

No. 29454-4-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

CRAIG R. HEBERLING
Appellant/Defendant,

vs.

PRIME REAL ESTATE CLOSING & ESCROW, INC., et al
Plaintiff/Respondent/Cross-Appellant

vs.

EMPIRE MORTGAGE GROUP, INC. d/b/a EMPIRE HOME LOANS
Defendant/Cross-Respondent

Brief of Respondent/Cross-Appellant
PRIME REAL ESTATE CLOSING & ESCROW

Elizabeth A. Tellessen
WSBA No. 36732
WINSTON & CASHATT
1900 Bank of America Financial Center
601 West Riverside Avenue
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorney for Plaintiff/Respondent

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Attorney for Plaintiff/Respondent

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1. INTRODUCTION

Craig Heberling obtained a refinance loan on one of his many properties. Prime Real Estate Closing & Escrow (herein “Prime”) was hired to close Mr. Heberling’s refinance of Loan 62. But the closing instructions provided to Prime by Mr. Heberling’s mortgage broker, Empire Home Loans (herein “Empire”), negligently misrepresented Loan 44 as the loan to be paid off. Because of the mistake, Mr. Heberling’s Loan 44 securing his Normandie rental property, was paid off and the property left unencumbered, while the rental property that secured Loan 62, the Decatur Property, was encumbered by two deeds of trust.

After discovering the mistake, Mr. Heberling took advantage of it and obtained another loan pledging the Normandie Property as collateral. Mr. Heberling took the cash loan proceeds and spent it on more rental properties, but defaulted on the two loans secured by the Decatur Property. During the foreclosure of the Decatur Property, Prime was called upon to pay Loan 62 so the second lender could take the Decatur Property.

Prime brought this action to recover the amounts it paid to satisfy Mr. Heberling’s debt—Loan 62. The Court below concluded that Mr. Heberling was unjustly enriched and owed Prime restitution, and its decision should be affirmed. However, the Court below incorrectly concluded Prime’s claims for negligent misrepresentation and indemnity

against Empire were barred as a matter of law, and Prime requests this Court reverse that decision.

2. RESPONSE TO HEBERLING APPEAL

2.1 ISSUES PRESENTED

1. Was Mr. Heberling unjustly enriched by Prime's payment of \$108,086.20 in satisfaction of Mr. Heberling's debt—Loan 62?

2. Was Mr. Heberling unjustly enriched by taking \$113,557 in loan proceeds which were only available to him because of the error?

3. Does Prime's fiduciary duty as an escrow agent obligate it to check and verify information contained in loan documents which it did not prepare?

4. Was Mr. Heberling's conduct following the discovery of the error the cause of his alleged harm?

2.2 STATEMENT OF FACTS

Mr. Heberling is in the business of buying and selling leveraged real properties. (CP 272) He owned at least 12 properties in May 2007, all encumbered by a mortgage or deed of trust. (CP 131) Mr. Heberling undertook to refinance one of his properties in the spring of 2007.

Mr. Heberling was approved for a loan from GN Mortgage to refinance his Wells Fargo Loan, number 0141133462 (hereafter "Loan 62"). (CP 59) Loan 62 was secured by a deed of trust on one of Mr.

Heberling's properties, which was located at 3405 West Decatur Avenue in Spokane (herein "Decatur Property"). (CP 306) Mr. Heberling's mortgage broker, Empire prepared the documents for the refinance which were later provided to Prime for closing. (CP 116-117)

Among the documents prepared by Empire was a Good Faith Estimate for the refinance which indicated the amount to be paid off in the refinance was only \$93,711. (CP 404) Empire also prepared a Uniform Residential Loan Application, Form 1003 (herein "Final 1003"), and used the customary asterisk to indicate Wells Fargo Loan number 0140801044 (herein "Loan 44") was to be paid off through the refinance. (CP 129, 398) Additionally, the Closing Instructions for the refinance indicated that the refinance was supposed "Pay All liens of record including WF \$92,450". (CP 387, 391)

Empire provided the closing documents and loan information to Prime who was hired to close the refinance. (CP 115-117) Because the closing documents were in error, Prime ordered the payoff for Loan 44 instead of Loan 62. The error was not discovered until about two weeks after the payoff, and by then the error could not be simply reversed. (CP 369, 407)

Mr. Heberling took immediate advantage of the mistaken payoff. First, Mr. Heberling took about \$12,282 from the refinance because Loan

44 had a lower principal balance than Loan 62. The final payoff amount of Loan 44 was \$92,324.84, while the final payoff amount of Loan 62 when the error was discovered was \$104,607.83, a difference of \$12,282.99. (CP 405, 409) Mr. Heberling admits he has closed “dozens of loans over the years”, (CP 607) wherein he “usually got a little less money than [he] expected”. But, here when he got more than twice as much than he could have reasonably expected from the refinance, he did not even notice. Mr. Heberling claims ignorance of the error despite his own records indicating that the principal balance on Loan 62 was significantly more than that of Loan 44. (CP 402, 415, 607-608)

