ADVANCE SHEET HEADNOTE
April 21, 2025

2025 CO 17

No. 23SC267, *Mid-Century Insurance Company v. HIVE Construction, Inc.*—Economic Loss Rule—Willful and Wanton Conduct—Construction Contracts.

This case involves limits on the reach of the economic loss rule. Plaintiff contends that because it had alleged willful and wanton conduct by defendant, with which plaintiff's subrogor had contracted to construct a restaurant, the economic loss rule did not preclude it from asserting a negligence claim, notwithstanding the existence of the contract. Plaintiff thus asks the supreme court to reverse the ruling of the court of appeals division below concluding that the economic loss rule barred its negligence claim.

The court now concludes that no exception to the economic loss rule exists for allegations of willful and wanton conduct. The court further concludes, based on longstanding economic loss rule principles, that the rule barred plaintiff from asserting a negligence claim premised on a duty established by the contract in this case.

Accordingly, the court affirms the judgment of the division below.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 17

Supreme Court Case No. 23SC267
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 21CA1393

Petitioner:

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

v.

Respondent:

HIVE Construction, Inc., a Colorado corporation.

Judgment Affirmed
en banc
April 21, 2025

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 This case involves limits on the reach of the economic loss rule. Mid-Century Insurance Company contends that because it had alleged willful and wanton conduct by HIVE Construction, Inc., with which Mid-Century's subrogor, Masterpiece Kitchen, had contracted to construct a restaurant, the economic loss rule did not preclude it from asserting a negligence claim, notwithstanding the existence of the contract. Mid-Century thus asks us to reverse the ruling of the division below concluding that the economic loss rule barred its negligence claim.[1]

¶2 We now conclude that no exception to the economic loss rule exists for allegations of willful and wanton conduct. We further conclude, based on longstanding economic loss rule principles, that the rule barred Mid-Century from asserting a negligence claim premised on a duty established by the contract in this case.

¶3 Accordingly, we affirm the judgment of the division below.

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[1] Specifically, we granted certiorari to review the following issue:

> Whether the division erred in concluding that Colorado's economic loss rule precludes Mid-Century Insurance Company's negligence claim alleging that HIVE Construction, Inc.'s willful and wanton conduct resulted in a fire and property damage.

I. Facts and Procedural History

¶4 HIVE served as the general contractor for the construction of Masterpiece Kitchen, a restaurant. In the contract governing the restaurant's construction, HIVE warranted, among other things, that "the Work will conform to the requirements of the Contract Documents." The contract further specified, "Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective."

¶5 As pertinent here, the architectural plans and design for the restaurant, which were part of the Contract Documents, called for the construction of a wall separating the kitchen and dining area. These documents specified that two layers of drywall, which would increase the wall's fire resistance, were to be installed on the kitchen side of the wall. When HIVE constructed the wall, however, it installed one layer of drywall and one layer of plywood on the kitchen side. HIVE did not submit a change order asking permission to deviate from the plans and design in this way.

¶6 The substituted plywood was combustible. Installing the plywood on the kitchen side of the wall thus placed combustible material much closer to a heat source (the broiler in the kitchen) than the plans and design had prescribed. A fire eventually started within the wall, causing damage to the restaurant that forced the restaurant to close.

¶7 As Masterpiece Kitchen's property insurer, Mid-Century made payments to and on behalf of Masterpiece Kitchen for damages caused by the fire. Mid-Century, as Masterpiece Kitchen's subrogee, then sued HIVE and the project's architect, asserting single claims for negligence against each of them. (Mid-Century settled its claim against the architect, and that claim is not before us.) Mid-Century's negligence claim alleged that HIVE "had a duty to perform its work as general contractor . . . in a safe, careful, competent, and workmanlike manner" and that HIVE had breached this duty by deviating from the architectural plans and design by installing combustible plywood in the wall, which was adjacent to heat-producing appliances. Mid-Century further alleged that HIVE's installation of the combustible plywood in the wall demonstrated a careless and reckless disregard for the rights and safety of others, including Masterpiece Kitchen's owners, and therefore constituted willful and wanton conduct.

