SUMMARY
March 16, 2023

2023COA25

No. 21CA1393, *Mid-Century Insurance Company v. HIVE Construction, Inc.* — Torts — Negligence — Willful and Wanton Conduct — Economic Loss Doctrine

In this tort action, where the plaintiff asserted a single negligence claim alleging that the defendant engaged in willful and wanton conduct, the district court denied the defendant's motion for a directed verdict based on the economic loss rule, extending the holding of *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, 2021 COA 2, to conclude that the economic loss rule does not apply to bar claims alleging willful and wanton conduct. A division of the court of appeals concludes that the district court erred because neither *McWhinney* nor the supreme court case on which *McWhinney* relied, *Bermel v. BlueRadios, Inc.*, 2019 CO 31, preclude application of the economic

loss rule to bar common law negligence claims involving willful and wanton conduct. Instead, the division clarifies that the economic loss rule may still apply to such a claim, provided the claim is based solely on the breach of a contractual duty resulting in purely economic loss.

COLORADO COURT OF APPEALS **2023COA25**

Court of Appeals No. 21CA1393
City and County of Denver District Court No. 18CV33512
Honorable Andrew P. McCallin, Judge

Mid-Century Insurance Company, a California corporation, as subrogee of Masterpiece Kitchen,

Plaintiff-Appellee,

v.

HIVE Construction, Inc., a Colorado corporation,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE BROWN
Dunn and Gomez, JJ., concur

Announced March 16, 2023

Cozen O'Connor, Cheri MacArthur, Denver, Colorado; Spencer Fane LLP, Dean Neuwirth, Denver, Colorado, for Plaintiff-Appellee

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¶ 1 Defendant, HIVE Construction, Inc. (HIVE), appeals the district court's denial of its motion for a directed verdict on the single negligence claim that plaintiff, Mid-Century Insurance Company (Mid-Century), asserted against it. HIVE argued that the economic loss rule barred the claim. Citing *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, 2021 COA 2, the district court declined to apply the economic loss rule because Mid-Century alleged that HIVE had engaged in willful and wanton conduct.

¶ 2 We conclude that neither *McWhinney* nor the supreme court case on which *McWhinney* relied, *Bermel v. BlueRadios, Inc.*, 2019 CO 31, precludes application of the economic loss rule to bar common law negligence claims involving willful and wanton conduct. Instead, we clarify that the economic loss rule may still apply to such claims. Because Mid-Century's negligence claim was based solely on the breach of a contractual duty resulting in purely economic loss, it is barred by the economic loss rule.

Consequently, we reverse the judgment entered against HIVE and

remand to the district court with instructions to direct a verdict in favor of HIVE.[1]

I. Background

¶ 3 In 2015, Masterpiece Kitchen Lowry, LLC (Masterpiece Kitchen) entered into contracts with HIVE and LIV Studio (LIV) for a build-out of a restaurant in Denver, Colorado. HIVE served as the general contractor for the project and LIV was the architect.

¶ 4 Part of LIV's design for the project included a wall to separate the restaurant's kitchen from the dining room. The architectural drawings and specifications called for installation of two layers of drywall (also called gypsum board or sheetrock) on the kitchen side of the wall, a layer of plywood covered with decorative wood on the dining room side of the wall, and metal studs and fiberglass insulation in between. But during construction, HIVE instructed its drywall subcontractor to substitute a layer of fire-resistant (but combustible) plywood for one of the layers of drywall on the kitchen

[1] Because this issue is dispositive, we need not address HIVE's remaining appellate contentions that the district court erred by (1) allowing Mid-Century's expert to provide a previously undisclosed opinion at trial and (2) failing to enforce a subrogation waiver in the contract.

side of the wall. The parties dispute whether Masterpiece Kitchen was aware that HIVE substituted plywood for the drywall specified by LIV's design.

¶ 5 The broiler chosen for the kitchen required a clearance of eight inches from combustible materials, such as wood, but did not require any clearance from noncombustible materials, such as steel, concrete, and masonry. Masterpiece Kitchen installed the broiler less than an inch from the wall.

