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COURT OF APPEALS
DIVISION II

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No. 42256-5-II

STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MATTHEW D. AUSTIN, *Appellant*,

v.

LANCE ETTL and MANDY ETTL, and the marital community
composed thereof,
Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CASES p. 2

ISSUES RAISED BY RESPONDENT p. 3

ISSUE 1: p. 3

Appellant did in fact point to the existence of an independent tort duty in his initial brief.

ISSUE 2: p. 4

Alejandre v. Bull and *Borish v. Russell*, the cases relied on by Respondents, can be differentiated from the case at bar, in that The respective plaintiffs' claims in those cases were based on Nondisclosure of physical defects in the subject properties, which were susceptible to inspection, whereas Appellant's claim in this matter is for nondisclosure of information regarding utility assessments, and was non susceptible to inspection.

ISSUE 3: p. 7

Recoverable tort damages are not limited to damages for bodily injury or physical damage to property.

In their briefing Respondents make the following arguments: (1) that Appellant failed to show the existence of a tort duty existing independently of the contract between the parties; (2) that the facts of *Alejandro v. Bull* and *Borish v. Russell* are most similar to those of the case at bar, and therefore those cases should control the outcome in the present controversy; and (3) that “tort damages” are limited to bodily injury and physical damage to property. Each of these arguments is incorrect.

ISSUE 1:

In their briefing Respondents argue that Appellant failed to show the existence of a tort duty existing independently of the contract between the parties. (Br. of Appellant at 5), and at one point states that Appellant “has never asserted that any recognized exception to the economic loss rule applies.” (Br. of Respondent at 9). Respondents base this argument on the mistaken belief that, if a contract (in this case, the REPSA) exists between the parties, then only that contract may be looked to for the existence of any duty.

ALPHABETICAL TABLE OF CASES

<u>Case Name and Citation</u>	<u>Where Cited in Brief (Page)</u>
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Alejandro v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007)

Borish v. Russell, 155 Wn. App. 892, 230 P.3d 646 (2010),
Rev. den., sub nom. Borish v. Olson, 170 Wn.2d 1024 (2011)

Colonial Imports, Inc. v. Carlton Northwest, Inc.,
121 Wn.2d 726, 853 P.2d 913 (1993)

Eastwood v. Horse Harbor Foundation,
170 Wn.2d 380, 241 P.3d 1256 (2010)

This is simply incorrect. As Appellant has already pointed out, “economic losses are sometimes recoverable in tort, even if they arise from contractual relationships.” *Affiliated FM Ins. V. LTK Consulting*, 170 Wn.2d 442, 448, 243 P.3d 521 (2010). Thus, though it is true that there would be no relationship between the parties at all had they not entered into a contract for the purchase of a home, the mere existence of a contract between the parties does not preclude recovery in tort, provided there is a tort duty that exists independently of the contract terms.

In this case there is such a duty. In *Eastwood v. Horse Harbor Foundation*, 170 Wn.2d 380, 241 P.3d 1256 (2010), the Supreme Court *specifically* held that *negligent misrepresentation* is a recognized tort in Washington, *arising independently, from an established common-law duty of care*, whether a contractual relationship exists or not. *Eastwood*, 170 Wn.2d at 388. More specifically, as in this case, negligent misrepresentation can arise from the breach of a duty to disclose. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 731, 853 P.2d 913 (1993).

ISSUE 2:

Respondents next argue that *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) and *Borish v. Russell*, 155 Wn. App. 892, 230 P.3d 646 (2010), control the case at bar because each case arises from a negligent misrepresentation claim based on a home purchase. (Br. of Respondent at 7). Both *Borish* and *Alejandre* are different from this case in an important way.

The Supreme Court's discussion of the *Alejandre* case in its *Eastwood* holding makes it clear that *Alejandre* turned on a physical defect in the property that the buyers should have uncovered during a home inspection performed on their behalf:

For example, *Alejandre v. Bull* involved a real estate sales contract, and the Alejandres (buyers) complained that Bull (seller) failed to tell them about a defect in the home's septic tank. The Alejandres sued for negligent misrepresentation, and so the issue was whether Bull owed them a "duty of care under the *Restatement (Second) of Torts* § 552 (1977)," which is the duty to use ordinary care in obtaining or communicating information during a transaction.

Although we couched our analysis in terms of looking for an "exception" to the economic loss rule, *the core issue was whether Bull, as the home seller, was under a tort duty independent of the contract's terms.* [Emphasis added]. The contract between Bull and the Alejandres contained ample disclosures about the home; the Alejandres agreed that "[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion," (alteration in original) (quoting ex. 4); the Alejandres

acknowledged "their duty to `pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation," (quoting ex. 5), and the Alejandres had their own inspection done. With significant information communicated about the home in the course of contractual negotiations, Bull had no independent tort duty to obtain or communicate even more information during a transaction. The contract sufficed, and the Alejandres' negligent misrepresentation claim did not survive. We recognized, however, that Bull's independent duty to not commit fraud persisted, and we would have allowed the Alejandres to sue for fraudulent concealment if they had offered enough evidence to support that tort claim. *Id.* at 689-90.

Eastwood, 170 Wn.2d at 389-90 (internal citations omitted). Likewise, in Borish, the defect in question is a physical defect in the construction of he home, in this case a substandard remodeling job using defective materials, that was susceptible to physical inspection. The REPSA contained an inspection clause, and the Borishes actually retained a home inspector and had an inspection done. Borish, 155 Wn. App. at 896-97.

In the present case, Austin has alleged in his Complaint that Ettl knew of, not only the pendency of an ongoing LID process, but actually knew the dollar amount of the assessment. Ettl chose to wait until the last possible second to disclose *anything*, and then only disclosed a vague statement about an LID for utilities, withholding the information regarding the \$41,226.40 plus interest in *costs* Austin would be incurring by

purchasing the Property. This obviously differs from a physical defect, in that there is no way a home inspector could discover it. And the dollar amount of the LID assessment was *never* disclosed by the Ettls.

ISSUE 3:

Finally, Respondents state repeatedly that Mr. Austin “only requests economic damages,” and that tort damages are limited to physical property damage and bodily injury. But as the Eastwood court recognizes, this is an incorrect view: “[f]urther, any injury that can be monetized can be thought of as an economic loss presumptively excludable under the rule because the legislature has defined “[e]conomic damages” as “objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.” *Eastwood*, 170 Wn.2d at 388. Tort damages have long included certain types of compensatory damages.

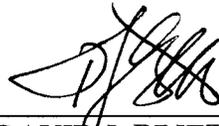
For the reasons set forth above, Appellant Matthew D. Austin prays this Court to REVERSE the trial court’s May 20, 2011 Order of

Dismissal for Failure to State a Claim, and REMAND this matter to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 16th day of November, 2011.

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