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This article provides an overview of the impact of the recently renamed independent duty doctrine for allocating risk in real estate transactions through the use of standardized forms. In Part I, the roles a real estate broker plays in a transfer of property are explained. In Part II, the interplay between a fraud claim and negligent misrepresentation claim and the policy behind the negligent misrepresentation tort are explored. Next, Part III lays out the statutory duties a broker owes to all parties in a real estate transaction under the Revised Code of Washington (“RCW”) Chapter 18.86. In Part IV, the judicial policy of the economic loss rule and independent duty doctrine in the context of real estate transactions are defended, particularly using the Supreme Court of Washington’s evolution of the doctrine from the application in *Alejandre v. Bull* to the possible confusion created in the *Jackowski v. Borchelt* decision. Finally, Part V reaches a solution to allocating risk with the independent duty doctrine using Northwest Multiple Listing Service (“NWMLS”) Forms 17 and 21 and RCW 18.86.030(2).

I. Real Estate Broker’s Role in the Transfer of Property

A real estate broker is an agent that facilitates the transfer of real property for his or her principal. A broker can represent the buyer or seller, and in Washington dual agency (representation of both the buyer and seller) is permitted. In Washington, the services provided by a broker include “[n]egotiating or offering to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate” and “[a]dvising, counseling, or consulting buyers, sellers, landlords, or tenants in connection with a real estate transaction.” In the usual transaction, the broker represents the seller in order “to find a buyer who is ready, willing, and financially able to purchase the land on terms acceptable to the seller.” Yet no matter what the service offered, “[a] broker must use reasonable professional skill in handling those parts of a real estate transaction that he undertakes to handle.”
In the last half-century, courts have increasingly been shying away from the general policy of *caveat emptor* (Latin for “let the buyer beware”) in real estate transactions and judicially evolving tort theories that can be used to impose liability on real estate brokers. However under RCW Chapter 18.86 and the NWMLS Forms, it is possible to allocate some risk via contract. Consequently, contractually limiting a broker’s liability in the NWMLS Form 17 Seller’s Disclosure Statement and the NWMLS Form 21 Residential Purchase and Sale Agreement (“PSA”) is key to defending real estate brokers (and sellers alike) in litigation.

II. Common Law Duties Owed by a Real Estate Broker

In order to understand how the independent duty doctrine may be used to bar a negligent misrepresentation claim against a broker, the intricacies of the common law duties must be investigated. In addition to statutory duties under RCW Chapter 18.86 (discussed fully below), a real estate broker owes duties under the common law. A broker generally has a duty to avoid fraudulent conduct or misrepresentation to all parties involved in the transaction. Further, in Washington “a broker may be liable to the buyer for negligent misrepresentation that does not amount to fraud.” Although negligent misrepresentation is an extension of the fraud tort, negligent misrepresentation can be allocated under the independent duty doctrine while fraud is considered an exception to the rule.

a. Fraud

A broker may be liable for traditional fraud based on two routes: (1) the broker makes an affirmative false representation, or (2) the broker breached an affirmative duty to disclose a material fact. Under the affirmative misrepresentation route, the plaintiff must establish the following elements:

1. representation of an existing fact;
2. materiality;
3. falsity;
4. the speaker's knowledge of its falsity;
5. intent of the speaker that it should be acted upon by
the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.\(^{20}\)

Importantly, the plaintiff’s right to rely upon the truth of the representation must be reasonable.\(^{21}\)

Under the fraud by silence route, “[i]n the sale of real estate, a broker or seller has a duty to disclose all material facts not reasonable ascertainable to the buyer. Failure to disclose a material fact, when there is a duty to disclose is fraudulent.”\(^{22}\) Furthermore, “[o]nce the broker speaks, he or she has the duty to speak the whole truth and not make the statements untruthful and misleading by partial suppression or concealment.”\(^{23}\)

In addition to the intentional tort of fraud, Washington recognizes a common law spin-off tort that replaces the intent requirement for fraud with the negligence standard found in most professional malpractice causes of action.

b. Negligent Misrepresentation

In Washington, if a broker “negligently conveys false information about real estate to a buyer, the broker is liable therefor.”\(^{24}\) Since “a real estate broker must act as a professional,” he or she “will be held to a standard of reasonable care.”\(^{25}\) Because negligent misrepresentation does not have the scienter standard of fraud, it is akin to broker malpractice and negligence.\(^{26}\)

_Bloor_ is an important decision explaining the parameters of a negligent misrepresentation claim involving real estate in Washington.\(^{27}\) In _Bloor_, the buyers of a house sued the sellers and broker for failing to disclose that the property had previously been used as a methamphetamine lab.\(^{28}\) In the sellers’ Form 17 disclosure statement they “represented that the property had never been used as an illegal drug manufacturing site.”\(^{29}\) Although the dual-agency broker went over the disclosure statement with the buyers, “he did not disclose that the drug task force had discovered a marijuana grow operation or methamphetamine lab on the property.”\(^{30}\)
The *Bloor* Court stated that the elements for negligent misrepresentation are:

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 plaintiff's reliance was reasonable, and
6. the false information proximately caused the plaintiff damages.