¶ 6 Despite the substitution of material and the broiler's proximity to the wall, the kitchen passed all inspections. But in April 2017, a fire broke out in the wall next to the broiler. Mid-Century's fire expert opined that the fire was caused by ignition of the substituted plywood due to heat that was radiated and conducted through the wall from the broiler. Masterpiece Kitchen made a claim on a commercial property insurance policy it obtained from Mid-Century, and Mid-Century paid $482,508.22 for fire-related damage.

¶ 7 Mid-Century, as subrogee of Masterpiece Kitchen, filed a complaint seeking to recover economic damages from HIVE and

LIV.[2] Mid-Century asserted a single negligence claim against HIVE, alleging that HIVE breached "a duty to perform its work as a general contractor . . . in a safe, careful, competent and workmanlike manner" by "installing combustible plywood" in the kitchen wall. It also alleged that HIVE's "installation of combustible plywood in the kitchen cookline wall adjacent to heat-producing appliances demonstrate[d] a careless and reckless disregard for the rights and safety of others, . . . and therefore constitutes willful and wanton conduct."

¶ 8 HIVE answered the complaint and denied that it was negligent or had engaged in willful and wanton conduct. It also asserted, among other defenses, that the economic loss rule barred Mid-Century's claim.

¶ 9 After Mid-Century concluded its presentation of evidence at trial, HIVE moved for a directed verdict, arguing that Mid-Century's negligence claim was barred by the economic loss rule. The district court denied the motion, relying on *McWhinney* to conclude "that

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[2] After LIV filed a motion for summary judgment arguing, among other things, that the economic loss rule barred Mid-Century's claim, Mid-Century and LIV reached a settlement.

the economic loss rule does not apply to an allegation of willful and wanton conduct."

¶ 10 The jury returned a verdict in favor of Mid-Century, finding that HIVE had engaged in willful and wanton conduct and that LIV, as a designated nonparty at fault, had been negligent. It determined that Mid-Century's damages were $482,508.22. It allocated 85% of the fault to HIVE, 15% of the fault to LIV, and 0% of the fault to Mid-Century, as Masterpiece Kitchen's subrogee.

II. Preservation

¶ 11 As an initial matter, Mid-Century contends that HIVE either invited or waived any error by the district court in denying its motion for a directed verdict based on the economic loss rule. Because Mid-Century's contentions implicate our ability to consider HIVE's alleged claim of error, we address these arguments first. *See People v. Rediger*, 2018 CO 32, ¶ 3 (invited error and waiver bar appellate review); *accord Bernache v. Brown*, 2020 COA 106, ¶¶ 10-11.

A. Invited Error

¶ 12 Mid-Century contends that HIVE invited the district court to err by opposing Mid-Century's motion to amend the complaint to substitute a contract claim for its tort claim. We disagree.

¶ 13 When Mid-Century filed its complaint in September 2018, it asserted a single claim of negligence against HIVE. At a pretrial conference on July 1, 2021, just eleven days before trial, Mid-Century moved to amend its complaint to assert a breach of contract claim instead of a negligence claim. HIVE objected, but the district court initially permitted the amendment.[3] Mid-Century filed its amended complaint the following day, substituting a contract claim for its negligence claim.

¶ 14 At a motions hearing a week later, HIVE renewed its objection to Mid-Century's amended complaint, arguing it was prejudiced by having to proceed on a breach of contract claim — an "entirely different theory . . . than negligence" — when Mid-Century had litigated the case for almost three years as a negligence case.

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[3] Because we do not have a transcript of the pretrial conference, we are not able to determine what arguments were made regarding the motion to amend or why the district court initially granted it.

Acknowledging the prejudice to HIVE resulting from Mid-Century "shapeshift[ing]" its case, the district court reconsidered and ordered the parties to proceed on the claim that had been asserted "from the very first day, which ha[s] been negligence."

¶ 15 As best we understand it, Mid-Century argues that, when HIVE opposed its request to amend the complaint to substitute a contract claim for its tort claim, HIVE essentially agreed that a tort claim, rather than a contract claim, was the right claim for Mid-Century to pursue, thereby inviting any error by the district court in allowing the tort claim to go forward. Mid-Century's argument stretches the invited error doctrine too far.