Next, because of the mistaken payoff, another of Mr. Heberling’s properties located at 5922 North Normandie Street (herein “Normandie Property”) was free and clear of encumbrances. So with some extra cash and a free and clear property, Mr. Heberling seized the opportunity to obtain a new loan from Option One Mortgage. Mr. Heberling pledged the Normandie Property as collateral for that loan and cashed out all of the equity created by the error. Mr. Heberling took \$101,275 in cash proceeds from the Option One loan. (CP 59, 62, 156, 160, 169, 172, 274) Between the extra proceeds from the refinance and the new Option One loan, Mr. Heberling took nearly \$113,557 from the error. (CP 156, 160, 172)

With the \$113,557 in cash, Mr. Heberling would have been able to pay off Loan 62 as intended. This would have made GN Mortgage's deed of trust the first position lien on Decatur, as intended. And the Normandie Property would have been encumbered as it was before. But, instead of paying any portion of these proceeds toward Loan 62, Mr. Heberling "reinvested" all of the \$113,557 from the error into his business. (CP 372) Mr. Heberling took this money and spent it on more leveraged properties that he could not afford to maintain, putting himself in an untenable position and creating an unsustainable negative cash flow situation. (CP 274-275)

Recognizing the error had put Mr. Heberling in an awkward situation, Prime offered to help correct the error by giving Mr. Heberling a private loan. (CP 441) The private loan from Prime could have been used to payoff Loan 62, and would have been secured by the Normandie Property. (CP 441-442) But, when Mr. Heberling stripped the equity created by the error, Prime was left without any avenue to put Mr. Heberling in the intended position.

So the fact remained that the Decatur Property was encumbered by two deeds of trust, one for Loan 62 and the other for GN Mortgage. Having squandered the proceeds from the error, Mr. Heberling stopped

paying on both Loan 62 and the GN Mortgage Loan, causing those to go into default and the Decatur Property to be foreclosed. (CP 110, 376)

Since Loan 62 was not paid off as intended in the refinance, GN Mortgage's deed of trust was second position behind Wells Fargo Loan 62. GN Mortgage had purchased a lender's policy of title insurance, which insured it against this sort of situation. So GN Mortgage made a claim under its title insurance policy to Pacific Northwest Title Insurance Company, Inc. (CP 106) Pacific Northwest Title paid Loan 62 in satisfaction of its obligations under the title insurance policy and demanded Prime reimburse it for that expense. (CP 95, 106) Pacific Northwest Title had obtained from Prime a certification that item 4 of the exceptions to the title policy (Loan 62) would be removed from title, because of this, Prime was compelled to settlement Pacific Northwest Title's claim. Prime informed Mr. Heberling and Empire of its intent to settle with Pacific Northwest Title, which was ultimately Mr. Heberling's debt and responsibility. (CP 50-51, 62) But Mr. Heberling and Empire refused to participate in the settlement and Prime alone settled with Pacific Northwest Title for \$108,086.20. (CP 56)

Mr. Heberling now had the benefit of \$113,557 in loan proceeds and relief from \$108,086.20 of debt. The total benefit Mr. Heberling took from this error was \$241,643.20. Despite taking this substantial windfall

Mr. Heberling claims he has been harmed by the erroneous payment of Loan 44. (CP 334-336)

2.3 SUMMARY OF ARGUMENT

It is unjust for a person to take a windfall that is the product of a known error. Prime mistakenly paid off Loan 44 instead of Loan 62 during the refinance. This mistake resulted in Mr. Heberling receiving a windfall, of which he took full advantage, leaving Prime with no choice but to pay off Loan 62. On summary judgment, the Court below correctly exercised its authority in granting Prime's claim for unjust enrichment and entered judgment for Prime in the amount of \$108,086.20.

Mr. Heberling claims the mistaken payment of Loan 62 caused him harm that Prime should be liable to remedy, ignoring the facts surrounding his conduct. The Court below, on summary judgment, concluded that Mr. Heberling's claims should be struck. Prime urges this court to affirm the lower court.

2.4 AUTHORITY

A trial court has broad discretionary authority to fashion equitable remedies. SAC Downtown Limited Partnership v. Kahn, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). When a trial court exercises its authority, the standard of review on appeal is for abuse of discretion. Id. The lower court, finding no genuine issue of material fact, granted Prime's request

for equitable relief in the form of restitution by Mr. Heberling for his unjust enrichment in the amount of \$108,086.20 in debt relief. Therefore, this court should limit its review to determining whether the court below abused its discretion in granting Prime's request for equitable relief.

2.4.1 Mr. Heberling took a windfall of more than \$221,643.20 in loan proceeds and debt repayment, which were available to him only because Loan 44 was paid in error.

Mr. Heberling was unjustly enriched by Prime paying his debt, Loan 62, in the amount of \$108,086.20, along with taking \$113,557 in proceeds from the error. A defendant is unjustly enriched when he takes and has an appreciation of a benefit that was conferred upon him by the plaintiff and then retains the benefit, even though the circumstances make it inequitable for him to retain the benefit without the payment of its value. Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). "A person confers a benefit upon another if he... satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage." Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 602-03, 137 P.2d 97 (1943).

Mr. Heberling does not dispute Prime's payment of Loan 62 was a benefit to him. It also cannot be disputed that Mr. Heberling took the benefit of \$113,557, which was only available to him because of the error.