¶8 Mid-Century did not initially assert a breach of contract claim against HIVE. One week before trial, however, it sought leave to amend its complaint to assert such a claim, in place of its negligence claim. In its proposed amended complaint, Mid-Century alleged that HIVE had breached its duty under the contract and project-related documents to perform its work as a general contractor safely and competently when it installed combustible plywood in the kitchen wall adjacent to heat-producing appliances.

¶9 Over HIVE's objection, the district court initially granted Mid-Century's motion. But HIVE then renewed its objection to the amended complaint, contending that it would suffer substantial prejudice from this "last-second change" in the nature of Mid-Century's claim. The court then reconsidered its prior decision, denied Mid-Century's motion for leave to file an amended complaint, and ordered Mid-Century to proceed to trial on its originally pleaded negligence theory.

¶10 A jury trial commenced, and after Mid-Century presented its case, HIVE moved for a directed verdict, arguing that the economic loss rule barred Mid-Century's negligence claim. Relying on *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, 2021 COA 2, ¶ 67, 486 P.3d 439, 453, in which a division of the court of appeals had concluded, contrary to other divisions, that in most instances, the economic loss rule does not bar intentional tort claims, the district court concluded that the rule does not apply to allegations of willful and wanton conduct. Accordingly, the court denied HIVE's directed verdict motion.

¶11 At the conclusion of the trial, the jury returned a special verdict, finding that HIVE's conduct was willful and wanton and caused Mid-Century's damages. The district court then entered judgment in Mid-Century's favor.

¶12 HIVE appealed, arguing, as pertinent here, that the district court had erred in denying its directed verdict motion on the ground that the economic loss rule does not apply to willful and wanton conduct. *Mid-Century Ins. Co. v. HIVE Constr., Inc.*, 2023 COA 25, ¶ 1, 531 P.3d 427, 429. A division of the court of appeals agreed with HIVE and reversed. *Id.* at ¶ 2, 531 P.3d at 429–30.

¶13 The division first analyzed the relief that Mid-Century had sought, its allegations of negligence, and the terms of the contract between Masterpiece Kitchen and HIVE and concluded that the duty of care that HIVE had allegedly breached was not independent of its contractual obligations. *Id.* at ¶¶ 29–32, 531 P.3d at 433–34. The division observed that under such circumstances, the economic loss rule should bar Mid-Century's negligence claim. *Id.* at ¶ 33, 531 P.3d at 434. The division proceeded, however, to consider Mid-Century's assertion that the economic loss rule does not apply to negligence claims involving willful and wanton conduct. *Id.*

¶14 In this regard, the division acknowledged that in *Bermel v. BlueRadios, Inc.*, 2019 CO 31, ¶ 20 n.6, 440 P.3d 1150, 1154 n.6, we suggested that the economic loss rule generally should not apply to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation. *Mid-Century*, ¶ 35, 531 P.3d at 434–35. The division reasoned, however, that this comment in *Bermel* was dicta and, in any event, did not address the kind of claim at issue in

this case, namely, one based on willful and wanton conduct. *Id.* at ¶ 36, 531 P.3d at 435. The division further noted that *McWhinney*, on which the district court had relied, similarly did not involve a claim based on willful and wanton conduct. *Id.* at ¶ 40, 531 P.3d at 436.

¶15 The division then considered several cases in which other divisions of the court of appeals had applied the economic loss rule to bar claims based on intentional or willful and wanton conduct, and the division perceived no reason to depart from this "consistent precedent." *Id.* at ¶¶ 41–42, 531 P.3d at 436. The division thus concluded that the district court had erred in declining to apply the economic loss rule to bar Mid-Century's negligence claim, notwithstanding the allegation of willful and wanton conduct. *Id.* at ¶ 43, 531 P.3d at 436.

¶16 Lastly, the division rejected Mid-Century's contention that any error in the district court's denial of the motion for a directed verdict was harmless and should be remedied by retrial on a contract claim. *Id.* at ¶ 44 & n.9, 531 P.3d at 436–37, 437 n.9. The division perceived "clear harm" in allowing the jury to decide a claim that should have been barred by the economic loss rule and concluded that a valid contract claim did not exist because the district court had denied Mid-Century's motion for leave to amend its complaint and substitute a contract claim for the negligence claim. *Id.*

¶17 Accordingly, the division reversed the judgment and remanded this case to the district court with instructions to direct a verdict in HIVE's favor. *Id.* at ¶ 45, 531 P.3d at 437.

