

No. 744470

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

STEVEN AND KAREN DONATELLI, a married couple,

Plaintiffs/Petitioner,

v.

D. R. STRONG CONSULTING ENGINEERS, INC.,

Defendant/Respondent.

BRIEF OF RESPONDENT

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I. Introduction

Plaintiff, Steven Donatelli (hereinafter “Donatelli”), was a real estate developer who was financially leveraged beyond all prudence when, like thousands of others, the 2008 financial crisis caught him. After losing his investment to foreclosure, he blamed his civil engineers at D. R. Strong Consulting Engineers, Inc. (hereinafter “Strong”) for his losses, and he sued them for negligence, negligent misrepresentation, breach of contract, and under the Consumer Protection Act.

This is the second appeal. The issue presented in the first appeal concerned what was known as the Economic Loss rule and is now known as the Independent Duty rule. At the conclusion of the first appeal, the Supreme Court held “the independent duty doctrine cannot apply to this case because the record does not establish the scope of D. R. Strong and the Donatellis’ contractual duties.” *Donatelli v. D. R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013).

On remand, Donatelli asked the trial court, the Honorable Bruce Heller, to declare an independent duty existed under the facts of the case. Judge Heller denied Donatelli’s motion and he dismissed the claim of negligence after concluding Donatelli provided no basis on which to conclude an independent duty exists. He ruled disputed issues of fact about the scope of duties under the parties’ oral and written contract required a trial.

At trial, Donatelli abandoned all his many theories of the case and submitted a single claim for breach of contract to a jury who found no breach of contract occurred. In the end Donatelli claimed Strong breached the contract by failing to file the Final Plat Map, but it was undisputed Strong filed the Final Plat Map as required under the contract.

Following a verdict for Strong, Judge Heller entered a Judgment in favor of Strong for attorney fees and costs pursuant to the parties' contract. The Judgment should be affirmed, and this Court should award attorney fees and costs on appeal.

II. Assignments of Error

Strong does not believe the trial court committed any error.

Issues pertaining to assignments of error.

In the first of his failures to comply with the Rules of Appellate Procedure, Donatelli failed to identify any Issues Pertaining to his Assignments of Error. Strong suggests the Issues Pertaining the Donatelli's Assignments of Error are:

1. When Donatelli sought summary judgment on his claim for negligence did he identify any fact, law or argument on which to base a duty independent of the contracted duties? A/E No. A.
2. Was summary judgment dismissing the claim for negligence harmless error when Donatelli was free to argue every one of his

claims for breach of duty in the claim for breach of contract? A/E No. A.

3. Was summary judgment dismissing the claim for negligent misrepresentation error when Donatelli failed to assert a misrepresentation of a presently existing fact? A/E No. B.
4. Was summary judgment dismissing the claim for negligent misrepresentation harmless error when Donatelli was free to argue his claims for breach of agreement as to the time to completion and the agreed fees in the claim for breach of contract? A/E No. B.
5. Is the trial court's award of attorney fees and costs reviewable when Donatelli failed to assign error to any of the trial court's Findings of Fact or Conclusions of Law? A/E No. C.
6. Was the trial court's award of attorney fees supported by substantial evidence? A/E No. C.
7. Did the trial court abuse his discretion in the award of attorney fees? A/E No. C.

III. Statement of the Case¹

A. The parties and the project.

Donatelli was a realtor and land developer. CP 50. Strong is a firm of civil engineers and surveyors. CP 51.

The project at issue in this suit was the development of two adjoining short plats totaling eight lots in unincorporated King County. CP 230, 231.

B. The Preliminary Approval.

Strong's work on Donatelli's project began before 2002 when they submitted an application to obtain a Preliminary Approval. CP 231. King County granted the Preliminary Approval on October 4, 2002 with conditions governing the design and construction of improvements, all of which were delivered to Donatelli. CP 231. Three conditions became important to the outcome of this project.

First, the Preliminary Approval would expire unless the improvements were completed and the plat recorded within 60 months. CP 231. Donatelli retained all the contractors to complete the improvements, and he could not

¹ Donatelli failed to inform the court what happened on his project or during the six years of this litigation before trial or the trial itself, and his Statement of the Case lacks any reference to the record as required by RAP 10.3(a)(5). Mindful of RAP 9.12, which limits review of summary judgments to the evidence and issues called to the trial court's attention, this Statement of the Case refers to the evidence and issues Judge Heller considered at summary judgment, except where noted for evidence admitted at trial.

record the plat until his contractors completed the improvements or he bonded their completion. CP 231.

Second, the project included a short street with a variance calling out the dimensions of the street, curb, gutters, and sidewalk. CP 232.

Third, the County required Donatelli to provide either a fire hydrant or he was required to fire sprinkle each of the homes he planned for the project. CP 232. Donatelli chose to install a fire hydrant. *Id.*

Three agencies had jurisdiction over portions of the work: King County, Seattle Public Utilities (they supplied the water), and a local sewer district. CP 231. Three departments within King County weighed in during the project plan review: the Department of Development and Environmental Services (DDES), Transportation, and the Fire Marshall. Donatelli had to obtain approvals from each of these agencies, and he took the plans in for submittal each time. CP 231.

C. Donatelli and Strong made a contract for professional services.

On October 31, 2002 Donatelli contracted with Strong to complete the civil engineering design for the project. CP 241-247. The contract's scope of services set forth six phases of work Strong agreed to perform and only one phase was at issue when the case was submitted, Phase 600 – Final Plat Map, and Additional Services. *Id.* Donatelli testified the contract's

descriptions of the scope of services were consistent with what he understood Strong would do for him. CP 289.

Several terms of the contract are important to the outcome.

First, Strong indicated it would be “able to complete the design within three to four weeks of receipt of the required topographic survey information.” This was the only time estimate Strong provided. CP 232. Land development in King County was quite active in 2002, and the County was notoriously slow in completing its review. CP 232. Strong specifically disclaimed any guarantee of the time it would take to complete the construction because they had no control over market conditions, which had a direct bearing on the County’s time to review the plans. CP 232, 233.

Second, the fees for Strong’s services depended on the Phase of the work. The Phases 100 and 200 services were a fixed fee; the fee for Phase 300 Construction Staking and Phase 400 Construction Observation/ Assistance were a time and materials estimate; the fee for Phase 500 As-Built Survey & Plans, Phase 600 Final Plat Map, and Phase 700 Additional Services were time and materials with a price quoted. CP 232.