Mr. Heberling was well aware of these benefits and accepted them despite the fact that justice and equity required him to pay Loan 62 with the loan proceeds he took from the error. The Court below correctly found that there was no genuine issue of material fact and that Mr. Heberling was unjustly enriched as a matter of law in the amount of \$108,086.20.

In an effort to refute this finding, Mr. Heberling offers nothing more than conclusory statements which are wholly insufficient to create a genuine issue of material fact. See Grimwood v. Puget Sound, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (conclusory statements and opinions about ultimate facts are not sufficient to defeat a motion for summary judgment).

Mr. Heberling routinely financed purchases of residential properties as an investment, estimating that he has “purchased 30 houses over the years” and that he has used “loan proceeds to purchase...leveraged properties” for over 30 years. (CP 272-273) Based on his experience he knew or should have known the implications of GN Mortgage being put into second position, and had sufficient information to appreciate the prejudice that would befall others if the situation was not rectified. It is immaterial that he may not have predicted precisely how that prejudice would affect each interested party.

Mr. Heberling knew that the payment of Loan 44 freed up the equity in the Normandie property, and that this was purely by mistake. Instead of working to unwind the error before any prejudice occurred, Mr. Heberling seized the unexpected “opportunity” to obtain a new loan, pledging the Normandie property as security. He then used the new loan proceeds to make down payments on more leveraged properties. Mr. Heberling rationalizes this maneuver by asserting that “...the use I could make of the money buying other properties was more beneficial.” (CP 276) More beneficial to whom?

Being fixated on “my cashflow issues,” Mr. Heberling simply didn’t care about the prejudice that would befall Prime, GN Mortgage, or anyone else. (CP 275) Under the circumstances, it is clearly improper and inequitable to permit Mr. Heberling to retain the fruits of the unjust enrichment, especially the sums paid by Prime to satisfy Mr. Heberling’s debt.

2.4.2 Prime’s claim for equitable relief is not barred by the doctrine of unclean hands.

Prime is entitled to equitable relief regardless of whether it had some hand in causing the mistaken payoff of Loan 44. The type of act or omission giving rise to unclean hands must be willful misconduct with a direct and necessary relation to the matter in litigation. J.L. Cooper & Co.

v. Anchor Sec. Co., 9 Wn.2d 45, 73, 113 P.2d 845 (1941). Moreover, bad intent is an essential element of the unclean hands defense. Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 173 (9th Cir. 1989). In fact some courts have concluded that even the existence of negligence, even if gross negligence, does not rise to the level of “unclean hands.” Id.

Even if Mr. Heberling were able to prove Prime was negligent in paying Loan 44 instead of Loan 62, this would not preclude Prime from obtaining an equitable remedy. Particularly, in this instance, the court should not allow Mr. Heberling to use equity as a shield for his inequitable conduct.

2.4.3 Mr. Heberling’s inequitable conduct was not a reasonable effort to mitigate his damages.

Mitigation is not an element of the claim of unjust enrichment, and not relevant to the Court’s analysis in this instance. The question here is whether Mr. Heberling should benefit from the full payment of Loan 62 by Prime and nonetheless escape any equitable duty to pay restitution. The answer to this inquiry is no. Prime is entitled to summary judgment that Mr. Heberling was unjustly enriched and must repay \$108,086.20.

Assuming *arguendo* that mitigation is relevant to the Court’s analysis, Mr. Heberling did not mitigate his damages. Mr. Heberling characterizes his inequitable conduct as “mitigation,” in the hopes of

skirting his responsibility to repay his debt. He argues he “invested” the funds to get a better return and mitigate against further losses. In reality, Mr. Heberling took advantage of a mistake, gambled with someone else’s money and lost.

Further, as a matter of law, Mr. Heberling did not elect one of two “reasonable” courses of action. Mr. Heberling was not “forced” to pledge the Normandie Property as security for a new loan. He was not “forced” to invest the proceeds in other, leveraged properties. He affirmatively chose to try and improve his cash flow, to the prejudice of Prime, and others. When this failed, he attempted to avoid responsibility for his debts. This is neither equitable nor proper under the law.

The cases cited in support of Mr. Heberling’s allegation he made a reasonable choice among alternatives, are not analogous to the case at bar, and do not establish a basis for reversal of summary judgment. See Hogland v. Klein, 49 Wn.2d 216, 298 P.2d 1099 (1956) (contractor abandoned a house-moving project and was denied claimed rent for use of his equipment necessary to complete the move); Cobb v. Snohomish County, 86 Wn. App. 223, 935 P.2d 1384 (1997) (developer failed to mitigate by refusing to pay share of cost to improve roads under protest and proceed with planned development pending appeal).

In this case, Mr. Heberling took actions that precluded the parties from restoring the original lien positions. By taking the Option One loan and pledging the Normandie property as security, Mr. Heberling effectively prevented Prime from correcting the error, irrespective of who may have fault for the mistaken payment of Loan 44. Nothing in the facts of Hogland or Cobb are similar in this regard. Mr. Heberling was unjustly enriched in the amount of \$108,086.20 and summary judgment was properly granted.