¶18 Mid-Century then petitioned this court for a writ of certiorari, and we granted its petition.

II. Analysis

¶19 We begin by setting forth the applicable standard of review. We then discuss the basic principles of the economic loss rule and conclude that willful and wanton conduct is not excepted from that rule. Finally, we apply these principles to the facts before us and conclude that the economic loss rule barred Mid-Century's negligence claim.

A. Standard of Review

¶20 C.R.C.P. 50 allows a party to move for a directed verdict at the close of an opponent's evidence or at the close of all of the evidence. A court may grant a directed verdict motion only when the evidence, viewed in the light most favorable to the non-moving party, "compels the conclusion that reasonable persons could not disagree and that no evidence, or legitimate inference therefrom, has been presented upon which a jury's verdict against the moving party could be sustained." *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325, 328 (Colo. App. 1992).

¶21 We review a district court's ruling on a motion for a directed verdict de novo. *People in Int. of L.S.*, 2023 CO 3M, ¶ 13, 524 P.3d 847, 851. Similarly, the application of the economic loss rule presents a question of law that we review de novo. *Engeman Enters., LLC v. Tolin Mech. Sys. Co.*, 2013 COA 34, ¶ 11, 320 P.3d 364, 367.

B. The Economic Loss Rule

¶22 Under the economic loss rule, "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). This rule serves several purposes, including maintaining a distinction between contract and tort law, holding parties to the terms of their bargain, and encouraging parties to allocate risks and costs during bargaining without fear of unanticipated future liability that would negate the parties' efforts to build cost considerations into their contract. *Id.* at 1262. By promoting these purposes, the rule "serves to ensure predictability in commercial transactions." *Id.*

¶23 The precise allocation of risk through contracting is of particular importance in the construction industry. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004) (citing and deeming persuasive *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992 (Wash. 1994)). This is because architects, contractors,

and other construction industry professionals determine the fees to be charged based on their expected liability exposure as bargained and provided for in their contracts. *Berschauer/Phillips*, 881 P.2d at 992.

¶24 Whether the economic loss rule applies depends not on the nature of the damages—physical or economic—but rather on the source of the duty allegedly breached—the contract or some other source. *Town of Alma*, 10 P.3d at 1262. Thus, a breach of duty arising from a contract must be redressed under the parties' contract, and a tort action will not lie. *Id.* Conversely, a breach of duty arising independently of the parties' contractual duties may support a tort action. *Id.* at 1262–63.

¶25 In determining the source of the duty at issue, courts consider whether (1) the relief sought in negligence is the same as the contractual relief; (2) there exists a recognized common law duty of care in negligence; and (3) the negligence duty and contractual duty differ in any way. *BRW*, 99 P.3d at 74. If the parties have memorialized the applicable duty of care in their contract (i.e., if the duty is contained within or imposed under the contract), then no duty exists independent of the contract, and the economic loss rule will apply to bar a tort claim. *City of Aspen v. Burlingame Ranch II Condo. Owners Ass'n*, 2024 CO 46, ¶ 43, 551 P.3d 655, 664.

¶26 We have never excepted willful and wanton tort claims from the economic loss rule. In *Bermel*, ¶ 20 n.6, 440 P.3d at 1154 n.6, however, we noted that the economic loss rule generally should not apply to *intentional* tort claims:

> [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," 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. (second alteration in original) (quoting *McShane v. Stirling Ranch Prop. Owners Ass'n*, 2017 CO 38, ¶ 20, 393 P.3d 978, 983).

¶27 This statement regarding intentional tort claims does not convince us that willful and wanton tort claims lie outside the reach of the economic loss rule. An intentional tort claim is distinct from a willful and wanton tort claim. Intentional conduct requires that the actor intend the result of the conduct or know that the conduct is likely to bring about that result. *See Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 392 (Colo. 2001); *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994); CJI-Civ. 24:2 (2024). Willful and wanton conduct, in contrast, refers to acts or omissions committed purposely but without regard to the consequences of those acts or omissions. § 13-21-102(1)(b), C.R.S. (2024); CJI-Civ. 9:30 (2024). Thus, as we said long ago, "[W]illful and wanton conduct is that which approaches but does not include an intentional tort nor can it be classified as such." *Brown v. Spain*, 466 P.2d 462, 465 (Colo. 1970).

