

COUNT OF APPEALS
DIVISION II

11 OCT 17 PM 3:37

NO.42256-5

STATE OF WASHINGTON
BY cm
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MATTHEW D. AUSTIN,

Appellant,

v.

LANCE ETTL and MANDY ETTL, and the marital community
comprised thereof,

Respondents.

BRIEF OF RESPONDENT
Honorable Susan K. Serko
Pierce County Superior Court

EISENHOWER & CARLSON, PLLC
By Robert G. Casey, WSBA # 14183
Chrystina R. Solum, WSBA # 41108
Attorneys for Respondents

EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, Washington 98402
Telephone: (253) 572-4500

TABLE OF CONTENTS

I. RESTATEMENT OF THE ISSUES1

II. FACTS1

III. ANALYSIS3

 A. Standard of Review.....3

 B. **The Independent Duty Doctrine Bars Austin’s Claims For Negligent Misrepresentation Because The Ettls Did Not Have A Duty Independent of the REPSA to Disclose Facts And Because Austin (1) Was A Homeowner; (2) Who Asserted Claims Against A Party With Whom He Has a Contractual Relationship, (3) Requested Only Economic Damages, and (4) Asserted No Exception to the Economic Loss Rule**4

 1. No Independent Duty Existed Because Case Law Does Not Recognize An Independent Tort for Claims Arising Out of a REPSA5

 2. Austin Failed to State A Claim Upon Which Relief May Be Granted Because He (1) Was A Homeowner; (2) Who Asserted Claims Against A Party With Whom He Has a Contractual Relationship, (3) Requested Only Economic Damages, and (4) Asserted No Exception to the Economic Loss Rule7

 C. **The Trial Court Did Not Err in Granting the Ettls’ Motion to Dismiss Austin’s Unjust Enrichment Claim Because He Failed to Plead Facts that Would Support A Finding of Unjust Retention of Benefits**11

D. Under the RCW 4.84.030, RCW 4.84.080, and the REPSA, The Ettls Are Entitled to Attorney Fees as the Prevailing Party12

TABLE OF AUTHORITIES

Cases

Affiliated FM Ins. Co. v. LTK Consulting Svcs., 170 Wn.2d 442, 462, 243 P.3d 521 (2010).....5, 6

Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007).....2, 3, 6
.....8, 9, 10

Borish v. Russell, 155 Wn. App. 892, 900-01, 230 P.3d 646 (2010), *review denied*, 170 Wn.2d 1024 (2011).....7, 8, 9
.....12

Bravo v. Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995).....4

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).....9

Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 241 P.3d 1256 (2010).....5, 6

San Juan Cnty. v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007).....3, 4

State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n, 140 Wn.2d 615, 629, 999 P.2d 602 (2000).....4

Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).....11

Statutes

RCW 4.84.030.....1, 12

RCW 4.84.080.....1, 12

RCW 4.84.330.....12

Rules

CR 12(b)(6).....	1, 2, 3
RAP 10.3(c).....	9
RAP 18.1.....	12

I. RESTATEMENT OF THE ISSUES

1. Whether the trial court erred in granting the Ettls' motion for dismissal of Austin's claim for negligent misrepresentation under CR 12(b)(6) when established case law holds that there is no independent tort for negligent misrepresentation arising from a Real Estate Purchase and Sale Agreement (REPSA)? **No.**

2. Whether the trial court erred in granting the Ettls' motion for dismissal of Austin's claim for unjust enrichment under CR 12(b)(6) when Austin failed to allege facts showing unjust retention of a benefit? **No.**

3. Whether the Ettls are entitled to attorney fees and costs on appeal under RCW 4.84.030, RCW 4.84.080, and the RESPA when the REPSA provides for attorney fees and the Ettls are the prevailing party? **Yes.**

II. FACTS

Austin and the Ettls entered into a REPSA on July 19, 2007.¹ Clerk's Papers (CP) at 12. By Austin's own admission, he received a notice of the proposed Local Improvement District (LID) before closing.