Against the broker, the Court analyzed the negligent misrepresentation claim similar to the claim for a breach of the statutory duty under RCW 18.86.030(1)(d) to “disclose ‘all existing material facts known by the [broker] and not apparent or readily ascertainable to a party.’” However, on this issue the Court concluded that “because substantial evidence supports the trial court’s finding that [the broker] knew of the illegal drug manufacturing on the property, and [the broker] does not claim that he disclosed the drug problem to the [sellers], [the broker’s] argument fails.”

In addition to the duties owed by a broker under common law, the Washington Legislature has codified certain common law duties of brokers and superseded others with RCW Chapter 18.86.

### III. Statutory Duties Owed Under RCW Chapter 18.86

In 1996, the Legislature defined the intricacies of “Real Estate Brokerage Relationships” in RCW Chapter 18.86. Chapter 18.86 regulates the relationship of brokers to all parties, including the relationship a broker owes to his or her client. Although most of the codified duties in Chapter 18.86 cannot be waived, RCW 18.86.030(2) clarifies that a broker does not owe an independent duty to investigate matters the broker has not agreed to investigate. This provision allows the risk of a negligent misrepresentation claim against a broker to be contractually allotted to the buyer.
a. Duties Owed to All Parties

Under RCW 18.86.030 a broker “owes to all parties to whom the broker renders real estate brokerage services the following duties which may not be waived:”

(a) To exercise reasonable skill and care;
(b) To deal honestly and in good faith;
(c) To present all written offers, written notices and other written communications to and from either party in a timely manner . . . ;
(d) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party . . . ;
(e) To account in a timely manner for all money and property received from or on behalf of either party;
(f) To provide a pamphlet on the law of real estate agency . . . ; [and]
(g) To disclose in writing to all parties to whom the broker renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the broker, whether the broker represents the buyer, the seller, both parties, or neither party. . . .

Importantly, RCW 18.86.030(2) provides that unless agreed to by the broker, he or she owes no duty: (1) “to conduct an independent inspection of the property,” (2) “to conduct an independent investigation of either party’s financial condition,” and (3) “to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.” Furthermore, the duty to disclose existing material facts known to the broker under RCW 18.86.030(1)(d) does not include a “duty to investigate matters that the broker has not agreed to investigate.” Therefore, “[a] statutory claim for breach of a real estate agent’s duties exist when the agent does not disclose all material facts known to the agent that are not apparent or readily ascertainable.”

The limitations of broker duties under RCW 18.86.030(2) is the Legislature setting the standard of care of a real estate broker. Since the broker is not an insurance policy for unknown defects in the property, he or she explicitly does not have a duty to conduct an independent investigation and inspection. Consequently, ignoring RCW 18.86.030(2)
violates core separation of power principals by discounting the Legislature’s policy promulgation.39-4

b. Statutory Fiduciary Duties Owed to Clients

In addition to the duties owed under RCW 18.86.030, Chapter 18.86 contains further duties the broker owes to his or her client specifically. Although the sections relating to the buyer’s agent and the seller’s agent duties are worded slightly differently, the broker owes his or her client the following duties: (1) “[t]o be loyal to the [client] by taking no action that is adverse or detrimental to the [client’s] interest in a transaction,” (2) “[t]o timely disclose . . . any conflicts of interest,” (3) “[t]o advise the [client] to seek expert advice on matters relating to the transaction that are beyond the agent’s expertise,” (4) “[n]ot to disclose any confidential information from or about the [client],” and (5) “to make a good faith and continuous effort” to complete the job the client hired the broker for, whether it is to find a buyer for the seller or to find the buyer a suitable property.

The duties a broker owes to a client under Chapter 18.86 have been classified by the Supreme Court of Washington as “statutory fiduciary duties.” According to the Supreme Court of Washington, “[i]n adopting this statutory scheme, the legislature changed some of the common law fiduciary duties of real estate licensees and codified other preexisting duties.” Further, RCW 18.86.110 states “[t]his chapter supersedes the fiduciary duties of an agent to a principal under the common law.”