2.4.4 Prime followed the instructions it was given, which lead to the improper payment of Loan 44, but was not a breach of its fiduciary duty.

An escrow agent's duties are specifically defined by the instructions provided by the parties to the transaction. National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 910, 506 P.2d 20 (1973). An escrow agent is bound "to act strictly in accordance with the provisions of the escrow agreement." Delson Lumber Co., Inc. v. Washington Escrow Co., Inc., 16 Wn. App. 546, 551, 558 P.2d 832 (1976). And, the instructed tasks must be undertaken with "ordinary skill and diligence, and due or reasonable care." Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn.2d 654, 663, 63 P.3d 125 (2003). Washington has not imposed a duty on escrow agents independent of the parties' instructions. Id.

Thus, while an escrow agent is an agent of the parties and owes a fiduciary duty to all parties to conduct the transaction with scrupulous honesty, skill, and diligence, one is not duty bound to identify or correct an error. Denaxas, 148 Wn.2d at 644 [escrow agent did not have duty to point out the discrepancy in legal description without specific instruction to do so]. The law “does not impose a duty on escrow agents to affirmatively identify differences between the closing documents and documents drafted by others.” Id.

Although Loan 44 was undeniably paid in error, this mistake was not the result of a breach of duty by Prime. Prime did as it was instructed and paid Mr. Heberling’s Wells Fargo Loan 44, in the amount of \$92,268.15.

Prime’s duty was to strictly follow the closing instructions. In this instance the closing instructions and documents incorrectly indicated Loan 44 would be paid through the refinance. The Closing Instructions directed Prime to pay “WF \$92,550”. (CP 387) The Final 1003 prepared and provided by Empire indicated Loan 44 would be paid off in the refinance. (CP 295) And, each of these was consistent with the Good Faith Estimate that the payoff would be approximately \$93,711. (CP 404) Prime was not duty bound to affirmatively identify or correct the incorrect payoff information.

Mr. Heberling points to a number of other instructions, which were also followed by Prime. The Closing Instructions require “Property address must match loan documents” and the property address on each of the loan documents, the Note, Deed of Trust, Settlement Statement, and Closing Instructions, did in fact match. (CP 383-387) Furthermore, the Closing Instructions require “Closing agent has compared legal description on Deed, Mortgage Title Commitment and Survey and is assuring lender that they are accurate and consistent.” Although there was no survey, the legal description on the Deed of Trust and title commitment are accurate and consistent. (CP 636, 653) The Closing Instructions further provide “All funds have been disbursed per the closing instructions”, here, the funds were disbursed in accordance with the Closing Instructions, the Final 1003 and the Good Faith Estimate. (CP 386)

Prime submits that the payment of Loan 44 was a mistake, but it was not a breach of its fiduciary duty. Therefore, this Court is asked to affirm the Court below and conclude as a matter of law that Prime’s duty was to follow the instructions it was provided, and there is no genuine issue of material fact that it did just that. See Equity Investors, 81 Wn.2d at 910.

2.4.5 Mr. Heberling was the proximate cause of his own harm.

Irrespective of the claim that Prime breached its fiduciary duty, any alleged breach was not the proximate cause of the harm allegedly suffered by Mr. Heberling. Proximate cause exists only where there is (1) cause in fact, which exists where the alleged harm arises from a direct and unbroken sequence of events; and (2) legal cause, which exists if based on logic, common sense, justice, policy and precedent liability should attach to the defendant's conduct. Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 203-204, 15 P.3d 1283 (2001).

Without exception, the facts establish that Mr. Heberling's harm arose directly from his own choice to squander more than \$113,557 on more leveraged properties, rather than paying off Loan 62. Additionally, there is no legal cause because there is no basis in logic, common sense, justice, policy or precedent to support the proposition that an escrow agent should be held responsible for alleged harm that arose first from the incorrect information provided by Empire, and then compounded by Mr. Heberling's unscrupulous conduct.

2.4.5.1 Prime's conduct was not the cause in fact of Mr. Heberling's alleged harm.

The intentional and exploitative acts of Mr. Heberling broke the causal chain between the mistaken payment of Loan 44 and the harm he

claims to have suffered. Cause in fact may be decided as a matter of law “when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion...” Daugert v. Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Where there is a later “independent and intervening act” that could not be reasonably anticipated there is no cause in fact because the causal chain has been broken. Griffin v. West RS, Inc., 143 Wn.2d 81, 18 P.3d 558 (2001). If there is no cause in fact because the original conduct is superseded by an intervening cause then there is no proximate cause. Id.