¹ Because this case was resolved on a CR 12(b)(6) motion to dismiss, this brief takes all facts regarding this transaction from the Plaintiff's complaint.

CP at 12. Austin did not take any action on the LID disclosure, such as suspending the closing, and instead completed closing. See CP at 12-13.

On March 12, 2010, Austin filed suit against the Ettls, alleging negligent misrepresentation and unjust enrichment. CP at 11-14. The Ettls filed a motion to dismiss pursuant to CR 12(b)(6) for failure to state a claim upon which relief may be granted.² CP at 19. The Ettls argued that under *Alejandro v. Bull*,³ the economic loss rule precluded a plaintiff from asserting claims for negligent misrepresentation for damages arising out of the breach of a REPSA. CP at 20. In addition, the Ettls argued that Austin had failed to allege any facts that would support an unjust enrichment claim. CP at 20-21.

Austin claimed in response that the Ettls supposedly had a duty to disclose and that the breach of this duty provided a basis for asserting a negligent misrepresentation claim. CP at 25. In addition, Austin argued that the economic loss rule did not preclude a claim of negligent misrepresentation in the context of breach of contract because case law

² The Ettls also moved to dismiss based on failure to comply with the case schedule, CP at 19, but the trial court declined to dismiss on that basis. Verbatim Report of Proceedings (VRP) (May 20, 2011) at 3. As such, this brief does not discuss these arguments.

³ 159 Wn.2d 674, 153 P.3d 864 (2007).

subsequent to *Alejandro* permitted tort claims that arose independently to the contract. CP at 26-27.

The trial court found that it could not “see any set of facts that would allow the plaintiff to prevail in this case based on the revelation that this LID was potentially there, and the closing could have been stopped.” Verbatim Report of Proceedings (VRP) (May 20, 2011) at 7. Additionally, the trial court found that Austin did not justifiably rely on any misrepresentation to his detriment: “Absent some requirement that that representation had to have been made, you know, so-and-so many days or months before the closing, the plaintiff still had the opportunity to stop the closing and not sign and take whatever time he felt necessary to investigate. He was on notice.” VRP (May 20, 2011) at 7. The trial court then found *Alejandro* to be more analogous and granted the Ettls’ motion to dismiss. VRP (May 20, 2011) at 7. Austin appeals.

III. ANALYSIS

A. Standard of Review.

A defendant is entitled to dismissal of any claim that fails to state a claim upon which relief may be granted. CR 12(b)(6). Courts should grant motions to dismiss for failure to state a claim when the plaintiff’s allegations show on the face of the complaint an insuperable bar to relief. *San Juan Cnty. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831

(2007) (citations omitted). Dismissal for failure to state a claim is appropriate when it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would justify recovery. *San Juan*, 160 Wn.2d at 164 (citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)). A trial court's ruling on a CR 12(b)(6) motion is a question of law reviewed de novo. *San Juan*, 160 Wn.2d at 164 (citing *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 629, 999 P.2d 602 (2000)).

Despite acknowledging that this Court's review is de novo, Austin appears to be arguing for an abuse of discretion standard of review. Br. of App. at 13-14. Because this Court's review is de novo, it is therefore irrelevant what language the trial court used in reaching her ruling.

B. The Independent Duty Doctrine Bars Austin's Claims For Negligent Misrepresentation Because The Ettls Did Not Have A Duty Independent of the REPSA to Disclose Facts And Because Austin (1) Was A Homebuyer, (2) Who Asserted Claims Against a Party With Whom He Has a Contractual Relationship, (3) Requested Only Economic Damages, and (4) Asserted No Exception to the Economic Loss Rule.

The trial court did not err in granting the Ettls' motion to dismiss for failure to state a claim because (1) the Ettls did not have a duty independent of the REPSA to disclose facts, and (2) Austin asserted purely economic damages that arose out of a contractual relationship with the Ettls for the purchase of a home, and Austin failed to assert any exception to the economic loss rule applied.