¶ 16 The invited error doctrine applies narrowly to prevent a party from complaining on appeal of an error that the party invited or injected into the case. *Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002). "The doctrine applies where one party expressly acquiesces to conduct by the court or the opposing party." *Id.* at 619; *see, e.g.*, *Hansen v. State Farm Mut. Auto. Ins. Co.*, 957 P.2d 1380, 1385 (Colo. 1998) (defense counsel invited error by actively participating in a jury instruction conference and deliberately choosing not to redraft an instruction to comport with the law); *cf. People v. Baker*,

2021 CO 29, ¶ 27 (the defendant did not invite error when it was the prosecutor, not defense counsel, who elicited inadmissible testimony).

¶ 17 HIVE did not invite the district court to erroneously conclude that the economic loss rule does not apply to willful and wanton negligence claims. It did not argue in the trial proceedings that the economic loss rule does not apply to such claims, only to argue on appeal that it does. Nor did HIVE assert that a tort claim, rather than a contract claim, was the right claim for Mid-Century to pursue to recover its economic damages. True, HIVE opposed Mid-Century's effort to swap in a contract claim on the eve of trial, but its objection was based on the prejudice resulting from the timing of the amendment given that the case had been litigated as a tort claim, discovery was closed, and trial was just days away.[4] HIVE did not have to concede to an otherwise prejudicial amendment to preserve whatever defenses it already had to

[4] Notably, HIVE and LIV both asserted the economic loss rule as a defense in their respective answers, and LIV moved for summary judgment based on the economic loss rule in March 2020, yet Mid-Century did not ask to amend its complaint to assert a contract claim until July 2021.

Mid-Century's tort claim. Under these circumstances, we conclude that HIVE did not invite the claimed error.

B. C.R.C.P. 16(f)

¶ 18 Alternatively, Mid-Century contends that HIVE waived the right to seek a directed verdict based on the economic loss rule because it did not include it as a defense in the trial management order as required by C.R.C.P. 16(f). We disagree.

¶ 19 Waiver is the intentional relinquishment of a known right. *Avicanna Inc. v. Mewhinney*, 2019 COA 129, ¶ 25. Waiver may be express, as when a party states its intent to abandon an existing right, or implied, as when a party engages in conduct that manifests an intent to relinquish the right or acts inconsistently with its assertion. *In re Marriage of Hill*, 166 P.3d 269, 273 (Colo. App. 2007).

¶ 20 C.R.C.P. 16(f)(3)(I) requires that the parties "set forth a brief description of the nature of the case and a summary identification of the claims and defenses remaining for trial. Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as 'withdrawn' or 'resolved.'" The trial

management order "shall control the subsequent course of the trial." C.R.C.P. 16(f)(5).

¶ 21 We are unaware of any authority, and Mid-Century has not cited any, establishing a blanket rule that the failure to list a defense in a trial management order as required by C.R.C.P. 16(f) waives the defense. Rather, given that a waiver is an intentional relinquishment of a known right, the circumstances surrounding the alleged waiver matter.

¶ 22 For example, in *Roberts v. Adams*, a division of this court concluded that even though a defendant did not raise attorney fees in a trial management order, she had not waived her right to claim them because she had requested attorney fees in her counterclaim. 47 P.3d 690, 699 (Colo. App. 2001). Thus, the plaintiffs had notice that attorney fees were an issue, and the trial court was able to resolve them after trial. *Id.*

¶ 23 Similarly, Mid-Century had notice that the economic loss rule was an issue in the case because HIVE asserted it as a defense in its answer. True, HIVE did not mention the economic loss rule in the summary of its claims and defenses in the trial management order. But it also did not designate the economic loss rule as a

"withdrawn" defense. *See* C.R.C.P. 16(f)(5). And to be sure, when HIVE moved for a directed verdict at trial, Mid-Century did not argue that HIVE had waived that defense by failing to raise it in the trial management order. *See State ex rel. Coffman v. Robert J. Hopp & Assocs., LLC*, 2018 COA 69M, ¶¶ 91-93 (affirming trial court's admission of an exhibit despite the defendant's failure to include it in the trial management order, in part because the plaintiffs failed to argue that admitting the exhibit conflicted with the trial management order). On this record, we perceive no intent by HIVE to relinquish the economic loss rule as a defense and conclude that HIVE did not waive the claimed error.[5]

III. Economic Loss Rule

¶ 24 In denying HIVE's motion for a directed verdict, the district court first explained *McWhinney*'s holding that "the economic loss