Certain specified statutory fiduciary duties owed to clients under RCW Chapter 18.86 can be waived, although not in the context of barring a negligent misrepresentation suit. However, understanding the statutory fiduciary duties provides context for why a negligent misrepresentation suit from a non-client should be barred by the independent duty doctrine. As
the broker is not an agent to the non-client, the “duty of utmost good faith, trust, confidence, and
candor owed by a fiduciary” is not present.\textsuperscript{46}

IV. The Independent Duty Doctrine

Prior to Jackowski in 2010, the economic loss rule was a tool for defending brokers from
“claims for tort damages [such as a negligent misrepresentation claim] that arise from a
transaction in which the risk of loss has already been allocated by a contract between the
parties.”\textsuperscript{47}

In 1994, the Supreme Court of Washington stated “[t]he economic loss rule marks the
fundamental boundary between the law of contracts, which is designed to enforce expectations
created by agreement, and the law of torts, which is designed to protect citizens and their
property by imposing a duty of reasonable care on others.”\textsuperscript{48} The Court stated that the purpose of
the economic loss rule is to “prevent disproportionate liability and allow parties to allocate risk
by contract.”\textsuperscript{49} Further, “[i]f tort and contract remedies were allowed to overlap, certainty and
predictability in allocating risk would decrease and impede future business activity.”\textsuperscript{50}
Specifically, the economic loss rule “preserve[s] the incentive to adequately self-protect during
the bargaining process,” otherwise “a party could bring a cause of action in tort to recover
benefits they were unable to obtain in contractual negotiations.”\textsuperscript{51} Consequently, “the expansion
of duty in tort to include economic interests would expose defendants ‘to a liability in an
indeterminate amount for an indeterminate time to an indeterminate class.’”\textsuperscript{52}

In 2010, the Supreme Court of Washington renamed the economic loss rule the
independent duty doctrine and shifted the focus of the doctrine from the type of damages the
plaintiff is seeking to whether the defendant owes the plaintiff “an independent tort duty.”\textsuperscript{53} The
\textit{Eastwood} Court held that “[t]he availability of a tort remedy depends on the existence of a tort
duty arising independently of a contract’s privately negotiated terms, not on whether an injury can be labeled an economic loss.”

Further:

The term “economic loss rule” has proved to be a misnomer. It gives the impression that this is a rule of general application and any time there is an economic loss, there can never be recovery in tort. This impression is too broad for two reasons. First, it pulls too many types of injuries into its orbit. When a contractual relationship exists between the parties, any harm arising from that relationship can be deemed an economic loss for which the law of tort never provides a remedy. Further, any injury that can be monetized can be thought of as an economic loss presumptively excludable under the rule . . .

Yet since its inception, the independent duty doctrine has been the subject of confusion and criticized because “if finding a tort duty is equivalent to finding an ‘independent duty’ precluding application of the economic loss rule, one can legitimately ask what is left of the economic loss rule.”

Prior to Jackowski, the Alejandre decision allowed the risk underlying a negligent misrepresentation claim to be allocated by contract under the economic loss rule, even though such risk was not specifically addressed in the contract. However, Jackowski applied the new independent duty doctrine in a suit against a broker and implied that the risk of negligent misrepresentation could not be allocated in the standard real estate transaction forms.

a. The Economic Loss Rule in Alejandre v. Bull

The seminal Washington case discussing the economic loss rule in the context of real estate transactions is Alejandre v. Bull. The buyer in Alejandre brought a negligent misrepresentation claim against the seller, alleging failure to disclose problems with the property’s septic system even though the risk had already been allocated by contract. The earnest money agreement for the transaction contained a provision that the “sale was contingent on an inspection of the septic system” to the satisfaction of the buyer. Furthermore, the seller’s
disclosure form stated that she “was aware of changes or repairs to the system,” but denied any major defects.\textsuperscript{60}

The \textit{Alejandre} Court held that “[u]nder Washington law, the defective septic system at the heart of plaintiffs’ claim is an economic loss within the scope of the parties’ contract, and the economic loss rule precludes any recovery under a negligent misrepresentation theory.”\textsuperscript{61} Explaining the economic loss rule, the Court stated:

\begin{quote}
The economic loss rule applies to hold parties to their contract remedies when a 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.”\textsuperscript{62}
\end{quote}

Consequently, “[t]he economic loss rule maintains the ‘fundamental boundaries of tort and contract law’” by “‘ensur[ing] that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract.’”\textsuperscript{63} Therefore, “[i]f the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.”\textsuperscript{64}

