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COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES H. JACKSON and C.R. HENDRICK, a marital community,

Petitioners,

vs.

TRENCHLESS CONSTRUCTION SERVICES, L.L.C., a Washington  
Limited Liability Company, and QPS, Inc., a Washington Corporation  
doing business as "QUALITY PLUMBING",

Respondents.

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RESPONDENT QPS, INC.'S SUPPLEMENTAL BRIEF (IN RESPONSE TO  
APPELLANT'S SUPPLEMENTAL BRIEF REGARDING *BORISH v.*  
*RUSSELL*)

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**ORIGINAL**

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## I. INTRODUCTION.

The recent decision in *Borish v. Russell*, 155 Wn.App. 892, 230 P.3d 646 (Div.2, May 4, 2010), is not applicable to the facts in this case. The holding in *Borish* with respect to the economic loss rule (to the extent it is deemed correct with respect to this issue) was based on a significantly different claim than the tort claims asserted in this case, and further relied on facts which also were significant different and readily distinguishable from the facts of this case. For these reasons, the decision in *Borish v. Russell* does not support Appellants' argument for a similar determination of the economic loss issue in the instant case.

## II. ARGUMENT

Appellants' theory of liability against Respondents was succinctly summarized by Judge Trickey during the summary judgment hearing:

THE COURT: So the plaintiffs' theory is that the tunnel was done negligently somehow which caused the erosion which damaged the property? MR. SETCHELL: Yes. THE COURT: Maybe that is over-simplification, but that is the plaintiffs' theory. MR. SETCHELL: That is a proper over-simplification, but I don't need to be more complicated here. They did it wrong. They did it negligently wrong. *RP 21, at ll. 11-21.*

In "Appellants' Supplemental Brief Regarding *BORISH v. RUSSELL*", Appellants James H. Jackson and C.R. Hendricks assert that the *Borish v. Russell* case, a decision which was rendered on May 4, 2010 by Division 2

of the Court of Appeals, establishes that the economic loss rule cannot be applied to bar their tort claims for negligent work asserted against Respondents QPS and Trenchless in this case. In their brief, Appellants contend that they are in the same position as the plaintiff-appellants in *Borish*, and since the court in the *Borish v. Russell* case held the economic loss rule did not apply in the absence of a contract between the Borish plaintiffs and defendant Russell therefore the same reasoning should and must be applied to a decision in this case. Appellants' reliance on the holding in *Borish* is misplaced, and the *Borish* decision does not establish a basis for reversal of the trial court's order granting summary judgment in the instant case.

*Borish v. Russell* is readily distinguishable from the instant case. The established facts of this case show that Appellants Mr. Jackson and Ms. Hendrick were simply successors in interest to the property they claim was damaged as the result of negligent work performed by Respondents under their respective contracts with the previous homeowner (Corinne Otakie), work which was completed *prior* to Appellants becoming the owners of the subject property. Appellants argument in reliance on the holding in *Borish*, a case which analyzed the applicability of the economic loss rule on a claim of negligent misrepresentation by the homeowners (plaintiffs *Borish*) against the appraiser who had contracted with their

lender to perform an inspection (defendant Russell), is without merit. In the present case, the tort claim against Respondent QPS alleges negligence in performance of duties assumed by QPS under a contract with the previous owner of the property. And just as a person who buys a car from the original purchaser would not have a right to assert a tort (negligence) claim for repairs to the vehicle which were performed under a contract with the previous owner, Appellants Mr. Jackson and Ms. Hendrick have no right to assert a tort (negligence) claim against Respondent QPS for work which was performed pursuant to a contract with the prior homeowner and which was completed well before Appellants purchased the property from Ms. Otakie.

Respondent does not believe that the decision in *Borish v. Russell* would extend to this case based on the very different facts and issues before the court in the instant case. The holding in *Borish* should be limited to the specific facts of that case, but even if viewed more broadly the decision is limited to claims involving intentional or negligent misrepresentation by a defendant. With the exception of misrepresentation claims similar to the claims in *Borish*, application of the economic loss rule does not require the existence of a contract between the parties to the litigation and instead looks at whether the claim arises out of a contract and/or concerns duties which were assumed by contract. If the

economic loss rule was intended to be applied only in circumstances where there is an actual contract between the parties as Appellants argue the holding in *Borish* requires, the value of the economic loss rule would be so limited it is difficult to see how it could be reconciled with the intent and purpose of the rule as stated in the significant line of prior cases which established and developed the rule. Based on this prior line of cases, and in particular the holding in the case of *Stuart v. Caldwell-Banker*, 109 Wn.2d 406, 745 P.2d 1284 (1987), it is clear that the economic loss rule would apply to the claims at issue in this case where Appellants' tort claims are based on allegations of negligence in performance of work under contracts between Respondents and the previous homeowner. Therefore, summary judgment is warranted on the grounds that the claim is barred under the economic loss rule.

In granting summary judgment in this case, the trial court properly found that Appellants had failed to establish the existence of any duty owed to them by either of the Respondents. In the decision to grant summary judgment based on lack of duty, the trial court also correctly stated that even if a duty were to exist it would have arisen out of Respondents' contracts with the prior homeowner and therefore the economic loss rule would be additional grounds for granting summary judgment where Appellants damage claim was solely for damage to the

property on which the work had been done. *RP 29-34.*

Summary judgment was properly granted on the issue of (no) duty where Appellants failed to establish the right to assert claims which relied on duties owed under contracts entered into with the previous homeowner and where they did not own the property at the time the work was performed under these contracts. (And Appellants admitted at the hearing on summary judgment that they were not third party beneficiaries of the contracts between Respondents and Ms. Otakie and/or entitled to assert a claim of rights under these contracts. *RP 19, ll. 14-25, and 20, ll. 1-7.*) The trial court also properly determined that the damages claimed were economic losses since the claims were based on allegations of negligent performance of work under these contracts and sought only money damages.

The trial court's decision to grant summary judgment is also warranted on additional grounds of failure to prove breach of a duty owed and/or proximate cause. Appellants not only failed to provide proof of the existence of a duty owed to them by Respondent QPS, they also failed to provide evidence of a breach of duty and/or that any alleged breach would have been a proximate cause of the claimed damage to their residential property.

Appellate review of summary judgment is de novo, and therefore

this court's determination that summary judgment was properly granted/is warranted is not limited to consideration of the grounds relied upon by the trial court and can be upheld on any "alternate" grounds appearing in the record. *Borish v. Russell*, 155 Wn.App. 892, 896, 230 P.3d 646 (citing *Hisle v. Todd Shipyards*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004), and *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989)). Respondent submits that summary judgment is warranted in this case on one and/or all of these grounds.

### III. CONCLUSION.

The decision in *Borish v. Russell* is inapplicable to the facts in this case. Therefore, Respondent QPS respectfully requests that this Court affirm the trial court's order granting summary judgment of dismissal of Appellants' claims.

Respectfully submitted this 2<sup>nd</sup> day of July, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2010, I placed into the US Mail a copy of the foregoing in a properly stamped envelope addressed to the following attorney of record for the petitioners:

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