Mr. Heberling had borrowed money to purchase and refinance more than 30 houses over the years. Every time he purchased a property, he took out a loan and used the rental income to pay the payments. While simple math would indicate that continuing this practice with one more loan than property to rent would result in negative “cash flow”, Mr. Heberling obtained more loans on more leveraged properties in order to fix his “cash flow situation”. Not surprisingly, Mr. Heberling spending the windfall on down payments for more leveraged properties resulted in “more negative cash flow instead of positive.” (CP 275)

Mr. Heberling’s conduct was intentional, unreasonable, and the direct cause of the harm he claims to have suffered. There is no question of material fact that Mr. Heberling knew what harm would befall him and

others if he stripped the Normandie Property of the equity the error created without addressing the double encumbrance on the Decatur Property. Mr. Heberling claims his attempt to fix his “cash flow situation” following the error was “reasonable mitigation”. (App. Brf. P. 22) The duty to mitigate “prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed.” Bernsen v. Big Ben Electric Cooperative, Inc., 68 Wn. App. 427, 842 P.2d 1047 (1993). One struggles to identify conduct more unreasonable and inconsistent with the doctrine of mitigation than that of Mr. Heberling. Instead of avoiding consequences of the error he compounded them by two fold: first, taking the windfall loan proceeds; and second, by defaulting on Loan 62 leaving Prime with no choice but to satisfy his debt.

On summary judgment Mr. Heberling has the burden to prove cause in fact. However, even if one were to view the facts in the light most favorable to Mr. Heberling, each alleged harm relates directly to his decision to take for himself the windfall created by the error. Accordingly, the Court below correctly dismissed Mr. Heberling’s claim because there is no genuine issue of material fact that Mr. Heberling’s conduct broke the causal chain of events and cut off any harm allegedly attributable to Prime. And so, even if it could be concluded that Prime

breached any duty by paying Loan 44, this breach was not the cause in fact of the harm Mr. Heberling claims to have suffered.

2.4.5.2 Prime's conduct was not the legal cause of Mr. Heberling's alleged harm.

Moreover, Prime was not the legal cause of Mr. Heberling's claimed harm. Legal cause "is grounded in policy determination as to how far the consequences of a defendant's acts should extend." Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 204, 15 P.3d 1283 (2001). Whether there is legal cause is resolved by the court upon consideration of logic, common sense, justice, policy and precedent, and is reviewable as a question of law. Id. There is no logic, common sense, or justice, in requiring Prime to compensate Mr. Heberling for the losses he voluntarily incurred.

Logic and common sense show that Mr. Heberling destroyed any possibility of curing the error, and thus, should be responsible for any loss subsequently suffered. When it was discovered that Loan 44 had been paid in error, only \$104,607.83 was needed to payoff Loan 62. (CP 409) The difference in the payoff amounts for Loan 44 and Loan 62 was \$12,282, which was paid directly to Mr. Heberling because of the error. (CP 289) Then, two months later, Mr. Heberling took more than \$101,275 in cash proceeds from the Option One Loan. (CP 172) But, instead of

paying off Loan 62, which would have left Mr. Heberling with about \$8,500 cash, he squandered more than \$113,557 and left Prime to pay Loan 62. There is no stretching of logic or common sense that would justify Mr. Heberling's conduct.

Justice, policy and precedent demand that Prime not be held liable for the error occasioned by Empire's negligent misrepresentation or the harm caused by Mr. Heberling's inequitable taking of \$113,557 in loan proceeds. In Washington, an escrow agent must strictly follow the instructions he or she is given, and when those instructions are followed, the agent is not responsible for damages that the parties to the transaction had sufficient information to avoid. Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn.2d 654, 63 P.3d 125 (2003) (parties had knowledge of correct legal description so escrow agent not liable for not identifying the error). To that end "[i]f a person exercising reasonable care could have known a fact, he or she is deemed to have had knowledge of that fact." Id. 148 Wn.2d at 667. This is consistent with the long standing rule that if a person has the opportunity to review a document he or she "cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein." National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 506 P.2d 20 (1973).

Mr. Heberling knew that Loan 62 was supposed to be paid and that the principal amount due on that loan at the time of the refinance was significantly more than \$92,550 or \$93,711, as indicated in the closing documents. Mr. Heberling noticed at the time he signed the closing documents that the payment to him was more than he expected. (CP 607) But, instead of calling attention to the error he proceeded with the closing and then took advantage of the mistake. On the other hand, Prime was instructed to pay off Mr. Heberling's Wells Fargo loan in the amount of \$92,550. Despite going beyond its duty and calling the matter to the attention of Empire, who had in its possession ample information to identify and correct the error, no new instructions were provided.

The Court would be remiss to excuse the careless and negligent conduct of Mr. Heberling and Empire, both of whom had the information necessary to identify and correct the error before any harm occurred. Holding Prime liability for the others' negligent and inequitable conduct would relieve the culpable parties of their obligations to review documents and verify information upon which they knew Prime was bound to rely. It would also impose a duty on all escrow agents to question, review and affirm the information and instructions they are given, forcing them to go beyond what the law presently requires.

3. CROSS APPEAL

3.1 ASSIGNMENTS OF ERROR

3.1.1 The Court below erred in finding the economic loss rule bars Prime's claim for negligent misrepresentation against Empire.

3.1.2 The Court below erred in finding Washington no longer recognizes a claim for common law indemnity between non-joint tortfeasors.

3.1.3 The Court below erred in finding Prime's claim for contribution is not supported by the facts of the case.

3.1.4 The Court below erred in dismissing Prime's suit against Empire with prejudice.

3.1.5 The Court below erred in denying Prime's Motion for Reconsideration.

3.2 ISSUES PRESENTED

3.2.1 Is Prime entitled to pursue its tort claim for negligent misrepresentation because it did not have a contract with Empire?