Based on the correct application of the economic loss rule the negligent misrepresentation claim was dismissed as “the parties’ relationship is governed by contract and the loss claimed is an economic loss.”\textsuperscript{65} Furthermore, the Court strengthened the rule by stating “the economic loss rule applies regardless of whether the specific risk of loss at issue was expressly allocated in the parties' contract.”\textsuperscript{66} The risk does not have to be expressly allocated because the risk allocation “can occur directly or indirectly,” such as “a lower price obtained by the buyer in exchange for the risk falling on the buyer.”\textsuperscript{67}

Justice Chambers concurred in \textit{Alejandre}, providing further insight into the economic loss rule. His concurrence reasoned that “the economic loss rule is a response to the risk that the tort remedies available[,] if applied in contract law, could gut it.”\textsuperscript{68} Further, the economic loss
rule “prevents one party to a contract from rewriting the damage provisions after a breach by styling the case in tort.”69 However, the concurrence recognized trouble on the horizon by stating “[t]he economic loss rule is a misnomer, and the majority mistakes the name of the doctrine for its function.”70 Rather, Justice Chambers “would approach the economic loss rule in light of what it is: a tool we use to ensure that tort is tort, contract is contract, and that each comes with its own remedies.”71

b. The Independent Duty Doctrine in Jackowski v. Borchelt

Five years after Alejandre, the Supreme Court of Washington severely weakened the real estate application of the economic loss rule (then renamed the independent duty doctrine) in Jackowski. Prior to Jackowski, the Supreme Court of Washington morphed the economic loss rule into the independent duty doctrine where “[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.”72 In determining whether an independent duty arises separate from a contract under the new rule, a court is to “consider logic, common sense, justice, policy and precedent.”73 However, the new independent duty doctrine is “‘not a rule at all; rather it is an analytical tool used by courts to decide whether there is an independent duty cognizable in tort in the first instance.’”74

In the context of allocating risk in real estate contracts, the Jackowski Court concluded that a negligent misrepresentation claim is not barred by the independent duty doctrine, “but only to the extent the duty to not commit negligent misrepresentation is independent of the contract.”75 However, since RCW 18.86.030(2) expressly allows a broker to disclaim a duty to conduct an independent inspection, investigation, and verification, such duties should never be independent of the contract if proper procedure is followed.
In Jackowski, “[a]fter a landslide damaged their home, the homeowners sued the sellers of the home . . . for fraud, fraudulent concealment, negligent misrepresentation, and breach of contract.” The buyers also sued their brokers and the seller’s brokers for similar claims and breaches of statutory duties under RCW Chapter 18.86. The fraud and negligent misrepresentation claims against the brokers “related to the [failure to disclose the] property being in a landslide hazard area.” Importantly, the amended Form 17 disclosure statement “indicated that the property was located within a landslide hazard area.” Furthermore, the PSA provided the buyers with an option to inspect the property and “[a]lthough the Jackowskis obtained a standard home inspection on [their broker’s] advice, they did not conduct an inspection of soil stability prior to closing.” Although the Court waited to rule on the case until after its decision in Eastwood “recast the economic loss rule as the independent duty doctrine,” the trial court “dismissed the Jackowskis’ negligent misrepresentation claims, applying the economic loss rule set forth in Alejandre.”

As stated above, 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.” Regarding the buyer’s own brokers, it was an easy call that “an independent duty based in statutory law” existed as RCW 18.86.050(1)(c) “requires a buyer’s agent to ‘advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent’s expertise.’” Consequently, the buyer’s brokers violated an independent duty when they “breached RCW 18.86.050(1)(c) by failing to advise the Jackowskis to seek the advice of a geotechnical expert” about the possible landslide danger.

Although the brokers argued that the PSA allocated the risk of negligent misrepresentation, the Jackowski Court refused to apply the independent duty doctrine simply
because the brokers “are not parties to the contract.” 86 Further, in concluding the duties under RCW Chapter 18.86 are clearly “independent of the bargained-for subject matter of the PSA,” 87 Jackowski was incorrect in stating that the independent duty doctrine does not preclude a negligent misrepresentation claim “to the extent the duty to not commit negligent misrepresentation is independent of the contract.” 88

First, as creating a “duty to not commit negligent misrepresentation” in a contract does nothing; it is unnecessary, pointless, and superfluous to put such a provision in a contract. Consequently, the language that a negligent misrepresentation is not barred to the extent “the duty to not commit negligent misrepresentation is independent of the contract” is confusing. Making sense of this language, the Jackowski Court may have been alluding to limiting duties under RCW 18.86.030(2). As discussed above, RCW 18.86.030(2) states “a broker owes no duty to conduct an independent inspection of the property . . . and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.” 89

Second, Jackowski can be distinguished based on the broker owing a statutory fiduciary duty under RCW Chapter 18.86 to advise the client to seek an expert. Had the independent statutory duty not been implicated, RCW 18.86.030(2) should have barred the independent tort duty to not commit negligent misrepresentation in Jackowski.