Third, in the event of a dispute Strong’s contract provided, “for any injury or loss on account of any error, omission, or other professional negligence, the Client agrees to limit” Strong’s liability to the greater of \$2,500 or the fee. CP 247. Strong also promised it would perform its work

“in accordance with generally accepted professional engineering and surveying practice.” CP 247.

D. The course of the project work and contract amendments.

Problems with the work of Donatelli’s other design consultants, his own financial circumstances, shifting requirements of the permitting agencies, and the financial crisis that began in 2007 impacted the project work. CP 230-239.

A large storm water retention vault was designed by a structural engineer Donatelli hired under a separate contract. CP 233. After his engineer’s vault design was approved, the design proved to be unbuildable and had to be redesigned; Donatelli replaced his structural engineer. CP 233.

In 2003 Donatelli’s financial circumstances began to impact the project. CP 234. Seattle Public Utilities (SPU) charged him a fee to extend its water main to his project, and on May 29, 2003, Donatelli delayed SPU’s water plan review for several months due to the cost of the water main extension agreement. CP 234.

On February 6, 2004, King County asked for changes to the structural plans and the geotechnical report, requiring responses from Donatelli’s other consultants. CP 234.

The County’s comments called for Additional Services, and Strong advised Donatelli they were working on Phase 700 “Additional Services”

and they would make the required changes to the civil plans on a time and materials basis. Donatelli approved the *first of four* Contract Amendments on February 25, 2004. CP 234.

On July 8, 2004, the County informed Strong the project was ready for final fee payment. This was about 15 months after submittal and typical for King County. CP 234.

Then King County asked for a Boundary Line Adjustment, a requirement not previously imposed on this short plat. CP 234. In addition, Seattle Public Utilities and the sewer district asked for changes to the design documents. These requests prompted the *second* request for Contract Amendment for Phase 700 “Additional Services” and Donatelli approved it on September 10, 2004. CP 235.

Donatelli could begin construction when he pulled the plans and paid the County review fees. On December 28, 2004, he told Strong he planned to wait for several months before pulling the plans and paying the fees. CP 235 (Ex. G, file memo).

Issues arose with an easement and property on the west side of Donatelli’s project, and on February 1, 2005 he approved a *third* Contract Amendment for additional services relating to the easement. CP 235.

On July 13, 2005, Donatelli told Strong he would need construction staking in 4 to 6 weeks. CP 235. But as of August 26, 2005, Donatelli still

owed King County its review fees. *Id.* He was unable to pull the plans and start construction until he paid the overdue County review fees. *Id.*

On August 10, 2005 Donatelli signed a *fourth* Contract Amendment to address issues arising from his first structural engineer's design of the storm vault. CP 236.

With every one of these contract fee amendments, Donatelli acknowledged the need for services additional to what Strong had contracted for in October 2002. CP 236. He paid each invoice and never expressed any complaint Strong was late in completing its work or the fees were excessive. *Id.*

As of November 9, 2005 the unpaid plan review fees Donatelli owed to King County totaled \$44,000. CP 236.

Donatelli began the construction work in early 2006 and he, not Strong, contracted with all the contractors for the build out of the short plat. CP 236. Strong provided construction staking services for the contractor in accordance with the contract, Phase 300 "Construction Staking Services", and Rick Olson, Strong's project engineer, answered questions from time to time, as they do on any short plat project per Phase 400 "Construction Phase Assistance & Construction Observation". CP 236.

The plat construction work was substantially completed by the end of 2006; on December 28, 2006, Strong advised Donatelli the plat was ready for recording if he would bond the remaining incomplete work. CP 236.

In January 2007, Donatelli borrowed \$765,000 at 12% interest from a private lender. Ex. 215, 216.²

Strong filed the Final Plat Map on January 19, 2007. Ex. 110.³ That fact is dispositive.

In July 2007, it became apparent Donatelli never obtained the permit required to install the fire hydrant. CP 237. Mr. Olson had informed Mr. Donatelli of the need for the Fire Marshall's permit on November 11, 2004. CP 237, Ex. L. Donatelli submitted an expedited permit application to the Fire Marshall on July 12, 2007. CP 237.

In the meantime, King County had changed its road ordinance to require streets in a development like this one to be wider than what was required under the rules in effect in 2002 when King County granted the Preliminary Approval. CP 237. But the street was already in and the increased width would eliminate parking on one side of the new street. *Id.*

In response to the application for a permit to install the already installed hydrant the Fire Marshall imposed new conditions on the project. *Id.* These

² Exhibits 215 and 216 were offered at trial.

³ Exhibit 110 was offered at trial.

new conditions required fire sprinklers in the homes or, alternatively, parking would be restricted to one side of the new street. Donatelli told Strong the cost of the fire sprinklers was too great. CP 237. Donatelli agreed the Fire Marshall imposed new conditions on his plat and that was not Strong's fault. CP 299.

During August-October, 2007, Donatelli and Olson argued with the King County bureaucracy to avoid complying with these new conditions, without success. CP 237. Then when they tried to implement the no parking restriction, DDES, Traffic Department and Fire Marshal argued amongst themselves about whether to allow restricted parking on one side. *Id.*

The County came to an agreement only after the 60 month deadline on the Preliminary Approval expired on October 4, 2007. CP 237.

King County issued a new Preliminary Approval early in 2008. CP 238. The work was completed, and the plat was ready to be recorded on August 21, 2008. Ex. 224.⁴ By then the worldwide financial crisis was in full bloom, Mr. Donatelli ran out of money, and he did not complete the project. CP 238.⁵

⁴ Exhibit 224 was offered at trial.

⁵ According to Wikipedia, the financial crisis began in September 2007 and was in full bloom by September 2008 when Lehman Brothers declared bankruptcy and Fannie Mae and Freddie Mac were placed into conservatorship.

http://en.wikipedia.org/wiki/Financial_crisis_of_2007%E2%80%9308

Donatelli stopped paying on his \$765,000 loan, and as of November 14, 2008 he owed \$837,000 with default interest accruing at 25%. Ex. 189.⁶ By 2008 the value of lots like those Mr. Donatelli was developing had plummeted by 50% or more.⁷ RP 8-10-2015. In 2009 he lost the property and his investment in foreclosure.