3.2.2 Did Empire have an independent duty to exercise reasonable care in providing information to Prime?

3.2.3 Does Washington still recognize a claim for common law indemnity between non-joint tortfeasors?

3.2.4 Did Prime establish a prima facie case for common law indemnity against Empire?

3.2.5 If Mr. Heberling's claims against Prime are revived on appeal, does Prime have the statutory right to seek contribution from Empire in this action before judgment is entered?

3.3 STATEMENT OF FACTS

Mr. Heberling hired Empire to find him a loan to refinance Loan 62. In order to complete the loan application, Empire collected and compiled Mr. Heberling's financial information. (CP 366) Included in the information provided by Mr. Heberling to Empire was a payment coupon for Loan 62 which indicated the unpaid principal balance was \$109,284.24. (CP 116, 401) Mr. Heberling also provided a payment coupon for Loan 44 indicating the unpaid principal balance was \$97,448.51. (CP 415)

Although Mr. Heberling provided the correct loan information, Empire prepared various loan documents which indicated the payoff amount for Loan 62 would be approximately \$93,711. (CP 404) Empire also failed to notice and correct the instructions for closing which stated: "pay all liens of record including WF \$92,540." (CP 391) Empire also incorrectly indicated on the Final 1003 that Loan 44 was to be paid off.

(CP 295) Empire provided Prime with this incorrect loan information for the purpose of guiding Prime in closing the refinance.

Prime relied on Empire to provide it with the necessary information to close the refinance, although there was no contractual relationship between Prime and Empire. (CP 140, 136-137, 148-149, 151, 153) Prime relied, as is the custom and practice for closing agents, on the instructions provided by the lender, and the Final 1003 provided by the mortgage broker. Id.; (CP 88) But, in this instance, both the closing instructions and the Final 1003 were incorrect. The closing instructions indicated that a Wells Fargo loan in the approximate amount of \$92,540 was supposed to be paid. (CP 391) The Final 1003 from Empire indicated that Loan 44, in the approximate amount of \$93,711, was to be paid. (CP 291) A mortgage broker customarily indicates on a Loan Application "1003", which loan is intended to be paid off by inserting an asterisk next to the loan number. (CP 88, 365) This practice was followed by Empire and relied on by Prime in this transaction. (CP 119)

Despite having documents to confirm Mr. Heberling's loan information and direct contact with Mr. Heberling to verify that information, Empire was unable to identify and correct the errors in the loan documents. Prime, relying on this bad and incorrect information, ordered and paid Loan 44 instead of Loan 62. (CP 407)

Prime asserted claims against Empire for its negligent misrepresentation of the loan information, and for indemnity and contribution for the amounts Prime was compelled to pay to correct the error. Empire brought a motion for summary judgment seeking dismissal of Prime's claims, which was granted.

Prime brought a motion seeking reconsideration of the Superior Court's ruling on summary judgment pursuant to CR 59(a)(8) citing an error in law with regard to the economic loss rule and common law indemnity between non-joint tortfeasors. This motion was denied. Prime seeks to have the lower Court's ruling on summary judgment reversed because Prime's claims are not barred as a matter of law and it is entitled to pursue its claims against Empire.

3.4 SUMMARY OF ARGUMENT

There was no contract between Prime and Empire, therefore, Prime is entitled to pursue its tort claim for negligent misrepresentation. Empire provided incorrect information to Prime on which it relied in this business transaction to its detriment. When the Court below found Prime's tort claim was barred by the economic loss rule, it did not have the benefit of the analysis in Borish v. Russell, 155 Wn. App. 892, 901, 230 P.3d 646 (2010), which concluded there must be a contract for the economic loss rule to apply.

Moreover, the Court did not have the benefit of the Supreme Court's analysis which clarified the economic loss rule, and further established the error below by explaining that even where there is a contractual relationship, a party may still bring a tort claim. See Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 241 P.3d 1256 (2010); Affiliated FM Insurance Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442, 243 P.3d 521 (2010).

Pursuant to the applicable authority, Prime asks this Court to reverse the Court below and restore Prime's claims for negligent misrepresentation, indemnity and contribution.

3.5 AUTHORITY

The court on appeal reviews an order on summary judgment de novo. Alejandre v. Bull, 159 Wn.2d 674, 681 (2007). Because, the appellate court applies the same standard and engages in the same analysis as the trial court, it too must view all facts in the light most favorable to the non-moving party. Prime submits the court below misapplied the law to the facts of this case, which are in dispute. Thus, Prime asks this Court to reverse the lower Court's order on summary judgment, and restore Prime's claims against Empire as a matter of law.

3.5.1 Prime is entitled to pursue its tort claim of negligent misrepresentation against Empire.

The economic loss rule does not operate to bar Prime's claim for negligent misrepresentation because there is no contract between Prime and Empire. A plaintiff may pursue a claim for negligent misrepresentation when it does not have a contract with the defendant. ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 959 P.2d 651 (1998); Borish v. Russell, 155 Wn. App. 892, 230 P.3d 646 (2010). "In order for the economic loss rule to apply and preclude tort damages for negligent misrepresentation, there must be a contract between the parties." Borish, 155 Wn. App. at 901. Although the court below did not have the benefit of the court's holding in Borish, which establishes the error here, Borish is consistent with the prior case law. Alejandre v. Bull, 159 Wn.2d 674, 683, 153 P.3d 864 (2007); Berschauer/Phillips Construction Co. v. Seattle School District No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994).