1. *No Independent Duty Existed Because Case Law Does Not Recognize An Independent Tort for Claims Arising Out of a REPSA.*

The independent duty doctrine has replaced the economic loss rule. *See Affiliated FM Ins. Co. v. LTK Consulting Svcs.*, 170 Wn.2d 442, 462, 243 P.3d 521 (2010) (Chambers, J., concurring) (stating that the “independent duty doctrine” was “formerly known as the economic loss rule”). Under the independent duty doctrine, an 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 v. Horse Harbor Found., Inc.*, 170 Wn.2d, 380, 389, 241 P.3d 1256 (2010). Using ordinary tort principles, the court decides as a matter of law whether the defendant was under an independent tort duty. *Id.* The existence of a duty depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Eastwood*, 170 Wn.2d at 389.

This case is distinguishable from *Eastwood*. In that case, the Court held that the tort of waste existed independently of a commercial lease. *Eastwood*, 170 Wn.2d at 383. Specifically, the Court relied on treatises and prior case law clearly recognizing a right to recover under both the lease and tort law for the tort of waste. *Eastwood*, 170 Wn.2d at 398-99 (“Independently of any express agreement, the law imposes upon every tenant...an obligation to treat the premises in such a manner, that no substantial injury shall be done to them”; “in Washington we have already allowed a plaintiff landlord to recover under both [tort and contract] for waste”) (citations omitted). As the Court explained, the tort of waste is

the measure of **duty** and harm, **while a lease covenant contracts for repairs.** *Eastwood*, 170 Wn.2d at 386.

In contrast, Austin has **pointed to no similar authority that would permit a negligent misrepresentation claim independent of a REPSA.** Rather, case law **shows that negligent misrepresentation is not a tort independent of a REPSA.** *Alejandre*, 159 Wn.2d at 689.

The above analysis under the independent duty doctrine is not to say that the Court has completely abandoned the economic loss rule. As Justice Madsen **explained in her concurrence in *Affiliated FM*, “the *Alejandre* opinion can only fairly be read...to say that in general the economic loss rule is implicated when the parties are in a contractual relationship and could or should have negotiated allocation of risks associated with *the subject matter of their agreement.* The losses must be economic losses for which this risk allocation could or should have been negotiated with these losses not being in the nature of personal injury or injury to property.”** 170 Wn.2d 466 (Madsen, C.J., concurring/dissenting).

In *Eastwood*, the Court **reaffirmed its holding in *Alejandre*, 170 Wn.2d at 389. The Court explained that the Alejandre defendants, who sued for negligent misrepresentation, failed to show any tort duty independent of the contract because the contract contained ample disclosures about the home, the Alejandres agreed that all inspections must be to their satisfaction, the Alejandres acknowledged their duty to pay diligent attention to any defects, and the Alejandres had their own inspection done.** *Eastwood*, 170 Wn.2d at 389-90. “With significant

information communicated about the home in the course of contractual negotiations, [the seller] had no independent tort duty to obtain or communicate even more information during a transaction.”

Similarly, Austin, who also sued for negligent misrepresentation, cannot show that a tort duty independent of the contract, existed. By Austin’s own admission in his Complaint, he was aware of the existence of an LID before he signed the closing paperwork. Austin chose not to stop the closing process and obtain more facts. Instead, Austin chose to sign the closing documents with full knowledge that an LID existed. The Ettls had no independent tort duty to obtain or communicate even more information during this transaction.

2. *Austin Failed to State A Claim Upon Which Relief May Be Granted Because He (1) Was A Homeowner; (2) Who Asserted Claims Against A Party With Whom He Has a Contractual Relationship, (3) Requested Only Economic Damages, and (4) Asserted No Exception to the Economic Loss Rule*

This case identical to this Court’s decision in *Borish v. Russell*, 155 Wn. App. 892, 900-01, 230 P.3d 646 (2010), review denied, 170 Wn.2d 1024 (2011). In *Borish*, this Court held that the plaintiffs who had sued the sellers of their home for negligent misrepresentation asserted economic losses when they sued for

damages...including, but not limited to, damages relating to: the loss of the value of the property as advertised; the cost of demolishing and disposing of the house; the insufficient septic system; and the fees paid to professionals to assess the subject property. For other such

relief as the Court deems just and appropriate, including attorney's fees and costs.