Notably, Donatelli does not dispute any of the forgoing facts.

E. The first appeal.

In May 2009, Donatelli sued Strong claiming they were responsible for his financial losses, and he alleged four claims for relief: breach of contract, negligence, negligent misrepresentation, and a violation of the Consumer Protection Act. CP 1-5.

In 2010, after taking Donatelli's deposition, Strong sought partial summary judgment seeking dismissal of the claims for negligence and negligent misrepresentation, and the Consumer Protection Act claim. CP 50-59. Strong argued claims for pure commercial loss on a project, like those Donatelli claimed, in the absence of personal injury or property damage are limited to contractual remedies under the Court's decision in

⁶ Exhibit 189 was offered at trial. The Report of Proceedings is from the trial.

⁷ With an offer to purchase the project at \$80,000 per lot in 2008, Donatelli's project had a value of \$640,000 against which he owed \$837,000.

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994).

On May 10, 2010 the trial court, The Honorable Jim Rogers, denied Strong's motion on the claims for negligence and negligent misrepresentation; he granted the motion to dismiss the Consumer Protection Act claim. CP 100, 101.⁸

On June 5, 2010, Donatelli also voluntarily withdrew the claim for negligent misrepresentation by motion. CP 110. That fact became important later.

Strong sought discretionary review of Judge Rogers' Order Denying Summary Judgment, and on August 11, 2010 Commissioner Verellen (as he was then) granted the motion for discretionary review, ruling the trial court's error was obvious as the legal issue was governed by the Court's decision in *Berschauer/Phillips*. Commissioner's Ruling Granting Discretionary Review, August 11, 2010.

While the appeal was pending in this court, the Supreme Court issued a decision changing the name of the rule adopted in *Berschauer/Phillips*. What was until then known as the Economic Loss rule became known as the Independent Duty rule. *Linda Eastwood, dba Double KK Farm v. Horse*

⁸ The CPA claim was withdrawn and is not in issue.

Harbor Foundation, Inc., 170 Wn.2d 380, 241 P.2d 1256 (2010); see also *Affiliated FM Insurance v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.2d 521 (2010). Thereafter this court and, after accepting review, the Supreme Court, affirmed Judge Rogers' denial of summary judgment. *Donatelli v. D. R. Strong Consulting Engineers, Inc.*, 163 W. App. 436, 261 P.3d 664 (Div. 1 2011), 179 Wn.2d 84, 312 P.3d 620 (2013).

The Supreme Court ruled it could not determine whether an independent duty existed under the facts of the case – and thereby provide a basis for a duty in a claim of negligence – because there was a dispute about the scope of the contracted services. *Id.*, 179 Wn.2d at 91. The Court relied in part on the affidavits of contractors who said, “D. R. Strong oversaw work” and “would advise and direct the contractors’ efforts in fixing day-to-day problems” and “coordinated the different parts of the job.” *Id.*, 179 Wn.2d at 94. Strong disputed those assertions. *Id.*

The decision also discussed the claim for negligent misrepresentation; the Court likely was unaware Donatelli voluntarily withdrew that claim.

The Court remanded the case to the trial court for further proceedings. CP 125.

F. Proceedings after remand.

After remand, Strong deposed the two contractors the Supreme Court relied on, and they recanted the Declarations Donatelli used in 2010. CP

276-280 Diorio, CP 281-285 Rugg. Notwithstanding this deposition testimony, Donatelli sought partial summary judgment relying in part on the recanted 2010 Declarations. CP 171-193.⁹

Donatelli asked for two things. First, he sought a ruling that “D. R. Strong had undertaken professional obligations to serve as a project manager on the Donatellis’ short plat development project and to complete the necessary paperwork and permitting processes and therefore had independent duties of care relating to those issues.” CP 171. Second, Donatelli sought a ruling that “the limitation on liability clause in the contract between the parties does not apply to the Donatelli’s tort claims.” CP 171.¹⁰

On the duty issue, Donatelli’s motion argued:

In short, either through the Parties’ agreement or Defendant’s affirmative conduct, **Defendant agreed**, among other things, to serve as a project manager on the Donatellis’ short plat development project and to completing the necessary paperwork and permitting processes. CP 172, lines 22-25 emphasis added.

The written agreement does not, however, reference **many of the terms confirmed orally by the Parties**—most notably, Defendant’s obligation to oversee the Project’s day-to-day operations and to take care of all of the necessary paperwork and permitting processes. CP 176, lines 1-3, emphasis added.

⁹ Donatelli’s assertion his motion was limited to the limitation of liability clause is not correct. App. Br. 4 fn 1. His reliance on evidence known to be mistaken at best is troubling.

¹⁰ Judge Heller ruled the limitation of liability clause was enforceable and the damages would be limited to the fees paid. Donatelli made No Assignment of Error to this ruling and it will not be addressed further.

His Motion for Partial Summary Judgment and his Reply Brief did not address the Revised Code of Washington (RCW) or the Washington Administrative Code (WAC). CP 171-193, 311-316. He made no argument in support of any basis for an independent duty beyond his assertion, “it is well-settled that design professionals such as Defendant have long had a duty of care recognized at law that arises independently of a contractual obligation.” For this proposition he cited *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 257 P.3d 532 (2011), which arose in a claim for wrongful death on a construction project. Donatelli’s claim alleged financial losses from a failed real estate development, not personal injury or property damage.

On January 14, 2015 Judge Heller issued an Amended Memorandum Opinion denying Donatelli’s motion. CP 333-339.¹¹

Judge Heller analyzed the Supreme Court’s *Donatelli* decision, and concluded the analysis must begin with a determination of what was agreed in the contract. He recited the Court’s holding, “the independent duty doctrine cannot apply to this case because the record does not establish the scope of D. R. Strong and the Donatelli’s contractual duties.” CP 334. He

¹¹ Judge Heller’s initial memorandum opinion also addressed the claim for negligent misrepresentation, but he withdrew the opinion and issued the Amended Opinion when he realized Donatelli had withdrawn that claim. Plus, he noted Donatelli’s motion did not seek any relief on the misrepresentation claim. CP 334.

applied the Court's guidance: "[t]o determine whether a duty arises *independent* of the contract, we must first know what duties have been assumed by the parties *within* the contract." CP 334.

