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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

~~SUPREME COURT OF THE STATE OF WASHINGTON~~

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

Cause No. 272010

ELCON CONSTRUCTION, INC.

Appellant,

v.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

ELCQN CONSTRUCTION'S PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. IDENTITY OF PETITIONER	1
II. COURT OF APPEALS DECISION	1
III. ISSUES PRESENTED FOR APPEAL.....	1
IV. STATEMENT OF THE CASE.....	1
V. ARGUMENT.....	10
A. Why Review Should Be Accepted.....	10
B. Elcon Was Unable To Negotiate To Allocate The Risk Of EWU Committing Fraud To Induce The Contract.....	11
C. The Economic Loss Rule Should Not Bar Claims For Fraud That Induces a Contract.....	14
D. EWU's Intentional Interference Was With Elcon's Separate Business Expectancy.	17
E. Public Works Contractors Are Entitled To Statutory Interest.....	18
VI. CONCLUSION	18

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Alejandro v. Bull</u> , 159 Wn.2d 674, 689 (2007).....	11, 12
<u>Allen v. Stephan Co.</u> , 784 So.2d 456, 457 (Fla. 4 th DCA 2000).....	16
<u>Atherton Condo. Ass'n Bd. Of Dirs. V. Blume Dev. Co.</u> , 115 Wn.2d 506, 523-527 (1990)	11
<u>Berschauer/Phillips Construction Co. v. Seattle School District</u> , 124 Wn.2d 816 (1994).....	15
<u>Budgetel Inns, Inc. v. Micro Sys., Inc.</u> , 8 F.Supp.2d 1137, 1146 (E.D. Wis. 1998).....	16
<u>Carlile v. Harbour Homes, Inc</u> , 147 Wn. App. 193, 250 (2008).....	12
<u>Coson v. Roehl</u> , 63 Wn.2d 384, 388 (1963).....	12, 15
<u>D&M Jupiter, Inc. v. Friedopfer</u> , 853 So.2d 485, 487 (Fl. 4 th DCA 2003)	16
<u>Formosa Plastics Corp. USA v. Presidio Engineers and Contractors</u> , 960 SW 2d 41 (1998).....	16
<u>Giles v. General Motors Acceptance Corp.</u> , 494 F.3d 865, 880 (2007)	16
<u>HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.</u> , 685 So.2d 1238 (Fla. 1996)	16
<u>Huron Tool and Engineering Co. v. Precision Consulting Services, Inc.</u> , 532 NW 2d 541, 545 (1995)	17
<u>Leibergesell v. Evans</u> , 93 Wn.2d 881 (1980).....	12
<u>Neibarger v. Universal Cooperatives, Inc.</u> , 439 Mich. 512, 525, 486 NW 2d 612 (1992).....	13
<u>Scroggin v. Worthy</u> , 51 Wn.2d 119, 123 (1957).....	15
<u>Steineke v. Russi</u> , 145 Wn. App. 544 (2008).....	12

<u>Vesta Const. & Design, L.L.C. v. Lotspeich & Assoc., Inc., 974</u> So.2d 1176, 1181 (Fl. Dist. Ct. App. 5 2008)	16
<u>Walla Walla Port Dist. v. Palmberg, 280 F.2d 237 (9th Cir. 1960)</u>	4
<u>Westmark Properties, Inc. v. McGuire, 53 Wn.App. 400, 401</u> (1989)	18
<u>Woody v. Benton Water Co., 54 Wash. 124, 127-28 (1909)</u>	15
<u>Statutes</u>	
RCW 39.04, <u>et seq.</u>	13
RCW 39.76.010(1)	18
<u>Other Authorities</u>	
1 <u>Bruner and O'Connor on Construction Law, §3:25 (2008)</u>	4
<u>Black's Law Dictionary 686 (8th ed. 2004)</u>	14
<u>Florida Bar Journal.....</u>	15
<u>Rules</u>	
RAP 13.4(b)	10

I. IDENTITY OF PETITIONER

Appellant Elcon Construction, Inc., by and through its attorneys Dunn & Black, P.S., files this Petition.

II. COURT OF APPEALS DECISION

The August 25, 2009 Unpublished Court of Appeals Division III decision in Cause No. 272010-III is at issue. **Appendix A.**

III. ISSUES PRESENTED FOR APPEAL

1. Is fraudulent concealment, causing a party to be induced into a contract, an exception to the Economic Loss Rule?
2. Did genuine issues of material fact exist with regard to the damages Elcon incurred as a result of EWU's intentional interference with its contractual relationships?
3. Is a public works contractor entitled to statutory interest when a Public Body does not pay amounts owed?
4. Is a public works contractor entitled to statutory interest when Arbitration confirms a contract pay request was owed but not paid?
5. Does a Superior Court retain jurisdiction to decide statutory interest after an Arbitrator confirms contract payments were owed?
6. Does a Superior Court retain jurisdiction to decide statutory interest when that issue was not previously submitted to or decided by Arbitration?