The Court below seemingly ignored the analysis in Alejandre, which established "the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties *where a contractual relationship exists....*" Alejandre, 159 Wn.2d at 683 (emphasis added). But, when a plaintiff does not have the choice between contract or tort remedies, the

economic loss rule is inapplicable, and the plaintiff is entitled to pursue its torts claims.

For instance, in ESCA the court allowed a lender that relied on an incorrect audit when lending money to pursue a claim for negligent misrepresentation against the accounting firm that prepared the audit. ESCA, 135 Wn.2d at 823-24. The ESCA court even noted that although losses suffered were economic losses, the doctrine of comparative negligence would still apply. Id. 135 Wn.2d at 831. Similar to the situation in ESCA, Prime had relied on incorrect information provided by Empire who had compiled Mr. Heberling's financial information for the refinance. Although Prime had a contract with Mr. Heberling, and Mr. Heberling a contract with Empire, there was no contract between Prime and Empire. While Prime does not concede that the losses it suffered were economic, but rather loss of tangible personal property, i.e. cash, even if they were economic losses the economic loss rule does not operate to bar Prime from recovering those losses in tort.

The Court below erroneously and improperly applied the economic loss rule and deprived Prime of its claim for negligent misrepresentation against Empire. The Court below did not find that there was no genuine issues of material fact, but rather Prime's claims were barred as a matter of law. Therefore, Prime submits that it is entitled to pursue its claim against

Empire as a matter of law and thus, this Court should reverse the lower Court's order on summary judgment.

3.5.2 Empire owed Prime an independent duty to exercise reasonable care to compile and provide correct information to Prime.

Even if one assumes, for the sake of argument, that the economic loss rule applied to Prime's claims against Empire, the Supreme Court's recent clarification of the economic loss rule, now the "independent duty doctrine", further establishes the error below. The Supreme Court explained in Eastwood "the economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract." Eastwood, 170 Wn.2d at 393. Additionally, even where the economic losses "arise from contractual relationships" they may still be recoverable in tort. Eastwood, 170 Wn.2d at 388.

In particular, unless "the parties have contracted against potential economic liability" a party has the right to bring a claim to recover the economic harm arising from another's negligent misrepresentation. Alejandre, 159 Wn.2d at 686. Accordingly, in Washington a person has an independent duty to exercise reasonable care to supply correct information in the course of his or her business. Lawyers Title Insurance Corp. v. Baik, 147 Wn.2d 536, 547-548, 55 P.3d 619 (2002) citing

Restatement (Second) of Torts § 522(1) (1977); see also ESCA 135 Wn.2d 820 (1998).

Empire supplied incorrect information to GN Mortgage and Prime. First, it misrepresented on the Final 1003 that the principal amount of both Loan 62 and Loan 44 was \$92,550. Second, it indicated on the Final 1003 that Loan 44 was supposed to be paid in the refinance. Third, Prime contends that the agents of Empire also verbally confirmed Loan 44 was supposed to be paid in the refinance.

But, despite having on-going and direct contact with Mr. Heberling, Empire failed to identify or correct the incorrect payoff information. Instead it provided incorrect information to Prime, upon which Prime relied in mistakenly paying Loan 44. Empire knew or should have known that Prime would be relying on the information it supplied, and Prime did in fact rely on the incorrect information to its detriment.

The Court below improperly granted Empire's motion for summary judgment because the economic loss rule/independent duty doctrine allows a party to go forward with a claim for negligent misrepresentation, even if the harm arises from contractual relationships.

3.5.3 Empire should indemnify Prime for the losses it incurred in correcting the error.

Prime claims a right to common law indemnity from Empire for amounts it was compelled to pay to Pacific Northwest Title (PNWT) in settlement of PNWT's claims. But, the Court below accepted Empire's argument that the Tort Reform Act abolished the claim for common law indemnity in Washington and dismissed Prime's claim pursuant to RCW 4.22.040. This conclusion is in error to the extent that Prime is not a joint tortfeasor with Empire. See Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 588, 5 P.3d 730 (2000); see also Fortune View Condominium Association v. Fortune Star Development Co., 151 Wn.2d 534, 90 P.3d 1062 (2004) (dissenting opinion). The Sabey court explains:

The language of RCW 4.22.040 contains no expression of intent to abolish tort-based indemnity claims between non-joint tortfeasors. In the absence of such an expression, the common law rule prevails.

Sabey, 101 Wn. App. at 591. Accordingly, the common law claim for indemnity survives as "a distinct and separate equitable cause of action...[which] requires full reimbursement and transfers liability from one who has been compelled to pay damages to another who should bear the entire loss." Id. 101 Wn. App. at 588.