After reviewing the evidence submitted in support of and in opposition to Donatelli's motion, including Olson's denial Strong agreed to be Donatelli's "Construction Manager", Judge Heller ruled "issues of fact remain regarding the scope of Defendant's contractual duties. These issues of fact are certainly material to Plaintiff's breach of contract claim." CP 336.

Quoting *Donatelli* again, Judge Heller observed, "a contract may assume an engineer's common law duty to act within reasonable care," and then he threw Donatelli a life-line when he observed, "the parties' agreement addresses damages caused by 'any error, omission, or professional negligence.'" CP 336. Judge Heller concluded as a matter of fact Donatelli's claim was based entirely on the written and alleged oral agreements.¹²

Therefore, he ruled there was no basis for an independent duty and he dismissed the claim for negligence in accordance with CR 56(d). CP 336, 337. Donatelli's contentions this ruling was made in response to

¹² Donatelli made no Assignment of Error to this or any other factual finding.

Defendant's Second Motion for Summary Judgment and he had no opportunity for "full briefing" are not correct. App. Br. at 8. Donatelli asked for summary judgment, and Strong responded asking for dismissal under CR 56(d). CP 219.¹³ Donatelli had every opportunity to brief the issue, and he did not ask for more time or leave to file anything more.

Donatelli then filed a motion to amend his complaint to *re-assert* the claim for negligent misrepresentation. CP 345. The alleged misrepresentations were, "defendant originally represented to Donatelli that the Project should be able to be completed within approximately one and ½ years, if not less time, from the date Defendant started working on the Project and that the Project should not take more than \$50,000 to complete." CP 440-444. Judge Heller granted Donatelli's motion to amend. CP 438, 439.

Strong then sought summary judgment to dismiss the resurrected claim of negligent misrepresentation on the grounds the alleged misrepresentations were not of presently existing facts. CP 448-456. On May 22, 2015, Judge Heller granted Summary Judgment ruling, "Plaintiff's claim for negligent misrepresentation does not allege a false representation

¹³ Strong also sought CR 11 sanctions for relying on Declarations of the contractors known to be false. Judge Heller denied the request for sanctions. CP 333-339.

as to a presently existing fact, and that is a prerequisite to a claim for negligent misrepresentation.” CP 506, 507.

Donatelli tried to appeal the two summary judgments, and Commissioner Neel denied Donatelli’s motion for discretionary review on July 24, 2015. Discovery was concluded, and a jury trial of the claim for breach of contract commenced on August 3, 2015 in Judge Heller’s court. CP 825, Clerk’s Minutes 8-3-2015.

G. The trial

Donatelli’s Trial Brief claimed Strong agreed to “run the project for him from beginning to end” and “Strong ran the project for Mr. Donatelli (more often than not directing everything he was doing to assist as well)”. CP 543. In pre-trial motions Donatelli persuaded Judge Heller to deny Strong’s Motion *in Limine* to bar “[a]ll testimony or argument that the scope of Defendant’s contract for services included duties to provide “project management” or “construction management” (CP 808, 816 Motion *in Limine*, CP 825, Clerk’s Minutes, 8-3-2015, first motion Denied).

Then Donatelli abandoned those claims and every other theory he advanced in the first six years of this litigation. He did not pursue claims Strong breached its contract to be a “construction manager” or “project manager” or Strong “oversaw work performed by at least some subcontractors” or Strong would “advise and direct the contractor’s efforts

in fixing day-to-day problems” or Strong “coordinated the different parts of the job” by contract or undertaking. He did not pursue a claim Strong had “failed to record the plat”. He did not pursue claims Strong was dilatory or failed to meet a deadline for performance or had breached the alleged agreement as to its fees. Despite Judge Heller’s express invitation, Donatelli did not pursue a claim Strong breached the contract by committing an error or omission or professional negligence.

Donatelli’s only claim was Strong breached the contract by failing to perform the Phase 600 services, which required Strong to “File the Final Plat Map”. CP 579. This was an odd turn of events after six years of litigation and one appeal because the evidence showed Strong filed the Final Plat Map on January 19, 2007, nearly eight months before the Preliminary Approval expired. Ex. 110.

Although at summary judgment Judge Heller ruled Donatelli’s assertions about what Strong agreed or undertook to perform were relevant to the claim for breach of contract (CP 336), he did not attempt to prove or argue a breach of contract based upon any breach of contract duty, written or oral, other than the duties of Phase 600 of the contract.

Under the contract terms, the Phase 600 services required the following:

Phase 600 – Final Plat Map

The Consultant will perform the field and office procedures necessary to survey and monument the legal boundaries of each created lot and the centerlines of all street R-O-Ws. All lot corners will normally be monumented with identity capped rebar. Other appropriate methods of monumentation may be utilized, depending upon site conditions, expected permanence of position, and boundary clarification requirements. A Plat Map (PM) will be produced, as required by law, indicating procedures, interpretations and references used in the survey, as well as descriptions of the monuments actually set. The PM will also include existing site features such as fences, structures, and obvious lines of occupation which might influence boundary interpretation. The original PM will be filed with the appropriate agencies and one copy will be provided to the Client. CP 243, 244, admitted as Trial Ex. 8.

Judge Heller instructed the jury on Donatelli's claim for breach of contract. CP 579. The Court's Instruction No. 6 told the jury:

In this case, plaintiff has the burden of proving each of the following propositions:

- (1) Plaintiff contracted with defendant for services required by Phase 600 of the contract between the parties,
- (2) Defendant breached the contract by failing to provide the services stated in Phase 600,
- (3) Defendant's breach of contract was a proximate cause of damages to plaintiff, and
- (4) The amount of the damages. *Id.*

Donatelli made no objection or exception to any of the Court's Instructions or the failure to give any proposed instructions. RP 8-12-2015. Indeed, the court file shows Donatelli did not file any proposed instructions,

and none are included in the Clerk's Papers. And while his Notice of Appeal (CP 783, 784) indicated he was seeking review of the Judgment, he assigned no error to the any of the Court's Instructions, the Judgment or any of its Findings of Fact and Conclusions of Law.

At the trial of this case, Donatelli abandoned every claim but one, and the evidence on that claim was undisputed. His maudlin plea Judge Heller *forced* Donatelli to limit his breach of contract claim is not correct; he was free to argue any breach of the contract duty to exercise a professional duty of care he wished to.

The jury answered "No" to the verdict form question, "Did defendant breach its contract with plaintiff?" CP 570.