IV. STATEMENT OF THE CASE

In 1999, EWU hired an engineering firm to produce a Water Capacity Study ("the Study"). CP 624-636. The Study included an in-

depth analysis of how to develop additional groundwater capacity either from EWU's existing wells or potentially from a new well. CP 534-607. See also CP 608-623; CP 695-696. The Study contained critical information about what would be required to obtain water from the Grand Ronde Aquifer on the EWU campus. CP 564-588. This included a Hydrogeological investigation ("Golder Report") performed with the assistance and review of EWU employee Dr. John Buchanan. CP 316-356; CP 702. The Golder Report disclosed significant information about the potential construction of a Grand Ronde well on EWU's campus. CP 316-356. As a result, EWU had a plethora of information about the local hydrogeology, the depths necessary to obtain water from a new Grande Ronde well, and the limited likelihood of successfully obtaining water from such a campus well. Supra.

At the end of 2002, EWU decided to drill two *new* campus wells into the Grand Ronde Aquifer. CP 695-698. The Court of Appeals completely ignored this fact and underlying record, and erroneously concluded EWU's project was simply to "*refurbish its [EWU's] existing wells*" in the Wanapum Aquifer. That was not even remotely the case. Supra.

Here, EWU's design parameters for the *new* wells specified two 750' deep wells to be bid on a per foot unit price basis. CP 671. Notably, that depth carries through the Wanapum and into the Grande Ronde Aquifer. In fact, EWU advertised and accepted bids for the drilling and construction of two new wells on EWU's campus. CP 1166 – "*...to drill two water supply wells...*" The facts surrounding how EWU induced Elcon and others to bid on that project are the basis for the fraud alleged in this case. EWU's existing wells were on campus in the Wanapum aquifer. CP 565. EWU does not dispute the Study was intentionally concealed from Elcon and the other potential bidders. EWU also does not dispute that it misrepresented the information it had relating to wells being drilled on campus. CP 864-865. Instead, EWU rationalized the Study was not produced "*because this report had not taken into account the alternative of consolidating EWU's existing water rights and refurbishing existing Wells 1 and 2...*" This unsupported statement was erroneously accepted by the Court of Appeals. At EWU's request, the Study included an in-depth analysis of how to develop additional groundwater capacity either from EWU's existing wells or a *new* well on campus, and also addressed the consolidation of the well rights. See e.g. CP 587; CP 610. The Study concluded that a well drilled 1,500' deep would be required to obtain

adequate water from the Grande Ronde aquifer if drilled anywhere on campus. CP 564-588; CP 316-356; CP 640-41. Since the *new* well was going to be drilled into the Grande Ronde, the Study and its conclusion, that any such well needed to be drilled to 1,500', was critical to a contractor assessing whether to bid and agree to enter into the type of unit price contract proposed by EWU. CP 624-636. Prior to bid, Elcon performed an "*independent investigation of the site or subsurface conditions*" as set forth in the instructions to bidders. CP 313. Elcon visited the site and requested all of the information EWU had relating to the Project, any other wells in the area, or the geology of wells in the area, "**including all exploratory work done by Owner...**" CP 864-865; CP 1113(emphasis added).

By requesting EWU's information, Elcon complied with the bidder instructions. In turn, EWU was legally obligated to supply the requested information which clearly contained important information about drilling a well on campus. Walla Walla Port Dist. v. Palmberg, 280 F.2d 237 (9th Cir. 1960); 1 Bruner and O'Connor on Construction Law, §3:25 (2008). EWU misrepresented *the only information* it possessed. The information it did provide to Elcon did not relate to the Grande Ronde aquifer. Id.

Later, EWU again affirmatively misrepresented that no such studies existed! CP 673.

EWU does not dispute it intentionally concealed the Study from Elcon or that it intentionally misrepresented information it had. The fact is that EWU concealed the Study and the fact that a campus Grande Ronde well would have to be drilled to 1,500', and misrepresented the information it had available. EWU's misconduct was done in order to induce bids, such as Elcon's bid. Elcon was induced into an adhesion contract and suffered significant damage it was otherwise prevented from recovering under the terms of EWU's contract.

EWU has been unable to explain why it designed two wells drilled to only 750' deep, despite the Study instructing that a new Grande Ronde well be drilled 1500' deep. CP 703-704; 740. Yet, the 750' depth was used as both the "*pre-design*" depth and the "*design*" depth. CP 651-655; 666-667. EWU represented the 750' depth to Elcon and other potential bidders as the scope of the Project. CP 678-680. The represented depth here was critical because as it increased, the drilling equipment required to drill deeper, changes. Specifically, drilling at 1,500', as the Study indicated, requires special drilling equipment not commonly found in this region. See e.g. CP 713-714. Prior to the bid, EWU had been informed

only a limited number of well drillers in the area were capable of drilling to 750'. CP 662. EWU knew the extremely deep well required special equipment. CP 713-714.