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[5] We are unpersuaded by the cases Mid-Century cites to support its argument. Unlike in *Greenlawn Sprinkler Corp. v. Forsberg*, 170 Colo. 286, 293, 461 P.2d 22, 25 (1969), HIVE did not wait until trial to raise the economic loss rule, and application of the rule did not depend on facts that had not been discovered before trial. Further, the analysis in *Vanderpool v. Loftness*, 2012 COA 115, ¶¶ 16-20, was unique to the doctrine of issue preclusion, and the plaintiff's failure to identify an issue in the trial management order was just one of myriad other facts supporting waiver that are not present here.

rule does not apply to intentional conduct," and then "appl[ied] th[e] *McWhinney* decision to . . . find that the economic loss rule does not apply to willful and wanton conduct." HIVE contends that the court erred by extending *McWhinney* in this way. We agree.

A. Standard of Review and Applicable Law

¶ 25 We review de novo a trial court's ruling on a motion for a directed verdict. *See Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 982 (Colo. App. 2011). We also review de novo whether the economic loss rule bars a plaintiff's tort claim. *Engeman Enters., LLC v. Tolin Mech. Sys. Co.*, 2013 COA 34, ¶ 11.

¶ 26 The economic loss rule generally provides that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such breach absent an independent duty of care under tort law. *Bermel*, ¶ 19; *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). The rule serves to maintain a distinction between contract law, where obligations arise from promises made between parties, and tort law, where obligations arise from duties imposed by law without regard to any agreement or contract. *Town of Alma*, 10 P.3d at 1262. Limiting tort liability when a contract exists "holds

parties to the terms of their bargain," encouraging them to "confidently allocate risks and costs . . . without fear that unanticipated liability may arise in the future" and "ensur[ing] predictability in commercial transactions." *Id.*; *see also Bermel*, ¶ 20.

¶ 27 To determine whether the economic loss rule applies, we must look to the source of the duty allegedly breached to determine whether it was created by or exists independently of the contract. *Town of Alma*, 10 P.3d at 1262; *see also Bermel*, ¶ 53 (Gabriel, J., dissenting). The existence and scope of a tort duty is a question of law we review de novo. *Engeman*, ¶ 18.

¶ 28 In deciding whether the duty is independent of the parties' contract, we consider whether (1) the relief sought in negligence is the same as the contractual relief; (2) there is a recognized common law duty of care in tort; and (3) the tort duty differs in any way from the contractual duty. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004) (citing *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1269-70 (Colo. 2000)); *see also Bermel*, ¶ 53 (Gabriel, J., dissenting). Even if the duty allegedly breached is separately recognized under tort law, it is not "independent" of the contract for

purposes of the economic loss rule if it addresses the same obligations created by the contract. *See BRW*, 99 P.3d at 74; *A Good Time Rental, LLC v. First Am. Title Agency, Inc.*, 259 P.3d 534, 537 (Colo. App. 2011).

B. The Duty HIVE Allegedly Breached Was Not Independent of the Contract

¶ 29 The parties agree that the relief Mid-Century sought under its negligence claim was identical to the relief it could have sought under a breach of contract claim — purely economic damages. And we conclude that the tort duty HIVE was alleged to have breached is indistinguishable from its duty under the contract.[6]

¶ 30 The contract utilized an American Institute of Architects "Standard Form of Agreement Between Owner and Contractor" and incorporated, among other things, "General Conditions of the

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[6] Before oral argument, it appeared there was no dispute that the duty HIVE allegedly breached was not independent of its contract with Masterpiece Kitchen. During oral argument, however, counsel for Mid-Century asserted that its expert had testified at trial to four independent tort duties HIVE breached. The transcript citations counsel provided did not support this assertion, nor did Mid-Century identify those four duties in its answer brief. The parties are responsible for alerting us to the parts of the record that support their arguments. *See S. Cross Ranches, LLC v. JBC Agric. Mgmt., LLC*, 2019 COA 58, ¶ 34.