Third, the Jackowski decision failed to acknowledge that not allowing a negligent misrepresentation claim to be allocated in the standard real estate forms exposes a broker “‘to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.’” 90 The real estate broker would in effect serve as an insurance policy for any type of misstatement by any party involved in the transaction. 91 A broker would be a guarantor of any information
exchanged between the parties, discouraging the broker from facilitating information and “imped[ing] future business activity.”92 Certainty and predictability in real estate transactions would be lacking. Most importantly, liability for a negligent misrepresentation claim when the risk has been allocated under RCW Chapter 18.86 contradicts the Washington Legislature’s promulgated duties that do not make a broker a property inspector.

Fourth, the fact that a broker is not technically a party to the PSA should not prevent the independent duty doctrine from barring a negligent misrepresentation claim against the broker.93 Whether the broker is in privity under the contract or a third-party beneficiary does not matter based on any tort liability being indirectly allocated through “a lower price obtained by the buyer in exchange for the risk falling on the buyer.”94 Furthermore, even if the broker is not technically a party to the PSA, the PSA is also just one document in the overall contractual scheme, including an agreement between the broker and client, necessary for a real estate transaction to occur.95

V. Contractually Allocating Risk in Forms Associated with Real Estate Transactions

Once Jackowski can be interpreted as being either distinguishable or misapplying the independent duty doctrine in the context of a negligent misrepresentation suit against a broker, RCW Chapter 18.86 allows the risk to be allocated. The stock language of the Seller’s Disclosure Statement (Form 17) and the PSA (Form 21) invoke the waiver of a broker’s independent duty to investigate or inspect under RCW 18.86.030(2) and should bar a negligent misrepresentation claim, regardless of how Jackowski is interpreted.96

Form 17 explicitly states “BUYER HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS DISCLOSURE STATEMENT AND ACKNOWLEDGES THAT THE DISCLOSURES MADE HEREIN ARE THOSE OF THE SELLER ONLY, AND NOT OF
ANY REAL ESTATE LICENSEE OR OTHER PARTY." Similarly, provisions of Form 21 state:

Buyer and Seller agree, that except as provided in this Agreement, all representations and information regarding the Property and the transaction are solely from the Seller or Buyer, and not from any Broker. The parties acknowledged that the Brokers are not responsible for assuring that the parties perform their obligations under this Agreement and that none of the Brokers has agreed to independently investigate or confirm any matter related to this transaction except as stated in this Agreement, or in a separate writing signed by such Broker. . . . Buyer is urged to use due diligence to inspect the Property to Buyer’s satisfaction and to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the Property as there may be defects that may only be revealed by careful inspection.

Since a negligent misrepresentation is premised on what a broker knows, or reasonably should know, these provisions clearly denounce the assumption of an independent duty on behalf of the broker to investigate and inspect the property like some sort of detective.

Although the independent duty doctrine should prevent a negligent misrepresentation against a broker, a properly filled-out Form 17 destroys the reasonable reliance requirement for either a fraud or negligent misrepresentation claim anyways. This balances the judicial policies of caveat emptor with protection of wronged purchasers of real estate. Furthermore, “even when a form 17 contains an error, a buyer's reliance may be unreasonable where the buyer is put on inquiry notice by facts inconsistent with the form 17 disclosures.”

VI. Conclusion

Despite Jackowski rattling the jurisdictional cage of the independent duty doctrine and leaving tort and real estate attorneys alike scratching their heads, the risk of a negligent misrepresentation lawsuit is still allocable via contract. Allocation is clear if the proper steps of disclaiming an independent duty to inspect and investigate through NWMLS Forms 17 and 21 are followed. Since RCW 18.86.030 prevents a broker from assuming independent duties to
inspect, investigate, and verify “[u]nless agreed in writing,”"\(^{103}\) under Jackowski there should not be “‘an independent duty cognizable in tort in the first instance.’”\(^{104}\)

Although the focus of the independent duty doctrine morphed from the damages sought by the plaintiff to the duty violated by the defendant, the policy behind the doctrine remains. The independent duty doctrine still seeks to “prevent disproportionate liability and allow parties to allocate risk by contract.”\(^{105}\) This furthers a judicial policy of “certainty and predictability,” which in turn does not “impede future business activity.”\(^{106}\) Now the doctrine depends on “logic, common sense, justice, policy and precedent.”\(^{107}\) Even so, “the risk that the tort remedies available[,] if applied in contract law, could gut it” is still present.\(^{108}\)