Nonetheless, EWU specified the contractor would be required to keep drilling beyond 750' deep if water was not reached at that elevation. CP 306. EWU placed significant limitations on remedies in the event of claims based on the contract. CP 92-102. Of course, EWU secretly knew claims were likely since the Study indicated a well of 1,500' deep was required to obtain water. Despite EWU's knowledge, the Study's conclusions were never discussed during the design of the Project. CP 713-714. EWU's Project specifications intentionally misrepresented to bidders that the scope of the drilling on the Project was two wells; both 750' deep. CP 678-680. EWU also expressly misrepresented *that the only geological information* available to the bidders was a well log and video for existing EWU wells located in a completely different aquifer. CP 864-865; CP 624-636. The Court of Appeals Opinion erroneously misstated this fact from the record.

In response to Elcon's request for all of the information EWU had relating to the Project, EWU misrepresented that the only information it had was an old well log and video from EWU's existing Well Number 2

and a video of the existing wells located in the Wanapum, which is a completely different aquifer. CP 864-5. The well Project was originally scheduled for an April 17, 2003 bid date. CP 268. When EWU learned that there would be few or no bids submitted, it delayed the bid date.

Thereafter, Elcon provided a successful bid for the Project and proceeded. Later, during the course of construction, Elcon learned of EWU's deception with regard to the pre-existing comprehensive geological investigations and studies EWU possessed. CP 269. After four public records requests, Elcon finally received the Study and the Golder Report confirming EWU's pre-bid misrepresentations, as well as those made during construction, were blatantly and intentionally false. Supra. Nonetheless, EWU ordered Elcon to continue drilling beyond the 750' depth. When Elcon insisted upon payment for its increased costs of drilling, EWU decided to terminate Elcon's contract "for convenience". CP 106.

On April 15, 2004, EWU terminated its contract with Elcon for its convenience. CP 106. As required by the contract, EWU instructed Elcon to submit a pay request for the work performed prior to termination and Elcon submitted that pay request. CP 106-7. EWU was required to render a decision within 60 days of the pay request claim. CP 109. At EWU's

request, Elcon allowed the Project records to be audited. CP 109. The document review was scheduled for August 6, 2004 and EWU indicated it would provide a response by September 7, 2004. CP 111-112. EWU did not provide a response. Instead, on October 22, 2004, EWU indicated it was “*converting*” the “convenience” termination into one for “*default*”. CP 113-14.

Elcon filed suit based upon both the contract and its statutory rights as a public works contractor. CP 3-16. Elcon later filed an Amended Complaint adding its tort causes of action. CP 17-33. EWU responded by moving to “*dismiss or stay*” the entire action based on the Economic Loss Rule (“ELR”) and the arbitration provision in the contract. CP 34-41. The Court denied EWU’s Motion to dismiss the tort claims. CP 221. The Court further ruled *that only a portion of the litigation would be stayed*, pending arbitration of the issue of whether money was owed under the contract. Only the “*contract claims*” were stayed “*pending arbitration*”. CP 222. The parties submitted only the termination for convenience/termination for default dispute to Arbitration. The Court retained all remaining claims, including the statutory rights.

In Arbitration, Elcon’s position was that EWU breached its contract by refusing to make payments owed as a result of EWU’s

termination for convenience. CP 927-932. In response, EWU claimed that due to its “conversion” to a termination for default, it did not owe any contract payments, but rather Elcon somehow owed it money. The Arbitrator confirmed Elcon was owed a contractual payment based upon Elcon’s June 4, 2004 pay request. CP 249-50. The Award did not address interest or attorney fees. Id. In fact, the issue of statutory interest was not submitted to Arbitration by the Superior Court and as a result, has never been decided!

Elcon then filed a motion with the Trial Court seeking statutory interest, or in the alternative, remand of the matter to the Arbitrator directing him to rule on the issue. CP 395-403. The Trial Court erroneously refused to decide the issue and also refused to remand it to the Arbitrator. CP 1019-1020. This was in spite of the fact the Arbitrator had never been directed by the Court to decide the issue of statutory interest as part of the Arbitration. As a result, Elcon was never provided redress on the issue of statutory interest.

