreement.

However, according to the majority's dicta in this case (it has nothing to do with the disposition of the case), the policy considerations used to determine whether an independent tort duty exists are considerations of common sense, justice, policy, and

precedent. Majority at 8; *see Affiliated FM*, 170 Wn.2d at 449-50 (plurality) (also including "logic"); *Eastwood*, 170 Wn.2d at 389 (plurality) (also including "logic").[1] These are exactly the same considerations that are *always* used to determine whether a tort duty is owed or liability attaches (the court has long recognized the interconnectedness of legal causation and duty). *See*, *e.g.*, *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 349, 197 P.3d 127 (2008) (whether a duty of ordinary care to warn of hazards involved in use of a manufacturer's product "depends on mixed considerations of logic, common sense, justice, policy, and precedent"); *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 66-67, 124 P.3d 283 (2005) (where negligence claim is concerned, "existence of a legal duty is a question of law and '"depends on mixed considerations of 'logic, common sense, justice, policy, and precedent'"'" (quoting *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994) (quoting *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985))))); *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004) (same); *Halverson v. Skagit County*, 139 Wn.2d 1, 8, 983 P.2d 643 (1999) (whether legal liability attaches to acts is a policy question for the court and is determined based upon "'mixed considerations of logic, common sense, justice, policy, and precedent'" (quoting *Phillips v. King County*, 136 Wn.2d 946, 965, 968 P.2d 871 (1998))); *Hartley*, 103 Wn.2d at 779-80 (same, and noting that "the question of

[1] The majority cites to a concurrence for its description of the "independent duty rule." Majority at 8-9. If the rule did not garner a majority of the court in prior decisions of this court, those decisions have no precedential value. If it did, then more is needed in the way of citation to show that the rule represents the conclusion of a majority of this court.

'whether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists'" (quoting *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 476, 656 P.2d 483 (1983))).

The analysis to determine whether the independent duty exists is no different from the analysis used in any case to decide whether a tort duty exists. There is nothing that analytically differentiates the situation from any other case where a contracting party argues that a tort claim may be brought. Therefore, although the "independent duty rule" is described as a tool used to preserve the boundary between torts and contract, majority at 8, it does no such thing. Nothing about the rule preserves the value of agreement to the remedies that will exist if the contract is breached.

Rather, this rule appears to mean that if a tort duty is cognizable in the circumstances, the tort claim will be allowed. *See id*. The "independent duty" theory is not an effective tool to determine whether a party will be restricted to agreed-upon contract remedies in the event both contract and tort remedies are available because under the "independent duty rule" once a tort duty is recognized, the party can assert the tort claim. Indeed, the "independent duty rule" does not ask what limitations on remedy are imposed or contemplated by the contract.

All that is required for a contracting party to completely bypass the contract remedies for which the parties expressly bargained is that the court acknowledge that a tort claim in fact exists. Since the whole point of the exercise, ostensibly, is to provide a framework for deciding when a party may assert a tort claim despite existence of contract

remedies, the analysis simply ends with the recognition that the tort remedies potentially exist.

Unlike the economic loss rule, which is designed to determine when a party should be held to agreed-upon remedies, the "independent duty rule" is not defined in a way that provides an effective tool for this determination. I continue to believe that the new "independent duty rule" is not reasonably grounded or defined. *See Affiliated FM*, 170 Wn.2d at 463-75) (Madsen, C.J., concurring/dissenting). Rather than attempting to explain this new rule in this case, where it unquestionably does not apply, I would wait for a case that actually presents the issue. Perhaps when this court applies the "independent duty rule" it will make sense. In the abstract it does not.

I am concerned, too, that the majority refers to the decisions of the trial court and the Court of Appeals as if they had employed the "independent duty rule." Both of the courts' rulings predate the unanticipated appearance of the "independent duty rule," and these courts actually decided this case under the economic loss rule. This blurring of historical fact is apt to add to the confusion about the new rule.

In conclusion, although I agree with the majority that the tort claims would fail in this case in any event, I believe it is a mistake to discuss the "independent duty rule." I concur in the result.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles K. Wiggins