H. Strong's application for attorney fees, and Donatelli's application for attorney fees.

Following the verdict, Strong applied for an award of attorney fees pursuant to the contract's prevailing party attorney fees clause. CP 606-609. The motion advised the court of the actual hourly rate Strong's attorney charged (\$210 per hour), and it asked for a multiplier under *Bowers v Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). In response to Strong's motion, Donatelli asked for a set off for the attorney fees he incurred in prevailing in the first appeal, and his attorney filed a

Declaration asserting a reasonable hour rate was \$380 per hour. CP 679-723.

Judge Heller instructed Strong to segregate the time spent on the claim for negligent misrepresentation, and Strong did so. CP 740, 741, 746-763. At the same time, Strong accepted the truth of Mr. Park's declaration a reasonable rate was \$380 per hour, and Strong asked Judge Heller to apply that rate plus whatever multiplier he concluded was warranted under all the circumstances of the case. CP 769-771. Donatelli's assertion the rate increase was made only in response to Judge Heller's ruling requiring a reduction for the time spent on the claim for negligent misrepresentation is not correct. App. Br. at 20, 25.

On November 30, 2015 Judge Heller entered Findings of Facts and Conclusions of Law Regarding Defendant's Motion for Judgment and Award of Attorney Fees and Costs. CP 772-779. Judge Heller found as a matter of fact the claim for negligence was indistinguishable from the claim for breach of contract and he concluded \$300 was a reasonable hourly rate and he declined to use a multiplier for the higher hourly rate. CP 776.¹⁴

¹⁴ Donatelli made no assignment of error to any of Judge Heller's Findings of Fact or Conclusions of Law on the award of fees and costs.

On December 4, 2015 Judge Heller entered a Judgment on the verdict against Mr. and Mrs. Donatelli with an award of attorney fees and costs of \$221,778.38. Donatelli filed a timely notice of appeal.¹⁵

IV. Summary of Argument.

The entry of summary judgments dismissing Donatelli's claims for negligence and negligent misrepresentation were not error, and even if they were, the errors were harmless.

On the claim for attorney fees, Donatelli failed to assign error to any of Judge Heller's Findings of Fact and Conclusions of Law. They become "verities on appeal" and the only issue is whether the findings were supported by substantial evidence or showed an abuse of discretion. Judge Heller did not err.

V. Argument

A. The standards of review.

1. Summary judgment is subject to *de novo* review.

The standard of review of the entry of summary judgments is *de novo*. The appellate court engages in the same inquiry as the trial court, to determine if the moving party is entitled to summary judgment as a matter

¹⁵ Mr. and Mrs. Donatelli are now divorced and she declared bankruptcy and was discharged. Strong believes this suit is pursued by Mr. Donatelli.

of law and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnational Title Ins. Co.*, 148 Wn.2d 788, 64 P.3d 22 (2003).

In the context of this case, the court must determine whether Judge Heller correctly ruled Donatelli presented no fact, argument or authority to support a duty that arose independent of the alleged oral and written agreement for services. If not, was any error harmless?

On the claim for negligent misrepresentation, did Judge Heller correctly apply the Washington cases holding a prerequisite element of the claim is the representation of a presently existing fact? If not, was any error harmless?

2. The standard of review of the award of attorney fees is substantial evidence or abuse of discretion.

Because Donatelli did not assign error to any of Judge Heller's Findings of Fact on the application for recovery of attorney fees, those findings are "verities" on appeal, and the standard of review is whether the challenged conclusions of law are supported by the court's findings of fact. *Lakeside Pump & Equipment, Inc. v. Austin Const. Co.*, 89 Wn.2d 839, 576 P.2d 392 (1978). Alternatively, the trial court's determination of the amount of an attorney fee award is reviewed for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 966 P.2d 305 (1998).

B. Judge Heller correctly ruled there was no basis for an independent duty.

In the evidence and arguments Donatelli offered at summary judgment, he identified no basis for an independent duty.

First, while the Court in *Eastwood* changed the name of the rule from “Economic Loss” to “Independent Duty”, in every decision since then our courts have adhered to the principle the unanimous *Berschauer/Phillips* Court adopted in 1994: claims for commercial loss arising from a construction project, absent personal injury, property damage, or a risk thereof are governed by the law of contract and not the law of negligence.

The Court acknowledged this state of the law in its decision in *this* case.

The majority said:

The independent duty doctrine continues to “maintain the boundary between torts and contract” in the place of the economic loss rule. The court has limited the application of the independent duty doctrine to a “narrow class of cases ... claims arising out of construction on real property and real property sales.”

Id. 179 Wn.2d at 92, Justice Fairhurst, citing *Elcon Constr. Inc. v. E. Wash. Univ.*, 174 Wn 2d 157, 165.

Berschauer/Phillips has not been overruled; it remains as the law governing the loss of commercial expectations in the construction industry.

Pacific Boring, Inc. v. Staheli Trenchless Consultants, Inc., 138 F.Supp.3d 1156 (W.D.Wash. 2015) (“The Court finds that *Berschauer* is still good law in Washington.”).

Second, Donatelli completely ignored the Court’s holding to his detriment. The Court held: “the independent duty doctrine cannot apply to this case because the record does not establish the scope of D. R. Strong and the Donatellis’ contractual duties.” *Donatelli*, 179 Wn.2d at 91. That makes the first sentence of Donatelli’s argument at section B. 1. complete nonsense. (App. Br. at 5). Contrary to his wishful thinking, the Court confirmed only one thing, “the independent duty cannot apply to this case.” Donatelli seems oblivious to the Court’s actual holding.

According to the Court’s holding, it was incumbent on Donatelli to prove up the contract; only then could the court make an analysis as to whether there was any basis to impose an independent duty. The Court said:

The analytical framework provided by the independent duty doctrine is only applicable when the terms of the contract are established by the record. To determine whether a duty arises *independently* of the contract, we must first know what duties have been assumed by the parties *within* the contract.

Id., 179 Wn. 2d at 91.

Donatelli’s attempt at summary judgment to prove the existence of duties independent of the contract alleged only that Strong had undertaken professional obligations orally and in writing:

1) to serve as a project manager on the Donatellis' short plat development project, and

2) to complete the necessary paperwork and permitting processes and therefore had independent duties of care relating to those issues. CP 171.