Following Arbitration, the litigation continued so the remaining issues could be resolved. Although the Trial Court had previously denied EWU’s motion to dismiss, EWU filed a Motion for Summary Judgment, again seeking to dismiss Elcon’s fraud claims based on the ELR. CP 359-

376. The Court correctly denied EWU's Motion, finding the ELR did not apply. The Court also determined that genuine issues of material fact existed with regard to all of the elements of fraud. CP 1017-20. However, the Court erred by granting summary judgment on Elcon's Tortious Interference claim by finding there was no evidence of damages. CP 1018. Almost two years later, the matter was reassigned to a new Judge. At that point, EWU again re-filed its ELR motion, which had been twice denied. CP 1088. The new Judge erroneously ignored and changed the prior rulings, finding that the ELR barred claims for fraudulent concealment and fraudulent inducement. CP 1379-1384.

V. ARGUMENT

A. Why Review Should Be Accepted.

Review should be accepted if the decision of the Court of Appeals conflicts with prior opinions of the Supreme or Court of Appeals; if a significant question of law under the Constitution is involved; or if the Petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). The Court of Appeals Decision in this case conflicts with decisions and policies expressed in prior Supreme Court decisions and also involves issues of substantial public policy that need to be determined. Specifically, (1) whether a party

may blatantly commit fraud in order to induce a party into a contract and then avoid liability for fraud by limiting remedies under the contract; (2) whether a public agency is entitled to use fraud to induce bids on a public project; (3) whether a public works contractor should be denied statutory interest where the issue was never submitted to Arbitration; and (4) whether the Court of Appeals decision conflicts with prior decisions by affirming the grant of summary judgment without applying the record.

B. Elcon Was Unable To Negotiate To Allocate The Risk Of EWU Committing Fraud To Induce The Contract.

Under Washington law, a claim of fraudulent concealment is not barred by the Economic Loss Rule. Alejandre v. Bull, 159 Wn.2d 674, 689 (2007) (citing Atherton Condo. Ass'n Bd. Of Dirs. V. Blume Dev. Co., 115 Wn.2d 506, 523-527 (1990)). “[U]nder Atherton, *the Alejandres’ fraudulent concealment claim is not precluded by the Economic Loss Rule.*” Id. (emphasis added). Here, the basis for Elcon’s fraud claim was the fact that EWU fraudulently concealed the Study from Elcon in order to induce Elcon to bid the Project and enter into the contract. CP 17-33. As a result, the determination that Elcon’s Fraudulent Concealment claim was barred by the ELR was contrary to this Court’s decision in Alejandre. Here, the Court of Appeals wrongfully relied upon

Alejandre, even though it expressly did not hold that the ELR barred fraud in the inducement claim. Alejandre, 159 Wn.2d at 690 fn. 6.

Beyond the similarity between a fraudulent concealment claim and a fraud in the inducement claim, the interplay between the ELR and a claim of fraud in the inducement appears not to have been directly addressed by any Washington Court. However, in Steineke v. Russi, 145 Wn. App. 544 (2008), Division II refused to apply the ELR to fraud allegations. It did so by interpreting Alejandre as follows: “[t]he Alejandre court reaffirmed that the economic loss rule does not apply to claims of fraud....” Id. at 560. Division II’s application is consistent with Washington’s well established policy condemning fraudulent behavior. See Coson v. Roehl, 63 Wn.2d 384, 388 (1963) (“*A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper...*”); Leibergesell v. Evans, 93 Wn.2d 881 (1980). The ELR should not be used to allow EWU to fraudulently induce Elcon’s bid.

In a recent case, Division I applied the ELR to allegations of intentional misrepresentation. See Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 250 (2008). However, Carlile was a construction defect case and there were no facts indicating it involved fraudulent inducement.

Id. at 282-283. Furthermore, the Carlile Court specifically limited its decision to apply the ELR to the facts of that case. Id. at 205 (“*Because we have no basis to depart from the application of the Economic Loss Rule here...*”)(emphasis added). Finally, the Carlile Court did not offer any substantive analysis to support the application of the ELR. As explained below, based upon the public policies underlying both Washington Law and the ELR, the ELR should not be applied to bar fraudulent inducement claims.

The ELR does not apply in situations where the parties have never been in a position to negotiate the risks. See e.g. Neibarger v. Universal Cooperatives, Inc., 439 Mich. 512, 525, 486 N.W.2d 612 (1992). It is sound public policy that a party is not required to negotiate risks on the assumption the other party has committed fraud. More importantly, in this case, because it was a public works project, Elcon was powerless to negotiate its risks. As a result, Elcon was required to submit a binding bid based on the terms established solely by EWU. See RCW 39.04 et. seq. Therefore, Elcon had no ability to negotiate the terms of the contract to allocate the risk that EWU committed fraud in order to obtain bids. Consequently, the ELR should not be held to bar a claim of fraud that induces a public works contract.