Contract for Construction," the architectural drawings, and the "Specifications" (collectively, the Contract Documents). The contract imposed a duty upon HIVE to "fully execute the Work described in the Contract Documents" and to "perform the Work in accordance with the Contract Documents." HIVE also warranted "that the Work will conform to the requirements of the Contract Documents and will be free from defects," which would include "substitutions not properly approved and authorized." The "Work" meant "the construction and services required by the Contract Documents," including all "labor materials, equipment and services" provided by HIVE to fulfill its obligations. And the "Specifications" were the "written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services" and were included in the architectural drawings.

¶ 31 These contractual provisions demonstrate that HIVE expressly assumed the duty to perform its work as a general contractor in conformity with the Contract Documents, which included the specifications that set the standard for workmanship and detailed the materials for the project. They also demonstrate that HIVE

warranted that its work would be free from defects, including unauthorized substitution of materials.

¶ 32 In its complaint, Mid-Century alleged that HIVE had a common law tort duty "to perform its work as a general contractor . . . in a safe, careful, competent, and workmanlike manner," and that HIVE breached that duty when it "deviated from the LIV Studio design and specifications" and "installed combustible plywood in the kitchen cook-line wall adjacent to heat-producing appliances." But the duty HIVE allegedly breached by substituting plywood for drywall is the same duty it owed under the contract. *See BRW*, 99 P.3d at 74; *A Good Time Rental*, 259 P.3d at 537. The specifications for the kitchen wall required installation of two layers of drywall, and the contract obligated HIVE to ensure that its work complied with those specifications. Thus, Mid-Century failed to allege that HIVE breached any duty independent of its contractual obligations. *See Town of Alma*, 10 P.3d at 1264.[7]

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[7] Our conclusion is buttressed by Mid-Century's proposed amended complaint, in which it sought to assert a breach of contract claim in lieu of its negligence claim. There, Mid-Century similarly alleged that "HIVE had a duty to perform its work as a general contractor . . . in a safe, careful, competent, and workmanlike manner

¶ 33 Having concluded that the duty of care owed and allegedly breached by HIVE was not independent of the contract, and that Mid-Century sought to recover purely economic damages, it should follow that the economic loss rule bars Mid-Century's negligence claim. But relying on *Bermel* and *McWhinney*, Mid-Century contends, and the district court concluded, that the economic loss rule does not apply to negligence claims involving willful and wanton conduct. We turn to this question next.

C. The Economic Loss Rule Can Apply to Negligence Claims Alleging Willful and Wanton Conduct

¶ 34 Mid-Century argues that, following the supreme court's decision in *Bermel* and the decision of a division of this court in *McWhinney*, "the fault line for application of the economic loss rule does not lie between willful and wanton conduct and intentional torts; it lies between negligence and any conduct more egregious than negligence." Thus, Mid-Century continues, the economic loss

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consistent with the contract and the project documents" (emphasis added), which it breached when it "installed combustible plywood in the kitchen wall adjacent to heat-producing appliances" in "deviation from the LIV Studio design and specifications."

rule does not apply to negligence claims involving willful and wanton conduct. We disagree.

¶ 35 In *Bermel*, the supreme court held, based primarily on separation of powers principles, that the "judge-made economic loss rule" cannot bar a statutory claim for civil theft, even when the theft also constitutes a breach of the parties' contract. *Bermel*, ¶¶ 15, 37, 43. To be sure, *Bermel* did not involve application of the economic loss rule to common law tort claims of any kind. But in briefly reviewing its adoption and previous applications of the economic loss rule, the supreme court noted that it had so far applied the rule "only to bar common law tort claims of negligence or negligent misrepresentation." *Id.* at ¶ 21. And it explained in a footnote:

> [J]ust as we have held that "[u]nder no circumstances will an exculpatory agreement be permitted to shield against a claim of willful and wanton negligence," *McShane v. Stirling Ranch Prop. Owners Ass'n, Inc.*, 2017 CO 38, ¶ 20, . . . we note that the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation.