155 Wn. App. at 898 n.3, 902. This Court held that the Borishes “only requested economic damages in their complaint and *a homeowner's disappointment in the economic benefit they failed to receive from a bargain is central to contract law and not tort law.*” *Borish*, 155 Wn. App. at 902. This Court further reasoned that the economic loss rule applied because “the Borishes entered into a REPSA with the Olsons and...the contract governs their relationship.” *Id.* Finally, this Court relied on the fact that no exception to the economic loss rule applied. *Id.*

This Court concluded that “[t]he Borishes' situation is thus identical to *Alejandro's* insofar as they are both home purchasers, suing a party with whom they have a contractual relationship, the requested relief involves purely economic damages, and no exception to the economic loss rule exists.” *Borish*, 155 Wn. App. at 903. This Court affirmed the summary judgment denial of the Borishes' negligent misrepresentation claim against their seller. *Id.*

Similarly to *Alejandro* and *Borish*, this case involves a plaintiff who is a home purchaser, who sued a party with whom he has a contractual relationship, he requested purely economic damages, and his Complaint has asserted no exception to the economic loss rule.

First, like the plaintiffs in *Alejandro* and *Borish*, Austin purchased a home after signing a REPSA with the defendants. Also like the

plaintiffs in *Alejandre* and *Borish*, Austin sued the parties to the REPSA.

Furthermore, Austin requested only economic damages. He requested

money damages from Defendants in the amount of \$41,226.40 plus interest as charged by the City of Tacoma; for his costs and attorney's [sic] fees; for rescission of the sale of the Property as allowed by law; and for any other and further relief this court may deem just and equitable under the circumstances.

Clerk's Papers (CP) at 35-36. Austin does not allege any damage to his person or his property. As such, Austin has asserted purely economic damages and the economic loss rule must apply.

Finally, Austin has never asserted that any recognized exception to the economic loss rule applies. Austin's Complaint does not assert that any exception applies, nor has his briefing before the trial court or this court. To the extent that Austin attempts to assert any exception applies in his Reply Brief, such arguments are too late to warrant this Court's consideration. RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Equities also balance in favor of applying the economic loss rule because the parties here had contractual and statutory remedies that Austin did not exercise. "Where economic losses occur, recovery is confined to contract to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract." *Alejandre*, 159 Wn.2d at 682-83. Permitting tort and contract remedies to overlap would impair the certainty and predictability of

allocating risk by contract and decrease future business activity. *Alejandro*, 159 Wn.2d at 683. A seller sets prices in contemplation of, among other things, potential contractual liability. *Alejandro*, 159 Wn.2d at 683. “If tort liability is expanded to include economic damages, parties would be exposed to *liability in an indeterminate amount for an indeterminate time to an indeterminate class.*” *Alejandro*, 159 Wn.2d at 683 (internal quotations omitted, emphasis added). In addition, the economic loss rule prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain. *Alejandro*, 159 Wn.2d at 683.

Here, Austin had several remedies available to him under contract and statute. He also had no obligation to complete closing once he received notice of the LID. Austin went ahead with closing despite notice of the LID, has decided that he does not like the deal that he received, and now seeks to hold the Ettl's responsible for tens of thousands of dollars in supposed tort damages that he suffered as a result of the parties contractual relationship. Allowing Austin to recover under tort would permit him to obtain “through a tort claim, benefits that were not part of the bargain.” *Alejandro*, 159 Wn.2d at 683.