C. **The Economic Loss Rule Should Not Bar Claims For Fraud That Induces a Contract.**

Fraud in the inducement occurs “*when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved.*” Black’s Law Dictionary 686 (8th ed. 2004). The case here is classic fraud in the inducement. As EWU admits, the Study concluded that any well drilled into the Grande Ronde aquifer needed to be 1,500’ deep. CP 578. EWU knew that regional drillers did not have the equipment necessary to drill 1,500’ deep. CP 713-714. EWU also knew only a handful of drillers in the area could even drill 750’ deep. CP 662. Consequently, EWU decided to intentionally conceal the Study from the new design engineer, from potential bidders, and from Elcon. CP 701, 704, 706-708 and 710. Incredibly, EWU dictated a design depth of 2 wells at 750’ and misrepresented to bidders the available Project information and the true scope of the Project. EWU also misrepresented to Elcon that it did not have information concerning a campus Grande Ronde well. CP 864-865; CP 673. As a result, Elcon was fraudulently induced to enter into a unit price contract that severely limited its right to recover costs if ever there were a claim. CP 97-102.

The ELR is a judicially created doctrine developed to “*prevent disproportionate liability and allow parties to allocate risk by contract.*” Berschauer/Phillips Construction Co. v. Seattle School District, 124 Wn.2d 816 (1994). As a result, the Rule does not apply in situations where a party commits fraud that prevents the other party from negotiating the allocation of risk. Washington law has long recognized that a party cannot benefit from using fraud to form a contract. See Coson v. Roehl, 63 Wn.2d 384, 388 (1963); Leibergesell v. Evans, 93 Wn.2d 881 (1980). Elcon simply should not be required to assume that EWU would use deception to obtain bids. Scroggin v. Worthy, 51 Wn.2d 119, 123 (1957)(internal citations omitted). “*The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity.*”; Woody v. Benton Water Co., 54 Wash. 124, 127-28 (1909)(emphasis added). This policy is why a majority of jurisdictions have held that fraudulent inducement claims are not barred by the ELR. “*But the common law of fraud imposes a duty not to lie in order to trick another into contract, period, end of story.*” See Fraudulent Inducement Claims Should Always Be Immune From Economic Loss Rule Attack, Florida Bar Journal, April 1, 2001 (emphasis added); see also, HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238 (Fla.

1996)(the Court held “a cause of action for fraud in the inducement of contract is an independent tort and is not barred by the Economic Loss Rule.”; Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, 960 S.W.2d 41 (TX 1998); and Giles v. General Motors Acceptance Corp., 494 F.3d 865, 880 (9th Cir. 2007)(“Although the events giving rise to Appellants’ fraud claim did occur in the context of a contractual relationship between the parties, the claim is not a mere contract claim cloaked in the language of tort. Appellants claim fraud in the inducement rather than fraud in the execution or promissory fraud.”).

The tort, after all, is inducing someone to enter a contract, so to say it does not apply where the tort involves the contract or its subject matter analytically makes no sense.

Budgetel Inns, Inc. v. Micro Sys., Inc., 8 F.Supp.2d 1137, 1146 (E.D. Wis. 1998).

[W]hen the fraud occurs in ...connection with misrepresentations, statements or omissions which cause the complaining party to enter into a transaction, then such fraud is in the inducement and survives as an independent tort.

D&M Jupiter, Inc. v. Friedopfer, 853 So.2d 485, 487 (Fl. 4th DCA 2003); see also, Vesta Const. & Design, L.L.C. v. Lotspeich & Assoc., Inc., 974 So.2d 1176, 1181 (Fl. Dist. Ct. App. 5 2008) and Allen v. Stephan Co., 784 So.2d 456, 457 (Fla. 4th DCA 2000) (“If the fraud occurs...which

cause[s] the complaining party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort.”)

Fraud in the inducement presents a special situation where parties to a contract appear to freely negotiate-which normally would constitute grounds for invoking the economic loss doctrine-but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party’s behavior.

Huron Tool and Engineering Co. v. Precision Consulting Services, Inc., 532 N.W.2d 541, 545 (Mich. 1995). Consequently, the Court of Appeals decision here is inconsistent with well established public policy and undermines the public good.

D. EWU’s Intentional Interference Was With Elcon’s Separate Business Expectancy.

Despite well established Washington law regarding the summary judgment standard, the Court of Appeals refused to review the Trial Court’s granting the summary judgment with regard to EWU’s intentional interference with a business relationship. It did so relying on the ELR, even though the interference allegations were not based on the contract at issue. In other words, the Court of Appeals held that as long as a contract exists, a party they can commit an economic tort with impunity. This expansion of the ELR is simply incorrect and requires this Court’s input.