The policy fits squarely into the context of real estate transactions. Based on economic reality and the bargaining process in the typical real estate transaction, the independent duty doctrine should recognize that risk in a real estate transaction can be indirectly allocated by “a lower price obtained by the buyer in exchange for the risk falling on the buyer.”\(^{109}\) Furthermore, RCW 18.86.030(2) demonstrates the intent of the Washington Legislature to not make a real estate broker a property detective and go-to insurance policy for anything that goes wrong in a real estate transaction.\(^{110}\) In order to “prevent[] one party to a contract from rewriting the damage provisions after a breach by styling the case in tort,” the independent duty doctrine (especially in the context of a negligent misrepresentation claim against a real estate broker) should be used with caution.\(^{111}\)

Although Jackowski was not clear about when “the duty to not commit negligent misrepresentation is independent of the contract,” NWMLS Forms 17 and 21 (and their permissible use of RCW 18.86.030(2)) disavow an independent duty and allocate the risk of a broker’s lack of independent investigation and verification to the buyer.\(^{112}\)
See Eastwood v. Horse Harbor Found., Inc., 241 P.3d 1256, 1262 (Wash. 2010) (Fairhurst, J., plurality opinion) (“An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.”).

See discussion infra Part I.

See discussion infra Part II.

See discussion infra Part III.

153 P.3d 864 (Wash. 2007).

278 P.3d 1100 (Wash. 2012).

See discussion infra Part IV.

See discussion infra Part V; see also Wash. Rev. Code § 18.86.030(2) (2013) (“Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.”).

William B. Stoebuck & John M. Weaver, Washington Practice Series: Real Estate: Transactions § 15.1 (2d ed. 2014); see Constance Frisby Fain, An Overview of Real Estate Agent or Broker Liability, 23 Real Est. L.J. 257, 258 (1995) (“A broker is ‘an agent who buys or sells for a principal on a commission basis without having title to the property.’”).


Id.

See Craig W. Dallon, Theories of Real Estate Broker Liability and the Effect of the "As Is" Clause, 54 Fla. L. Rev. 395, 413 (2002) (“As courts in the past few decades have moved away from caveat emptor, they have imposed liability upon real estate brokers for failure to make disclosures under various tort theories.”); see also Constance Frisby Fain, An Overview of Real Estate Agent or Broker Liability, 23 Real Est. L.J. 257, 258 (1995) (“The trend has moved away from ‘caveat emptor’ as the rights of purchasers have increased, requiring the agent or broker to make potential consumers aware of the condition of real estate being marketed. Consequently, more responsibility is placed on the broker as opposed to ‘let the buyer beware’
requiring the buyer to ‘examine and judge the product on his or her own’ as dictated by caveat emptor.”).

15 See Dallon, supra note 14, at 435-36 (“Real estate brokers have turned to contract law to limit their increasing risk of liability. These provisions may appear in the real estate purchase agreement, as a separate document at or prior to closing, or in other collateral documents.”).

16 See 12 C.J.S. Brokers § 120 (updated Jun. 2015); see also William B. Stoebuck & John M. Weaver, Washington Practice Series: Real Estate: Transactions § 15.10 (2d ed. 2015) (as most broker’s represent the seller, “the broker usually has no contractual or agency relationship with the buyer, such liability as he may have lies in tort, more specifically for some kind of misrepresentation.”); accord 12 Am. Jur. 2d Brokers § 150 (updated Nov. 2014) (“A broker may be answerable in damages to his or her principal for any loss caused by the broker's fraudulent misconduct. A duty on the part of a real estate broker to refrain from knowingly making any false representations to any party in a real estate transaction may be inferred from statute and from the customs and practices of real estate brokers in general.”).


18 See Jackowksi, 278 P.3d at 1109 (“Because the duty to not commit fraud is independent of the contract, the independent duty doctrine permits a party to pursue a fraud claim regardless of whether a contract exists.”).

19 David K. Dewolf & Keller W. Allen, Washington Practice Series: Tort Law and Practice § 19:2 (4th ed. 2014) (“In proving claims of fraudulent concealment or misrepresentation, a plaintiff can affirmatively plead or prove the nine elements of fraud, or may simply show that the defendant breached an affirmative duty to disclose a material fact.”).


21 See id.

22 McRae v. Bolstad, 646 P.2d 771, 774-75 (Wash. App. 1982), aff’d and remanded, 676 P.2d 496 (1984); See Dallon, supra note 14, at 419 (“The law, however, has increasingly allowed recovery in the face of otherwise fraudulent omissions through a series of broad and ever-expanding ‘exceptions’ which permit a finding of fraud where a party had a duty to speak but failed to do so. Courts today recognize fraud based on nondisclosure, sometimes referred to as ‘fraud by silence.’”).