Donatelli's motion claimed only that he and Strong had agreed on the services Strong would provide. He argued:

In short, either through the Parties' agreement or Defendant's affirmative conduct, **Defendant agreed**, among other things, to serve as a project manager on the Donatellis' short plat development project and to completing the necessary paperwork and permitting processes. CP 172.

The written agreement does not, however, reference **many of the terms confirmed orally by the Parties**—most notably, Defendant's obligation to oversee the Project's day-to-day operations and to take care of all of the necessary paperwork and permitting processes. CP 176.

Donatelli did not ask the judge to consider any other source of duty beyond what he and Strong agreed to. He did not argue a statute or administrative regulation created a duty, let alone an independent duty. His arguments about RCW 18.43 and WAC 197-27A-020 and the decision in *Burg v. Shannon & Wilson, Inc.* 110 Wn App. 798, 43 P.3d 526 (Div. 1 2002) first raised in this appeal are too little and too late. App. Br. at 6-8.¹⁶

¹⁶ In addition, Donatelli abused the decision in *Burg*. This court held the RCW and WAC did not create a basis for a duty in negligence, and he wrongly asserts "plaintiffs were not clients of the engineers". App. Br. at 8.

RAP 9.12 says in reviewing an order granting summary judgment “the appellate court will consider only evidence and issues called to the attention of the trial court.” It is well settled the court will not review an issue, theory, argument, or claim of error not presented to the trial court. *Lindblad v. Boeing Co.*, 108 Wn.App. 198, 207, 31 P.3d 1 (2001); *Behnke v. Ahrens*, 172 Wn.App. 281, 295, 294 P.3d 729 (2012) (summary judgment). When he sought summary judgment, Donatelli failed to raise his argument about statutes or administrative regulations or the *Burg* decision to Judge Heller and he cannot assert them now for the first time on appeal.

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.” *Eastwood*, 170 Wn.2d at 389, 241 P.3d 1256. In *Eastwood*, the Court found such a duty in the tort of waste, which is wholly independent of any contract. *Id.* The Court also found an independent duty where an engineer’s failure to exercise due care caused death or injury in *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 257 P.3d 532 (2011), and where there was a life threatening fire on the monorail occupied by passengers in *Affiliated FM Ins. v. LTK Consulting Svcs., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010), and where there was a risk of catastrophic structural failure in *The Pointe at Westport v. Engineers Northwest, Inc.*, No. 45839-0-2, 46079-3-2 (Div. II May 3, 2016). None

of those circumstances exist here. No court in this state has ruled there is an independent duty for a claim of negligence against an engineer where commercial losses only are sought. Instead, in recently discussing the import and reach of its decision in *Affiliated FM Ins.*, where the Court applied the new independent duty analysis to a negligence claim against engineers, the Court reaffirmed the absence of duty where no personal injury, property damage or risk of either is at issue.

In *Centurion Properties v. Chicago Title Ins.*, No. 91932-1 (July 14, 2016) the Court answered the 9th Circuit's certified question whether a title company owes a negligence duty to third parties, and the Court said, "no" 9-0. Addressing the impact of *Affiliated FM Ins.*, the Court said the prerequisite to a claim for negligence against engineers is the existence of a bodily injury, catastrophic property damage, or the risk of those events, in order to invoke the "safety" policies of tort law.

We found that a duty existed. *Id.* [*Affiliated FM Ins.*] at 453-54. In doing so, we balanced the risk to the physical safety of persons and property arising out of an engineer's work against the usefulness of private ordering (e.g., preference for contractual remedies) and against the economic burden a duty would place on engineers. *See id.* at 451-54. These policy considerations supported the court's analysis that a duty exists where "the interest in safety is significant" and the engineers occupy a position of control such that their training, education, and experience place them in the best position to prevent harms caused by their work.

The Court specifically rejected the argument Donatelli makes here, *i.e.*, because Washington's common law holds an engineer owes a duty of care, the duty applies in all respects to all contexts as a matter of "precedent". App. Br. at 5, 6.

We also considered precedent, both here and nationally, finding that the engineers' common law duty of care has long been acknowledged in Washington. *Id.* at 454. These considerations do not weigh in favor of a duty here. There is no significant interest in public safety at issue and no concerns for physical safety.

Centurion Properties v. Chicago Title Ins., supra.

Donatelli's argument "extra contractual sources" of duty are "in play" should be rejected as he showed none at summary judgment. App. Br. at 8. Nothing about his claim implicated a significant interest in public safety or a concern for physical safety.

In the absence of any evidence, citation or argument stating a basis to conclude the relations between Donatelli and Strong, or the nature of his alleged damages, implicated a duty independent of what they agreed to among themselves, Judge Heller had no choice other than to conclude Donatelli's claims were based entirely and only on the contract. The ruling was correct, not because the parties had a contract, but because Donatelli did not identify any reason to impose a duty beyond the promises they made in the written and oral agreements.

Summary judgment dismissing the claim for negligence was not error.

C. Dismissal of the negligence claim, even if error, was harmless.

Judge Heller's alleged error, and none is conceded, should not cause reversal because his ruling dismissing the claim for negligence was harmless error. As Justice Chambers said in *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 381, 292 P.3d 108 (2013,), citing RCW 4.36.240, "Washington courts have never reversed civil judgments for harmless error." RCW 4.36.240 states:

Harmless error disregarded.

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 992 P.2d 496 (2000). The ruling dismissing Donatelli's claim in negligence did not prejudice his substantial rights in any way. Judge Heller gave Donatelli free rein to prove up any claimed breach of contract he wished to pursue, including claims for breach of contract:

1. To serve as "construction manager" or "project manager",
2. To oversee work performed by the subcontractors,

3. To advise and direct the contractor's efforts in fixing day-to-day problems,
4. To coordinate the different parts of the job,
5. To complete the necessary paperwork,
6. To record the plat,
7. To meet a deadline for performance,
8. To charge only so much in fees, or
9. By committing an error or omission or professional negligence, including his argument about "respondent's obligation to know, be aware of, track, and inform appellants of project critical deadlines and regulations, such as the expiration of the preliminary short plat approval" App. Br. at 11.

Indeed, every one of those theories could have formed the basis of a claim for breach of contract for committing an error or omission of professional negligence – if he could find an expert witness to say so.