Id. at ¶ 20 n.6.[8]

¶ 36 Notably, *Bermel* did not address the question before us. It did not hold that the economic loss rule categorically applies or does not apply to any type of tort claim. Its statement regarding the frequency with which the economic loss rule should apply to intentional torts was not necessary to its holding, and thus constitutes dictum. *See Main Elec., Ltd. v. Printz Servs. Corp.*, 980 P.2d 522, 526 n.2 (Colo. 1999) ("Dictum is not the law of the case and is not controlling precedent."). Still, even if the economic loss rule generally should not apply to bar intentional torts, no intentional torts were alleged in this case. Mid-Century alleged a single negligence claim based on willful and wanton conduct. *See Brown v. Spain*, 171 Colo. 205, 212, 466 P.2d 462, 465 (1970) ("[W]illful and wanton conduct is that which approaches but does not include an intentional tort nor can it be classified as such.").

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[8] The final statement in this footnote appears to depart from the supreme court's holding in *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004), that a duty memorialized in the parties' contract cannot be "independent" for purposes of the economic loss rule.

¶ 37 We acknowledge that, as part of its discussion of the economic loss rule, the supreme court referenced the principle that contractual provisions purporting to exculpate a party from its own willful and wanton conduct are unenforceable. *Bermel*, ¶ 20 n.6; *see also McShane*, ¶ 20; *Doe v. Wellbridge Club Mgmt. LLC*, 2022 COA 137, ¶ 13 ("In no event will an exculpatory agreement be permitted to shield against a claim of willful and wanton conduct."). And without a doubt, the same principle applies to contract provisions purporting to limit a party's liability for intentionally tortious conduct. *See Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1191 (Colo. App. 2008) ("Most courts will not enforce exculpatory and limiting provisions . . . if they purport to relieve parties from their own willful, wanton, reckless, or intentional conduct."). But in our view, that principle only reinforces application of the economic loss rule to negligence claims involving such conduct.

¶ 38 The economic loss rule's primary purpose is to maintain the distinction between contract and tort law on the theory that parties to a contract should confidently allocate risks in the contract and that such allocations should be respected once made. *See Town of Alma*, 10 P.3d at 1262; *see also Engeman*, ¶ 27 (not applying the

economic loss rule where there is no difference between the common law tort duty and the contractual duty "would defeat the principle of risk allocation at the heart of commercial contract law"). It follows that because the economic loss rule only applies when the duty allegedly breached is a duty established by a contract, *Town of Alma*, 10 P.3d at 1262-63, a party whose tort claim is precluded by the economic loss rule necessarily has a contract remedy. And if the contract includes an exculpatory provision purporting to shield against a claim involving willful and wanton conduct, that provision will not be enforced. *McShane*, ¶ 20.

¶ 39 Thus, even if the economic loss rule bars a party's tort claim, there is little risk that a party injured by willful and wanton conduct (or intentional conduct, for that matter) is left without a remedy because of an exculpatory contract provision. *See Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 2012 COA 120, ¶¶ 17-19 (recognizing actions for willful and wanton breach of contract, which permit parties to recover noneconomic damages, and rejecting contention that refusing to enforce limitation of liability provisions in the context of willful and wanton conduct "improperly blurs the distinction between tort and contract law"). In the end,

we see nothing in *Bermel* that leads us to conclude that the economic loss rule cannot or should not apply to bar negligence claims involving willful and wanton conduct.

¶ 40 Nor are we persuaded to so conclude by *McWhinney*. Although it recognized that *Bermel* "was limited to statutory tort claims," the division in *McWhinney* nonetheless found footnote 6 in *Bermel* "instructive on the economic loss rule's applicability to common law intentional tort claims" and "expressly [held] that the economic loss rule generally does not bar . . . common law intentional tort claims." *McWhinney*, ¶¶ 1, 74. Despite the apparent breadth of its holding, *McWhinney* did not reject the factors outlined in *BRW* to determine whether a duty allegedly breached is independent of the parties' contract. *Compare id.* at ¶ 76 (concluding that the economic loss rule barred a claim for civil conspiracy because the "duty not to conspire to breach the contract stemmed solely from" the contract), *with id.* at ¶ 75 (concluding that the economic loss rule did not bar the remaining intentional tort claims "because each of these claims stems from a duty based in tort law independent of" the contract). In any event, we need not consider the breadth of *McWhinney* here because that case did not involve a willful and wanton negligence

claim, and Mid-Century did not allege that HIVE committed an intentional tort.