24 Hoffman v. Connall, 736 P.2d 242, 246 (Wash. 1987) (“broker was held not liable for pointing out erroneous boundaries to the buyer when the seller had pointed out those boundaries to the broker, and they seemed plausible; it was held reasonable for the broker to pass on this information without having a professional survey made.”).
Id.

26 See supra note 17; see also Dallon, supra note 14, at 420-21 (“The law has not stopped at expanding broker liability under a fraud theory. It has also imposed tort liability for misstatements or omissions under a negligence or malpractice theory. Several courts have recognized the tort of negligent misrepresentation in the broker context.”).


Id. at 809-10.

Id. at 811.

Id.

Id. at 815.

Id. at 814 (quoting WASH. REV. CODE § 18.86.030(1)(d) (2013)).

See Bloor, 180 P.3d at 815 (“Miller points out that, under RCW 18.86.030(2), a real estate agent owes no duty to independently verify the accuracy or completeness of a party's statement unless otherwise agreed. But because Miller actually knew of the illegal drug manufacturing, this standard does not apply.”).


See id.; accord Sing v. John L. Scott, Inc., 948 P.2d 816, 820 n.3 (Wash. 1997) (“In 1996, the Legislature enacted comprehensive legislation which redefined the duties of real estate brokers.”).


See WASH. REV. CODE § 18.86.030(1) (“the following duties, which may not be waived . . .”); see also WASH. REV. CODE § 18.86.030(2) (“Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.”).

36-2 See WASH. REV. CODE § 18.86.030(2).

WASH. REV. CODE § 18.86.030(1).
WASH. REV. CODE § 18.86.030(2).

WASH. REV. CODE § 18.86.030(1)(d).


WASH. REV. CODE § 18.86.030(2).

Id.

State v. Moreno, 58 P.3d 265, 268 (Wash. 2002) (“The question to be asked for determining whether separation of powers is violated is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” (quoting Carrick v. Locke, 882 P.2d 173 (Wash. 1994)),

See WASH. REV. CODE § 18.86.040 (“Seller’s agent—Duties”); see also WASH. REV. CODE § 18.86.050 (“Buyer’s agent—Duties”).

See WASH. REV. CODE § 18.86.040(1); see also WASH. REV. CODE § 18.86.050(1).

Jackowski, 278 P.3d at 1102; see Mersky v. Multiple Listing Bureau of Olympia, Inc., 437 P.2d 897, 899 (Wash. 1968) (at the common law there is a “duty and obligation upon the part of the listing broker, as well as on the part of his subagents, to exercise the utmost good faith and fidelity toward his principal, his seller, in all matters falling within the scope of his employment.”).

Jackowski, 278 P.3d at 1106-07.

WASH. REV. CODE § 18.86.110 (2013); see Washington Final Bill Report, 2013 REG. SESS. S.B. 5352, at 3 (July 28, 2013) (“The chapter supersedes all, not just inconsistent, common law fiduciary duties owed by a principal to an agent.”).

WASH. REV. CODE § 18.86.030(1) (“Regardless of whether a broker is an agent, the broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived . . . .”).

BLA CK ’ S LAW DICTIONARY 581 (9th ed. 2009).


Id. at 990.

Id. at 992.

Id. at 992-93.

Id. at 992 (quoting Ultramares Corp. v. Touche, 174 N.E. 441, 451 (N.Y. 1931)).


Eastwood, 241 P.3d at 1259 (“Because the duty to not cause waste is a tort duty independent from a lease's covenants, Eastwood had a cause of action for waste, and the trial court properly concluded she may recover tort damages from Horse Harbor's employee and two of its board directors.”).

Id. at 1261.


Supra note 52 (“The landmark case announcing and explaining the economic loss rule was Alejandre v. Bull, in which a home buyer attempted to recover damages from the seller based upon the seller's alleged failure to disclose problems with the septic system. In determining that the claim was barred by the economic loss rule, the court treated the risk of loss as one that could be allocated by contract.”).

See Alejandre, 153 P.3d at 866.

Id. (“If the seller did not receive such notice, the inspection would be deemed satisfied.”).

Id. at 867 (“The Alejandres thus acknowledged, as expressly explained in the disclosure statement, their duty to “pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.””).

Id. at 866.

Id. at 867-68 (quoting Berschauer/Philips Constr. Co., 881 P.2d at 992).

Id. at 868.

Id.
Id. at 870.

Id. at 871.

Id.

Id. at 874.

Id.

Id. at 873.

Id.

Eastwood, 241 P.3d at 1262.

Jackowski, 278 P.3d at 1105 n.1.