E. Public Works Contractors Are Entitled To Statutory Interest.

Division III's decision creates a dangerous precedent allowing public agencies to ignore the legislature's direct requirement that public contractor's be paid interest when pay requests are not timely paid. In this case, the Court of Appeals relied on the "*good faith*" exception found in the statute. RCW 39.76.010(1). However, that exception only applies if there is proper notice of the dispute. In this case, the record is clear that EWU never sent notice by certified mail, personal delivery or in accordance with the procedures in the contract. As a result, the Court of Appeals' Opinion clearly goes beyond the express language of the statute.

In addition, its Opinion confuses pre-judgment interest with statutory interest and fails to address the fact, that in this case, only a limited factual dispute was submitted to Arbitration. As a result, Westmark Properties, Inc. v. McGuire, 53 Wn.App. 400, 401 (1989) did not apply. Therefore, the Court of Appeals decision should be reviewed.

VI. CONCLUSION

Elcon respectfully requests that review be granted to address the inconsistent application of the ELR and its improper application to fraud in the inducement cases. Elcon also requests that review be granted so the

protections provided by our legislature to public works contractors is confirmed and enforced.

DATED this 24 day of September, 2009.


DUNN & BLACK, P.S.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of September, 2009,
I caused to be served a true and correct copy of the foregoing document to
the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FAX TRANSMISSION
- EMAIL

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Elcon 2661

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ELCON CONSTRUCTION, INC.,)
)
 Appellant,)
)
 v.)
)
 EASTERN WASHINGTON UNIVERSITY,)
)
 Respondent.)

No. 27201-0-III

Division Three

UNPUBLISHED OPINION

BROWN, J. — Elcon Construction, Inc. appeals the trial court’s summary dismissals of its tort claims against Eastern Washington University (EWU) arising from the parties’ well drilling contract, and the court’s refusal to grant pre-award interest on Elcon’s arbitration award against EWU. Like the trial court, we hold that the economic loss rule precludes Elcon’s tort claims arising from the contract. We agree with the trial court that it lacked jurisdiction over the pre-award interest claim because it was an issue for arbitration under the contract. Accordingly, we affirm.

FACTS

EWU uses two campus wells for its water supply. The first well is 512 feet deep and pumps approximately 330 gallons per minute (gpm) and the second well is 561 feet deep and pumps approximately 450 gpm. The wells draw water from the Wanapum

APPENDIX A

cc. client ✓

aquifer. Wanting to increase its water capacity, EWU hired engineers Varela & Associates for a water capacity study in 2000. Varela, in turn, hired Golder & Associates to perform a hydrogeological investigation. The "Golder Report" suggested a new well be built in the Grande Rhonde aquifer below the Wanapum aquifer "from about 700 to 1,500 feet below ground surface." Clerk's Papers (CP) at 338. The Golder Report acknowledged it would be a less expensive alternative to drill into the Wanapum aquifer, and opined that either alternative could satisfy EWU's needs.

In 2003, the Department of Ecology (DOE) approved EWU's long-standing application to consolidate its existing water rights, permitting pumping of 900 gpm. DOE permitted refurbishment of existing wells, which included drilling in the "immediate proximity" of the existing wells. CP at 303. EWU decided to drill replacement wells near the existing wells to increase its water supply to 900 gpm. EWU began accepting bids for the job. EWU did not believe the Golder Report's Grande Rhonde alternative was relevant since it wanted to refurbish its existing wells and consolidate its water rights.

Also in 2003, Elcon successfully bid for "Wells 1 & 2 Refurbishment" by drilling two 750 feet wells. Elcon certified it had, "investigated and satisfied itself as to the general and local conditions which can affect the Work or its cost, including . . . (d) the conformation and conditions of the ground; and (e) the character of equipment and facilities needed preliminary to and during the performance of the Work." CP at 313. EWU agreed to pay Elcon \$1,516,635 for the well work.

As construction progressed, Elcon had increased difficulty in drilling near Well 1. Elcon did not have the equipment to drill significantly deeper than 750 feet. Elcon refused to continue drilling unless EWU assumed the risk of damage to its equipment. In April 2004, EWU terminated its contract with Elcon for convenience and requested a final pay request. Elcon submitted its pay request, which EWU disputed. Based on later discovered damage information to Well 1 derived from a high-resolution video, EWU changed its termination claim from convenience to for cause. EWU notified Elcon by letter of its change from convenience to for cause. It provided Elcon's bonding company a copy of this change letter.

Elcon sued for breach of contract and later amended to add several tort claims, including defamation, publication in a false light, fraud, and tortious interference with a contractual relationship. Elcon also requested "prejudgment interest as provided for by law." CP at 33. The parties' contract required arbitration of the contract claims. The arbitrator rejected EWU's for cause argument and awarded Elcon \$891,202.70, noting that EWU already paid Elcon \$946,293.36. After the arbitrator filed its decision, Elcon requested prejudgment interest. The arbitrator denied its request, concluding he lacked post-final-award jurisdiction to make such an award.