In Sabey, the *plaintiff* settled with a third party and then brought an action against the defendant claiming negligent misrepresentation and

indemnity for amounts plaintiff was compelled to pay in order to settle third party's claims. Sabey, 101 Wn. App. at 581. "Sabey acknowledges his indemnity right is grounded in tort, and denies it was abolished by the Tort Reform Act. Sabey is correct." Id. 101 Wn. App. at 588. Sabey should guide the Court's analysis here because Prime was compelled to pay PNWT in order to cure the error that was occasioned by the incorrect information negligently provided by Empire.

It was Empire's negligence in compiling and providing incorrect information that caused the wrong loan to be paid off. Thus, Empire, not Prime, should pay for the loss that its negligence caused.

3.5.4 If Mr. Heberling's claims against Prime are revived on appeal, Prime has the statutory right to seek contribution from Empire in this action before judgment is entered.

Contribution is an alternative means by which Prime may recoup a portion of the loss it has suffered from Empire, the other party at fault. See RCW 4.22.040 (stating this rule as applied to jointly and severally liable tortfeasors); see also CR 8(a). If Prime is able to establish it is a non-joint tortfeasor, then Prime's relief from Empire is proper through common law indemnity. If, on the other hand, and assuming for the sake of discussion purposes only, Prime is found to be liable for the amounts paid to PNWT to cure the error, then Prime is entitled to seek contribution from Empire.

Empire argued below that "...a party can only be held liable for contribution when another party has paid more than it's pro rata share of fault, and pursuant to RCW 4.22.070 a judgment is entered against two or more defendants." (Empire Memo., p. 6) Empire's argument fails for the following reasons:

First, the determination of whether Prime's payment to PNWT represents a pro rata share, or something in excess of a pro rata share, has not yet been made. At this time, the question requires resolution of competing and disputed facts. Prime paid PNWT in full and the other parties are responsible to reimburse Prime for some or all of its loss because it paid far in excess of any fault that could be attributed to it.

Second, it is premature to decide that a contribution claim must fail because a judgment has not yet been entered. Such a judgment would result from the trial of this case. The statute contemplates that a contribution claim can be made either before or after a judgment in the original action. RCW 4.22.050(1)-(2). Prime properly sought contribution in advance of a judgment in this instance.

Third, Empire misinterprets the meaning of RCW 4.22.070(1)(b). The statutory language provides that the liability of the "defendants against whom judgment is entered" shall be joint and several (rather than merely proportionate), when the *trier of fact* determines that the claimant

is not at fault. See RCW 4.22.070(1)(b). The phrase “defendants against whom judgment is entered” recognizes that certain defendants may not be subject to a judgment, such as defendants that are immune from liability. See RCW 4.22.070(1). The phrase does not mean, as assumed by Empire, that a contribution claim must be dismissed at the summary judgment stage because judgment has not been entered. The claim for contribution is properly left for trial, and thus, Empire’s motion for summary judgment should be denied, and the lower court’s order reversed.

(Intentionally Left Blank)

4. CONCLUSION

Because of the mistaken payment of Loan 44 and Loan 62, Mr. Heberling was unjustly enriched in the amount of \$108,086.20. The Court below properly exercised its equitable authority and granted Prime's motions for summary judgment and those decisions should be affirmed on appeal. On the other hand, the Court below misapplied the economic loss rule to Prime's claim of negligent misrepresentation by Empire, and granted Empire's motion for summary judgment dismissing all of Prime's claims as a matter of law. Prime requests this court reverse the court below and reinstate Prime's claims against Empire.

DATED this 1 day of February, 2011.


ELIZABETH A. TELLESSEN
WINSTON & CASHATT
Attorney for Respondent/Cross-
Appellant

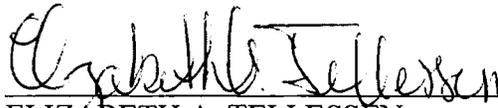
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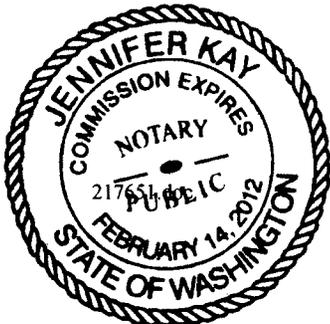
Elizabeth A. Tellessen, being first duly sworn upon oath, deposes and states as follows: At all times hereinafter mentioned I was a citizen of the United States and a resident of the State of Washington, over the age of 18 years, and not a party to this matter. That on February 1 2011, I served the foregoing document on the following, by causing a true and correct copy of said document to be hand delivered to the address shown below:

Dustin D. Deissner
Van Camp & Deissner
W. 1707 Broadway
Spokane, WA 99201
Attorney for Defendant/Appellant/Cross Respondent Craig Heberling and Heberling Homes

Everett B. Coulter, Jr.
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Suite 250
Spokane, WA 99201
Attorney for Defendant/Respondent Empire Mortgage Group d/b/a Empire Home Loans


ELIZABETH A. TELLESSEN

SUBSCRIBED AND SWORN to before me this 1st day of February, 2011.




Notary Public in and for the State of Washington, residing at Spokane Post Falls, ID.
My commission expires 2/14/12