Id. at 1106 (quoting Eastwood, 241 P.3d at 272 (Chambers, J., concurring)).

Id. at 1109.

Id. at 1102.

Id.

Id. at 1103.

Id.

Id.

Id. at 1105.

Id. at 1104.

Id. at 1105 (quoting Eastwood, 241 P.3d at 1261) (brackets in Jackowski).

Id. 1107 (quoting WASH. REV. CODE § 18.86.050(1)(c)).

Jackowski, 278 P.3d at 1107.

Id.

Id.
Id. at 1109.

89 Wash. Rev. Code § 18.86.030(2); see also Wash. Rev. Code § 18.86.030(1)(d) ("the duty to disclose existing material facts known to the broker does not include a "duty to investigate matters that the broker has not agreed to investigate.").


91 Robert L. Raper, Esq. & Andrew J. Vandiver, Real Estate Broker Liability, 36 N. Ky. L. Rev. 409, 443 (2009) ("Imposing a duty to inspect on real estate brokers would change the real estate broker's current role as a facilitator of a transaction to that of an independent inspector for the purchaser.").

92 See Raper supra note 96, at 442 ("Application of negligent misrepresentation would force real estate brokers to independently determine the veracity of a seller's statements concerning the property. Otherwise, the real estate broker would be open to liability for unknowingly providing information to a seller that later turned out to be false. As a result, real estate brokers would be less likely to share information with purchasers since they could not solely rely on the seller's representations.").

93 See Dallon, supra note 14, at 439 ("A few courts have refused to extend contractual protections to a broker based on the real estate sales contract where the broker was not a party to the contract, but most courts permit the broker to claim the benefits of such provisions.").

94 See Alejandre, 153 P.3d at 871 (also stating “the economic loss rule applies regardless of whether the specific risk of loss at issue was expressly allocated in the parties' contract.”).

95 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, 668-69 (2013) (“Under these circumstances, it is fair to apply the independent duty doctrine because parties that are not in privity nonetheless participate in the general contract scheme. As with any independent duty analysis, courts should apply the defense to claims brought by third parties against design professionals when, based on the pillars of policy (effective risk allocation, the reasonable expectations of the parties, self-protection, and certainty), the claim is properly resolved under contract theory. Thus, while Washington courts should generally apply the independent duty doctrine only where contractual privity exists, an exception to this general rule should apply where liability arises from a network of construction contracts.”).

96 See William B. Stoebuck & John M. Weaver, Washington Practice Series: Real Estate: Transactions § 15.10 (2d ed. 2014) (“In 1996 the Legislature enacted RCWA Chapter 18.86 and it became effective in 1997. It appears to alter, if not nullify, the rules adopted in Hoffman v. Connall and the other cases cited in this section. See especially, RCWA 18.86.030(2).”).
WASHINGTON REV. CODE § 64.06.013 (2013) (in Washington, the language of Form 17 seller’s disclosure statement is promulgated by statute).

NORTHWEST MULTIPLE LISTING SERVICE FORM 21, Residential Purchase & Sale Agreement.

See Alejandre, 153 P.3d at 872 (for the fraud claim, “the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.”); see also 12 AM. JUR. 2D Brokers § 150 (“a broker may not be liable to a purchaser for fraud where the purchaser has not detrimentally relied upon any possible misrepresentations of the broker; where the purchaser could not have reasonably relied upon the alleged misrepresentations in view of the purchaser's own independent investigation; or where there is no evidence that the broker knew of the condition on the property that caused the purchaser's subsequent damage.”); see also Dallon supra note 14, at 432 (“Many statutes expressly provide that the disclosures are made by the seller and not by the seller's agents. The clear purpose of these provisions is to limit brokers' liability for misstatements made by sellers in the disclosure statement. To establish fraud, a plaintiff must show that the defendant made a misstatement or had a duty to speak but failed to do so. If statements in the disclosure statement are made by the seller, not the broker, then any misstatements in the disclosure statement are not the broker's misstatements.”).

See id.


WASHINGTON REV. CODE § 18.86.030(2).

See Jackowski, 278 P.3d at 1105 n.1 (quoting Eastwood, 241 P.3d at 272 (Chambers, J., concurring)).

See Berschauer/Philips Const. Co., 881 P.2d at 989-90.

See Id. at 992.

See Jackowski, 278 P.3d at 1105 n.1.

See Alejandre, 153 P.3d at 874.

See id. at 871 (also stating “the economic loss rule applies regardless of whether the specific risk of loss at issue was expressly allocated in the parties' contract.”).

See WASHINGTON REV. CODE § 18.86.030(2).
111 See Alejandre, 153 P.3d at 874.

112 See Jackowski, 278 P.3d at 1109.