¶ 41 A survey of our court's historical and more recent applications of the economic loss rule to bar claims involving both intentional conduct and willful and wanton conduct reveals that application of the economic loss rule depends not on the nature of the defendant's conduct but on the nature of the duty owed by the defendant. *See, e.g.*, *Dream Finders Homes LLC v. Weyerhaeuser NR Co.*, 2021 COA 143, ¶ 64 (rule barred post-contractual fraud claim because the duty to not make misrepresentations or engage in fraud was subsumed within the contract's implied duty of good faith and fair dealing); *Top Rail Ranch Ests., LLC v. Walker*, 2014 COA 9, ¶¶ 38-39 (rule barred fraud claims that duplicated a claim for breach of the duty of good faith and fair dealing); *Engeman*, ¶¶ 29, 42 (rule barred a claim alleging willful and wanton conduct where there was no duty independent of the contract, "consistent with the principle that the economic loss rule turns not on the nature of the defendant's conduct, but on the nature of the duties owed by the defendant"); *Former TCHR, LLC v. First Hand Mgmt. LLC*, 2012 COA 129, ¶¶ 29, 33 (rule barred post-contractual fraud claims where breached

duties were described by the contract or subsumed within the implied covenant of good faith and fair dealing); *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 289 (Colo. App. 2009) (rule barred post-contractual fraud claims where the breached duties existed only because of the parties' contract); *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*, 192 P.3d 543, 547-50 (Colo. App. 2008) (rule barred claims for negligence and gross negligence, even where an accompanying contract claim alleged willful and wanton conduct); *cf. Van Rees v. Unleaded Software, Inc.*, 2016 CO 51, ¶ 15 (rule did not bar intentional tort claims "based on misrepresentations made prior to the formation of the contracts" because those actions "violated an independent duty in tort to refrain from such conduct"); *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 72 (Colo. 1991) (rule did not bar a claim alleging negligent misrepresentation *prior to* the execution of the contract); *Rhino Fund*, 215 P.3d at 1194 (rule did not bar civil theft and conversion claims where contract did not address plaintiff's remedies in the event the collateral was diverted by a nonparty, which was an act "independent of the contractual breach").

¶ 42 We see no reason to depart from our consistent precedent, which is faithful to the test for determining when a duty is independent of a contract as outlined in *BRW*, 99 P.3d at 74. If the tort duty allegedly breached arises from the parties' contract, the economic loss rule may apply to bar the claim. If the tort duty allegedly breached arises independently of the parties' contract, the economic loss rule does not apply.

¶ 43 We conclude that the district court erred by failing to apply the economic loss rule to bar Mid-Century's negligence claim — notwithstanding Mid-Century's allegation that HIVE engaged in willful and wanton conduct — because Mid-Century's losses were purely economic and because the duty HIVE allegedly breached was a duty it owed under the contract with Masterpiece Kitchen. As Masterpiece Kitchen's subrogee, Mid-Century's remedy against HIVE was contractual.

D. Remedy

¶ 44 Mid-Century contends that any error by the district court in denying HIVE's motion for a directed verdict should be remedied by a "remand for re-trial under a contract theory" because the damages it sought under its negligence claim were the same

damages it would have sought under a breach of contract claim.[9] But Mid-Century's argument rests on a faulty premise — that there is a valid contract claim that remains for it to pursue on remand. Because the court ultimately denied Mid-Century's request to substitute a contract claim in place of its negligence claim, no such contract claim exists.[10]

IV. Disposition

¶ 45 We reverse the judgment and remand to the district court with instructions to direct a verdict in favor of HIVE.

JUDGE DUNN and JUDGE GOMEZ concur.

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[9] Mid-Century frames this argument in terms of harmless error, *see* C.R.C.P. 62, but we see clear harm in allowing the jury to decide a claim that should have been barred by the economic loss rule. Mid-Century also argues that the error is harmless because the contract between HIVE and Masterpiece Kitchen was not admitted as evidence at trial. Mid-Century did not argue this evidentiary claim to the district court in opposing the motion for a directed verdict. Regardless, the contract was in the record before the district court and Mid-Century admitted the existence of the contract during summary judgment proceedings. Further, there was extensive testimony at trial about the content of the contract documents, including by Mid-Century's standard of care expert, who proclaimed that HIVE did not meet the standard of care in "following the [contract] documents."

[10] Mid-Century did not cross-appeal the district court's ultimate denial of its motion to amend the complaint.