In conclusion, there is no independent duty in this case because Austin was aware that an LID existed before he signed the closing papers. Additionally, to the extent it still exists, the economic loss rule bars Austin's tort remedies because this case involves a plaintiff who is a home purchaser, who sued a party with whom he has a contractual relationship,

he requested purely economic damages, and his Complaint has asserted no exception to the economic loss rule.

C. The Trial Court Did Not Err in Granting the Ettls' Motion to Dismiss Austin's Unjust Enrichment Claim Because He Failed to Plead Facts that Would Support A Finding of Unjust Retention of Benefits.

“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A plaintiff claiming unjust enrichment must prove three elements: “(1) the defendant received a benefit, (2) the defendant received the benefit at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.” *Young*, 164 Wn.2d at 484-85.

As the trial court found, Austin failed to plead facts that would support a finding that it is unjust for the Ettls to retain the purchase price. *See* VRP (May 20, 2011) at 7 (finding that Austin was on notice of the LID before closing). Simply put, Austin admitted in his Complaint that he was aware of an LID before he signed the closing papers. Despite this knowledge, Austin went forward with the transaction. The Ettls were not unjustly enriched when Austin failed to fully consider all relevant information before he acted. Austin's failure to investigate cannot be pinned on the Ettls. The trial court did not err in dismissing Austin's unjust enrichment claim.

D. Under the RCW 4.84.030, RCW 4.84.080, and the REPSA, The Ettls Are Entitled to Attorney Fees and Costs as the Prevailing Party.

RAP 18.1 permits a party to recover attorney fees when such fees are provided by contract. Under RCW 4.84.330, parties can enter agreements that allow the prevailing party to recover attorney fees in disputes arising from the agreement. And tort claims are based on a contract when they arise from the contract and the contract is central to the dispute. *Borish*, 155 Wn. App. at 907. Furthermore, RCW 4.84.030 and RCW 4.84.080 permits the prevailing party to recover attorney fees and costs.

In *Borish*, this Court held that the Borishes' claim against the sellers was defeated by application of the economic loss rule to the parties' REPSA, and that the Borishes' lawsuit arose out of the contractual relationship with the sellers. Because the REPSA provided for attorney fees, this Court award them attorney fees on appeal.

Similarly, Austin's claims against the Ettls should be defeated by application of the economic loss rule to the parties' REPSA. Austin's claims arose from his contractual relationship with the Ettls. Furthermore, the REPSA provides for attorney fees on appeal: "If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." CP at 59.

///

///

///

Therefore, this Court should award the Ettls their attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 17 day of October, 2011.

EISENHOWER & CARLSON, PLLC

By: 
Robert G. Casey, WSBA # 14183
Chrystina R. Solum, WSBA # 41108
Attorneys for Respondents

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

COURT OF APPEALS
11 OCT 18 AM 11:50
STATE OF WASHINGTON
BY CM
DEPUTY

MATTHEW D. AUSTIN,

Appellant,

v.

LANCE E TTL and MANDY E TTL,
and the marital community
comprised thereof,

Respondents.

NO. 42256-5-II

CERTIFICATE OF SERVICE

KIMBERLY S. RUGER **declares and states** as follows:

1. I am a legal assistant at the law firm of Eisenhower & Carlson, PLLC, am over the age of 18, and am otherwise competent to testify.

2. On the 17th day of October, 2011, I deposited with Legal Messengers, a true and correct copy of the Brief of Respondent, to be delivered to counsel for the Appellant on October 17, 2011 at the following address:

David J. Britton
Britton & Russ, PLLC
2209 North 30th St., Suite 4
Tacoma, WA 98403

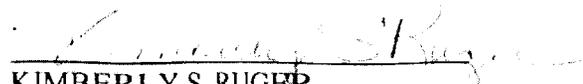
///

///

CERTIFICATE OF SERVICE - 1

I declare under the penalty of perjury and in accordance with the laws of the state of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington this 17th day of October, 2011.


KIMBERLY S. RUGER

CERTIFICATE OF SERVICE - 2