¶28 Furthermore, our discussion in *Bermel*, ¶ 20 n.6, 440 P.3d at 1154 n.6, of agreements purporting to exculpate a party from liability for willful and wanton negligence does not support removing willful and wanton negligence claims from the economic loss rule's reach. Application of the economic loss rule, unlike an exculpatory agreement, does not shield anyone from a claim asserting willful and wanton conduct. It merely dictates the nature of that claim—contract, rather than tort.

¶29 In short, our statement in *Bermel* did not create an exception to the economic loss rule for tort claims asserting willful and wanton conduct, and we decline to adopt one now. Indeed, in our view, such an exception would undermine the purposes of the rule because it would allow a party to evade the rule's application simply by alleging willful or wanton conduct. Nor do we deem such an exception necessary to deter willful and wanton conduct or to compensate plaintiffs when such conduct occurs because a remedy already exists in contract.

¶30 For these reasons, we conclude that willful and wanton conduct is not excepted from the economic loss rule, and we turn to the facts now before us.

C. Application

¶31 As described above, the three factors that we identified in *BRW*, 99 P.3d at 74, guide our determination of the source of the duty at issue and, in turn, whether the economic loss rule applies. These factors, again, are whether (1) the relief

sought in negligence is the same as the contractual relief; (2) there exists a recognized common law duty of care in negligence; and (3) the negligence duty and contractual duty differ in any way. *Id.* We address each of these factors in turn.

¶32 First, the parties do not dispute that the relief that Mid-Century sought by way of its negligence claim (i.e., damages to the restaurant caused by the fire) is the same relief that it could have sought by way of a contract claim. Indeed, when Mid-Century belatedly attempted to amend its complaint to assert a contract claim, it demanded exactly that relief.

¶33 Second, Mid-Century alleged in its complaint a duty of care in negligence "to perform its work as general contractor . . . in a safe, careful, competent, and workmanlike manner" and that HIVE had breached this duty when it deviated from the plans and design and installed combustible plywood in the wall.

¶34 Third, notwithstanding the possible existence of this duty of care in negligence, such a duty does not differ in any way from HIVE's duty under the contract, in which HIVE warranted that "the Work will conform to the requirements of the Contract Documents" and specified that "substitutions not properly approved and authorized" did not conform to the requirements. Indeed, when Mid-Century sought to amend its complaint to assert a breach of contract claim, it described HIVE's contractual duty as a duty to perform its work as a

general contractor safely and competently, and it alleged that HIVE breached this duty when it installed combustible plywood in the kitchen wall adjacent to heat-producing appliances. This duty and the alleged breach are identical to those allegedly arising under tort law.

¶35 The parties thus memorialized in their contract the same duty that Mid-Century contended HIVE breached by deviating from the plans and design, and thus, the alleged tort duty was not independent of the duty set forth in the parties' contract. Accordingly, the economic loss rule required Mid-Century to pursue its claim in contract, rather than tort. *City of Aspen*, ¶ 43, 551 P.3d at 664; *Town of Alma*, 10 P.3d at 1264. The fact that Mid-Century alleged that HIVE had engaged in willful and wanton conduct does not alter this conclusion.

¶36 We are not persuaded otherwise by Mid-Century's assertion that the economic loss rule does not apply because Mid-Century suffered property damage, rather than pure economic loss. Mid-Century raised this argument for the first time in its briefing in this court. Accordingly, the issue is not properly before us. *See Est. of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992) ("Arguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal.").

¶37 Nor are we persuaded by Mid-Century's argument that the error in allowing its tort claim to proceed was harmless because it could have alleged the

same damages in contract. Ultimately, Mid-Century did not do so (even though it belatedly tried to do so). Although we "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties," C.R.C.P. 61, we do not believe that harmlessness may be measured against a claim that Mid-Century never asserted and that the jury never considered.

III. Conclusion

¶38 For these reasons, we conclude that the economic loss rule does not except allegations of willful and wanton conduct from its reach. Applying, then, the economic loss rule to the facts before us, we conclude that the rule barred Mid-Century's negligence claim here.

¶39 Accordingly, we affirm the judgment of the division below.