Judge Heller's Amended Memorandum Opinion concluded there were unresolved issues of fact as to what was within the parties' agreement.¹⁷ Judge Heller ruled "these issues of fact are certainly material to Plaintiff's breach of contract claim." CP 336. At trial – consistent with the summary

¹⁷ There was no dispute the contract required Strong to avoid an "error or omission or professional negligence."

judgment ruling – Judge Heller *denied* Strong’s motion *in limine* to bar Donatelli from testifying Strong agreed to provide “construction management” or “project management.” CP 808, 816, CP 825 Clerk’s Minutes, 8-3-2015.

Donatelli abandoned all of these claims, and he took no exception to any of the court’s instructions or the court’s failure to give his own proposed instructions. RP 8-12-2015. His trial decisions to abandon the very claims he spent 6 years advancing do not obviate the fact that the entry of summary judgment dismissing the claim of negligence was harmless error. The orders granting summary judgment deprived him of nothing substantial.

D. A claim for negligent misrepresentation requires a misrepresentation of a presently existing fact.

1. Judge Heller applied the correct law.

It was and is undisputed the alleged “misrepresentations”, *i.e.*, the predicted engineering fees and the time to completion, were not presently existing facts. But a claim for negligent misrepresentation requires proof a presently existing fact was misrepresented. *Micro Enhancement v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 40 P.3d 1206 (Div. 3 2002). Since at least 1960, the rule in Washington has been “where the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon particular

future use, or future requirements of the representee, then the representation is not of an existing fact.” *Shook v. Scott*, 56 Wn.2d 351, 353 P.2d 431(1960).

In affirming dismissal of a claim for negligent misrepresentation in *Micro Enhancement*, the court held:

Promises of future conduct may support a contract claim. But failure to perform those promises alone cannot establish the requisite negligence for negligent misrepresentation. A false representation as to a presently existing fact is a prerequisite to a misrepresentation claim. *internal citation omitted*; see also *Stiley v. Block*, 130 Wn.2d 486, 505-06, 925 P.2d 194 (1996) (promises of future performance are not representations of existing fact). None of Coopers' representations are of existing fact. They are instead representations of future performance.

Those were Donatelli's facts. The representations of the engineering fees to complete the work and the time it would take were at best promises of future performance, not statements of presently existing fact.¹⁸

In *Donald B. Murphy Contractors, Inc. v. King Co.*, 112 Wn.App. 192, 49 P.3d 912 (Div. 1 2002), this court applied this rule to affirm dismissal of a contractor's misrepresentation claim against King County where the County allegedly failed to purchase and maintain all risk insurance for a project as promised. The court held,

Murphy claims that it justifiably relied on the County's promise to "purchase and maintain" all-risk insurance for the project. This

¹⁸ The time to completion and fees were described in the contract for services. The fees were "estimated" and Strong did not guarantee a time for completion. CP 244.

claim fails because a false representation as to a presently existing fact is a prerequisite to a misrepresentation claim. *citing, Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 182, 876 P.2d 435 (1994). The County's promise to procure insurance was not a representation of a presently existing fact. Therefore, the negligent misrepresentation claim was properly dismissed.

That principle applies here. Donatelli's alleged reliance on Strong's promises the work would be completed in 1 ½ years for fees not exceeding \$50,000 does not create a claim for misrepresentation because they were not representations of presently existing facts. As in *Micro Enhancement*, Strong's alleged representations might have supported a claim for breach of contract, but not a claim for misrepresentation.

In *Stiley v. Block* 130 Wn.2d 486, 925 P.2d 194 (1996), relied upon in *Micro Enhancement, supra*, the Court applied the rule that a promise of future performance is not a representation of existing fact. *Id.* 130 Wn.2d at 505, 506. Here Strong's alleged promises of future performance were not representations of existing fact.

Judge Heller was bound to apply these decisions as the controlling law in Washington. The holdings in these decisions were not at issue when the Supreme Court wrote its majority opinion in this case. Nor could they be. Donatelli voluntarily withdrew his claim for negligent misrepresentation *before* the first appeal in this case commenced. CP 110. The Supreme Court was not asked to decide whether a misrepresentation claim could be brought

if it was not based on any presently existing facts. That issue was not presented, and it was not briefed or argued.

That a misrepresentation could form the basis of an independent duty was not a novel idea when the Court decided *Donatelli* in 2013. In *Elcon Const. v Eastern Washington University*, 174 Wn.2d 157, 273 P.3d 965 (2012), the Court said “We have repeatedly recognized a fraud claim to be outside the doctrine's scope, allowing such claims to be decided based on established tort precedent.” The *Donatelli* Court’s reference to this theory on which to base an independent duty is nothing more than a re-affirmation of this basic principle. The Court’s language should not be construed to overrule the decisions holding a false representation of a presently existing fact is a prerequisite to a misrepresentation claim.

2. No authority supports Donatelli’s argument.

Donatelli cited no Washington authority for his argument. The Court in *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987) was not asked to rule on the legal issue presented here. Moreover, the 1994 decision in *Berschauer/Phillips* where the Court unanimously declared a claim for negligent misrepresentation was not actionable in construction claims absent personal injury or property damage, is more recent and far more relevant than the Court’s 1987 decision in *Haberman*.

Instead of relevant Washington authority, Donatelli cited decisions from Colorado and South Carolina that are completely irrelevant. Plus, Donatelli failed to mention later decisions in both states reject his theory.

The courts in *Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69 (Colo. 1991) and *Gilliland v. Elmwood Properties*, 301 S. C. 295, 391 S.E. 2d 577 (1990) were not asked and did not decide the legal issue Judge Heller ruled on here. In *Keller*, a dairy farmer brought a product liability claim against the manufacturer of dairy equipment; those facts and the Court's ruling are completely irrelevant to Donatelli's claim.¹⁹ And while in *Gilliland*, an owner's misrepresentation claim against its architect for failure to produce drawings that met the architect's alleged representations of suitability survived, the South Carolina court was not asked to decide the legal question presented here. Neither of those courts were asked to decide whether a claim of negligent misrepresentation would survive in the absence of a representation of a presently existing fact.