Relying mainly on the economic loss rule, EWU eventually succeeded in gaining summary dismissals of Elcon's tort claims arising out of the parties' contract. Further, the trial court denied Elcon's request for prejudgment interest, noting it lacked jurisdiction in view of the contract's arbitration provisions. Elcon appealed.

ANALYSIS

A. Summary Judgment

The issue is whether, considering the economic loss rule, the trial court erred in summarily dismissing Elcon's tort claims.

On review of an order for summary judgment, this court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Our review is de novo. *Id.* Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). We will grant summary judgment if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

Washington's economic loss doctrine prohibits plaintiffs from recovering purely economic damages in tort when the plaintiffs' entitlement to the damages is based in contract. *Alejandre v. Bull*, 159 Wn.2d 674, 683, 113 P.3d 1039 (2005). "[T]he purpose

of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses.” *Id.* A clear distinction between the remedies available in tort and contract claims with respect to economic loss encourages the parties to allocate risk and prevents a party to a contract from obtaining benefits that were not part of the bargain. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 203, 194 P.3d 280 (2008). The court in *Berschauer/Phillips* held, “[W]hen parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles in [RESTATEMENT (SECOND) OF TORTS, § 552 (1977)] and, thus, purely economic damages are not recoverable.” *Id.* at 828.

Here, Elcon’s damages are the same as those claimed as compensatory under the contract. Moreover, the conduct complained of is not extraneous to the contract but a significant part of the contract. The parties agreed to the general conditions, which allocate responsibility to Elcon for determining foreseeable subsurface condition. This holding is consistent with two recent Division Two cases. See *Cox v. O’Brien*, 150 Wn. App. 24, 35, 206 P.3d 682 (2009) (economic loss rule bars fraudulent representation claim against seller for pest damage); *Jackowski v. Borchelt*, ___ Wn. App. ___, 209 P.3d 514, 520 (June 16, 2009) (economic loss rule bars negligent misrepresentation claim against sellers after landslide damaged home).

Relying in part on the Golder Report, Elcon argues EWU's actions amount to fraud in the inducement and that such claims are an exception to the economic loss rule. The Golder Report, drafted several years before EWU contracted with Elcon, related to a plan for increased water capacity (drill a large well into the aquifer below the currently used aquifer) distinct from the plan EWU chose to pursue (refurbish the two existing campus wells) in the higher Wanapum aquifer.

Nonetheless, even assuming EWU's actions amount to fraud in the inducement, our Supreme Court noted in a footnote in *Alejandre*, "Other courts recognize a limited exception to the economic loss rule for fraudulent misrepresentation claims that are independent of the underlying contract (sometimes referred to as fraud in the inducement) but only where the misrepresentations are extraneous to the contract itself and do not concern the quality or characteristics of the subject matter of the contract or relate to the offending party's expected performance of the contract." *Alejandre*, 159 Wn.2d at 690 n.6 (citing *Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 209 Mich. App. 365, 532 N.W.2d 541 (1995); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 884-87 (8th Cir. 2000)). The court declined to make such ruling in Washington.

Accordingly, we hold Elcon's tort claims are barred by the economic loss rule. Based on this holding, this court need not address Elcon's remaining arguments regarding fraud, intentional interference with a business expectancy, and publication in

a false light. See *Lake v. State Farm Mut. Auto. Ins. Co.*, 127 Wn. App. 114, 117, 110 P.3d 806 (2005) (courts need only address dispositive issues).

B. Pre-award Interest

The issue is whether the trial court erred in denying Elcon's request to modify the arbitration award to grant pre-award interest.

"Washington courts accord substantial finality to arbitration decisions rendered under [former] chapter 7.04 RCW."¹ *In re Point Allen Serv. Area v. Dep't of Health*, 128 Wn. App. 290, 303, 115 P.3d 373 (2005). The superior court was limited to confirming, modifying, or correcting the arbitrator's award on limited statutory bases. *Barnett v. Hicks*, 119 Wn.2d 151, 156, 829 P.2d 1087 (1992). Review on the arbitration merits is not permitted. *Id.* at 156-57. Our review of the arbitration award is confined to the same scope as the trial court's review. *Id.* at 157.

The trial court could modify or correct the arbitration award solely on grounds of "evident miscalculation of figures, or an evident mistake in the description of any person, thing or property," or "imperfect[ion] in a matter of form, not affecting the merits of the controversy." Former RCW 7.04.170(1), (3) (1943); former RCW 7.04.175 (1985).

¹ Former chapter 7.04 RCW was repealed by LAWS OF 2005, chapter 433, section 50, and recodified as chapter 7.04A RCW, the 2005 Uniform Arbitration Act. The former chapter applies here because the arbitration was commenced before the new statutory scheme was effective on January 1, 2006. RCW 7.04A.900. The 2005 Uniform Arbitration Act "does not affect an action or proceeding commenced or right accrued before January 1, 2006." RCW 7.04A.903.