A South Carolina court **was** asked to decide the precise question presented in this case nine years after *Gilliland* in *Koontz v. Thomas*, 333 S.C. 702, 511 S.E. 2d 407 (S.C. App. 1999). There, Mr. Koontz sued his architect, Thomas, alleging the architect had, among other faults,

¹⁹ Donatelli's assertion "services" were at issue in *Keller* is not correct. App. Br. at 14.

misrepresented the amount of the architect's fees that would be incurred and the time to complete the project. *Id.*, 511 S.E. 2d at 409. The trial court granted summary judgment dismissing all claims, the Court of Appeals affirmed, and on the claim for negligent misrepresentation the Court said:

to be actionable, the representation must relate to a present or pre-existing fact and be false when made. *Id.* "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.*

All of [the architect's] alleged representations related to future events, not existing facts. Koontz alleged T & D represented the construction phase of the project could be completed for \$400,000, the preliminary architectural services could be completed in a reasonable time, and the architect's fees for services rendered would not be excessive. *Id.*, at 413.

The facts and claim presented in *Koontz* are identical to the facts and Donatelli's claim here. The same rule should apply.

As for Colorado, in *Former TCHR, LLC v. First Hand Management, LLC*, 2012 COA 129, 317 P.3d 1226 (Colo. App. Div. 6 2012), the court affirmed summary judgment dismissing plaintiff's claims for fraudulent concealment and misrepresentation under a pure form of the economic loss rule applicable in Colorado. *Id.*, 317 P.3d at 1231. Like Judge Heller did here in the ruling dismissing Donatelli's claim for negligence, the Colorado court declared, "when a tort duty is memorialized in a contract, it follows that the plaintiff has not shown any duty independent of the contract and the

economic loss rule bars the tort claim and holds the parties to the contract's terms." *Id.*

Lastly, Donatelli's reliance on *Keyes v. Bollinger*, 31 Wn. App. 286, 640 P.2d 1077 (Div. 1 1982) is misplaced. App. Br. at 18. First, the claim at issue in *Keyes* was a claim under the Consumer Protection Act, not negligent misrepresentation. Second, Judge Rogers granted summary judgment dismissing Donatelli's claim under the Consumer Protection Act, concluding the alleged deceptive act was "no more than a dispute over the contract and/or duties related to it." CP 101. Donatelli has not appealed that ruling, he assigned no error to it, it is the law of the case, and it is not reviewable now. *King Aircraft Sales, Inc. v. Lane*, 68 Wn.App. 706, 846 P.2d 550 (Div. 1 1993). RAP 10.3(g).

E. Dismissal of the negligent misrepresentation claim, even if error, was harmless.

As was the case with summary judgment on the negligence claim, Donatelli lost no substantial rights to prove his case when Judge Heller dismissed his claim for negligent misrepresentation. He was free to argue the alleged representations as the basis for a breach of contract. The ruling was therefore harmless error.

Indeed, Donatelli would have had an easier time proving breach of a contract with regard to the fees and time to completion, than a claim for a misrepresentation of the same alleged facts.

Misrepresentation is subject to proof by “clear, cogent, and convincing evidence.” *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). The burden of proof on his breach of contract case was the lesser “preponderance of the evidence” standard. CP 576.

This court should affirm Judge Heller’s ruling dismissing Donatelli’s claim for misrepresentation.

F. Judge Heller’s award of attorney fees was not error.

1. Donatelli failed to assign error to Judge Heller’s findings of fact on the application for attorney fees.

RAP 10.3(g) says the “appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto,” and it requires a separate assignment of error for each finding of fact a party contends was improperly made. As previously noted, Donatelli did not assign error to any of Judge Heller’s Findings of Fact, and he stated no Issues Pertaining the Assignments of Error.

The cases hold plaintiff’s failure to specifically assign error to the trial court’s findings of fact in either the assignments of error or the text of their

brief causes such findings to become the established facts of the case. *Logan v. Logan*, 36 Wn.App. 411, 675 P.2d 1242 (Div. 1 1984), citing *In re Bennett*, 24 Wn.App. 398, 400, 600 P.2d 1308 (Div. 3 1979), and *Lakeside Pump & Equip., Inc. v. Austin Constr. Co.*, 89 Wn.2d 839, 842, 576 P.2d 392 (1978). Unchallenged findings of a trial court will be treated as verities on appeal. *In re Estate of Jones*. 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g). “Since no challenge was made to any finding of fact by either party, the trial court's findings become the established facts of the case. *Goodman v. Bethel School Dist. No. 403*, 84 Wn.2d 120, 524 P.2d 918 (1974). We must decide only whether the challenged conclusions of law are supported by the court's findings of fact.” *Lakeside Pump & Equipment, Inc. v. Austin Const. Co.*, 89 Wn.2d 839, 576 P.2d 392 (1978).

In ruling on Strong’s application for attorney fees and costs, Judge Heller entered Findings of Fact and Conclusions of Law. CP 772-779. He found:

#14: a reasonable rate for Mr. Bond’s services is \$300/hour.

#18: the negligent claim was indistinguishable from the breach of contract claim.

#19: The court has already taken into account the quality of Mr. Bond’s work and his experience into consideration in upwardly adjusting his hourly rate. Therefore no multiplier is warranted. CP 777.

Donatelli's failure to assign error to Judge Heller's findings of fact the negligence claim was indistinguishable from the contract claim and \$300 was a reasonable hourly rate should be dispositive of his arguments Judge Heller erred.

If the court is inclined to consider Donatelli's argument, then the court should reject his argument the time spent on the negligence claim should have been segregated and, instead, conclude the trial court's finding the claims were indistinguishable was supported by substantial evidence. Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). In determining the sufficiency of evidence, the court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 385 P.2d 727 (1963), cited in this court's unpublished opinion, *Kim v. Kyung-Rak*, 69274-7-I (Div. 1 October 28, 2013). Substantial evidence showed Donatelli's claim for negligence was factually indistinguishable from his claim for breach of contract.

Donatelli's assertion Judge Heller approved a "retroactive" rate increase is nonsense. App. Br. at 26. The trial court was required to determine what in his discretion was a reasonable rate and he did so.

2. No abuse of discretion is shown.

In any event, fee decisions are entrusted to the discretion of the trial court. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987). No abuse of discretion is shown in determining a reasonable rate or any other aspect of the award.

G. The court should award attorney fees and costs under the contract.

The contract provided for the recovery of attorney fees and costs to the prevailing party. Ex. 8. In accordance with RAP 18.1, Strong requests an award of attorney fees and costs for this appeal.

VI. Conclusion

The summary judgments and Judgment should be affirmed with an award of attorney fees and costs in Strong's favor.

DATED this 11th day of October, 2016.

Respectfully submitted,


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