RCW 39.76.010(1), in relevant part provides: "Except as provided in RCW 39.76.020, every state agency . . . shall pay interest at the rate of one percent per month, but at least one dollar per month, on amounts due on written contracts for public works . . . whenever the state agency . . . fails to make timely payment." Prejudgment interest, however, does not apply to, "*Claims subject to a good faith dispute*, when before the date of timely payment, notice of the dispute is: (a) Sent by certified mail; (b) Personally delivered; or (c) Sent in accordance with procedures in the contract." RCW 39.76.010(1) (emphasis added).

In *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 401, 766 P.2d 1146 (1989), a property owner appealed a superior court order, which confirmed an arbitration award, but added prejudgment interest. Division Two of this court deleted the prejudgment interest, holding that the court, "had no basis for determining whether the amount awarded met the test for prejudgment interest; this was part of the merits of the controversy, forbidden territory for a court." *Id.* at 404. Similarly, here, the trial court had no basis to assess prejudgment interest.

Relying on *Phillips Building Company, Inc. v. An*, 81 Wn. App. 696, 701, 915 P.2d 1146 (1996), Elcon argues the court should have awarded prejudgment interest because the arbitrator exceeded his authority in failing to do so. The *Phillips* court held, "Arbitrators may exceed their authority by failing to award attorney fees to the prevailing party under an arbitration agreement." *Id.* However, the court ultimately held that because the prevailing party could not be determined on the face of the arbitration

award, the court properly declined to modify the award to include attorney fees. *Id.* Similarly, here, it cannot be determined on the face of the award whether prejudgment interest is justified based on the good faith dispute exception in RCW 39.76.010(1). Under *Westmark* and *Phillips*, the trial court properly declined to award prejudgment interest.

Lastly, Elcon asks us to direct the trial court to direct the arbitrator to reconsider its decision regarding prejudgment interest. Elcon fails to cite persuasive legal authority to justify its request. Furthermore, under RCW 39.76.010(1), it is unlikely interest would be awarded since EWU notified Elcon in April 2004 that it would be terminating the contract and requested a final pay request and the pay request was disputed, which led to arbitration.

C. Attorney Fees

Both parties request attorney fees. Elcon requests fees under RCW 39.76.040. This statute states, "In any action brought to collect interest due under this chapter, the prevailing party is entitled to an award of reasonable attorney fees." Since Elcon did not prevail on the prejudgment interest issue, its request is denied. EWU requests attorney fees under RAP 18.1. Since it fails to cite "applicable law," warranting such an award, EWU's request is denied. RAP 18.1.

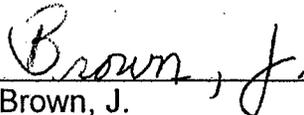
Affirmed.

A majority of the panel has determined this opinion will not be printed in the

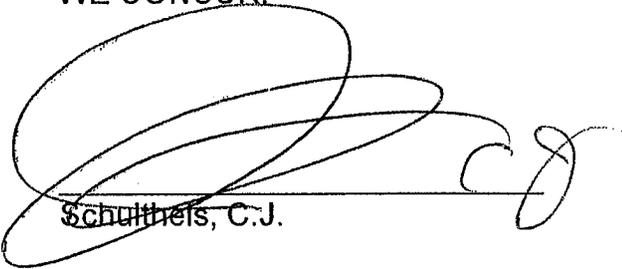
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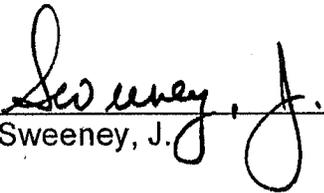
Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.


Brown, J.

WE CONCUR:


Schulteis, C.J.


Sweeney, J.

RCW 39.76.010

Interest on unpaid public contracts — Timely payment.

*** CHANGE IN 2009 *** (SEE 1199.SL) ***

(1) Except as provided in RCW 39.76.020, every state agency and unit of local government shall pay interest at the rate of one percent per month, but at least one dollar per month, on amounts due on written contracts for public works, personal services, goods and services, equipment, and travel, whenever the state agency or unit of local government fails to make timely payment.

(2) For purposes of this section, payment shall be timely if:

(a) A check or warrant is mailed or is available on the date specified for the amount specified in the applicable contract documents or, if no date is specified, within thirty days of receipt of a properly completed invoice or receipt of goods or services, whichever is later.

(b) For any amount which is required to be withheld under state or federal law, a check or warrant is mailed or is available in the proper amount on the date the amount may be released under the applicable law.

[1981 c 68 § 1.]