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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 27201-0-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ELCON CONSTRUCTION, INC., a Washington corporation,

Appellant,

v.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

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I. BACKGROUND AND INTRODUCTION

A. The Contract For Refurbishment Of Eastern Washington University's Water Wells¹

Since 1984, Eastern Washington University (EWU) has had three separate water right certificates permitting it to pump 900 gallons per minute (GPM) from its two campus water wells. CP 302. Both EWU wells pump water from the Wanapum aquifer. CP 322. Well 1 was built prior to 1915 to a depth of 512 feet and pumps approximately 330 GPM; Well 2 was built in 1970 to a depth of 561² feet and pumps approximately 450 GPM. CP 327.

In 1987, EWU applied to consolidate its water certificates so that it might withdraw the full 900 GPM from one well, or might otherwise have flexibility in the manner in which it was permitted to withdraw water. CP 303. On February 13, 2003, after a sixteen year wait, the Washington Department of Ecology (DOE) approved EWU's application to consolidate its water rights. CP 303. The 2003 DOE authorization did not

¹ This introduction is based upon the Declaration and Supplemental Declaration of Shawn King and their attachments (CP 302-58 and CP 1448-70). The Golder Report (5/11/2000), which is the primary document Elcon relies upon in its fraudulent inducement allegation, is included as an appendix to the King declaration (CP 316-56) and serves as a clarifying document in this discussion.

² Since both wells were less than 600 feet deep, a refurbishment contract that estimated the depth of the refurbishment project at 750 feet (plus 15-20 percent) was, by definition, reasonable. At the time EWU terminated the contract, Elcon's refurbishment of Well 1 was 831 feet (significantly less than the 900 feet Elcon contracted for and expected). CP 980-1012; CP 1448-49.

give EWU permission to dig additional wells, either on campus or at some remote location. CP 303.

In order for EWU to take advantage of DOE's approval to consolidate, the College accepted bids to refurbish its two existing wells with the expectation that either might be able to pump the 900 GPM allowed under the DOE authorized consolidation. CP 303. Under DOE regulations, refurbishment of an existing well could include drilling a replacement well as long as the new extraction point was in the immediate proximity (within 100 yards) of the existing well. CP 303. The engineering firm of Thomas Dean & Hoskins (TD&H) designed the refurbishment project for Wells #1 and #2. CP 303. On June 9, 2003, Elcon successfully bid on the project to refurbish EWU's existing wells.³ CP 303-04, 1103-20.

In response to the instructions to bidders, Elcon certified that it had taken the steps:

[R]easonably necessary to ascertain the nature and location of the Work, and that it has investigated and satisfied itself as the general and local conditions that can affect the work or its cost, including. . .

(d) the conformation and conditions of the ground; and
(e) the character and equipment and facilities needed preliminary to and during the performance of the Work.

CP 313, 1113.

³ A compendium of relevant contract provisions, including §8 governing arbitration between the parties, is included at CP 179-209.

Three years before DOE approved the consolidation of water rights for EWU's existing wells, EWU explored a number of long range options for expanding its groundwater supply. CP 305-6. The "Golder Report"—which consolidated *publicly available* information for the EWU wells and those operated by the City of Cheney—recommended, as an option for increasing groundwater supply prior to DOE's approval of EWU's water rights consolidation, that a new well be dug into the Grande Ronde aquifer (below the Wanapum aquifer) at one of two possible locations—one on the southwestern portion of the EWU campus (with only a 20-30 percent likelihood of success) and one to the southwest of the City of Cheney. CP 338, 340.

Digging a *new well* into the Grande Ronde aquifer would have required a permit from DOE for locations unrelated to Well 1 and Well 2 and would have required digging to a depth of 1500 feet. CP 302-58. EWU did not have DOE permits to dig a new well in 2003 or at any time period relevant to this litigation. CP 302-58.

The Golder Report is, and has always been, irrelevant to the refurbishment project for Well 1 and Well 2 and to the inadequacy of Elcon's performance in its contract with EWU. CP 162-64, 305.

As a result of the arbitration in this case, Elcon was paid \$1,837,496.00 for its partial “refurbishment”⁴ of EWU Well 1. CP 1132-33. The original contract between Elcon and EWU required payment of \$1,516,635.00 for refurbishment of both EWU wells. CP 1107. This contract amount was increased by \$11,865.00 at Elcon’s request on December 30, 2003, after Elcon’s initial drilling detected a sand interbed. CP 980-1012, CP 1448-9.⁵

After the problems identified by DOE with the refurbishment of Well#1 (CP 162-4), EWU terminated its contract with Elcon before the corporation began refurbishment work on Well#2. CP 308. Thus, Elcon was paid more than the amount it contracted for, but performed less than half of the contract work. CP 308.

B. The Litigation

In late 2004, Elcon Construction, Inc., (Elcon) sued EWU on multiple contract and tort theories arising from a contract to drill two water wells on the EWU campus. CP 1-16. The contract claims were arbitrated in accordance with the contract, and Elcon prevailed.⁶ CP 206, 1132-34. The

⁴ An objective description of Elcon’s contract performance on the refurbishment of Well 1 (by DOE) may be found at CP 162-64.

⁵ Mr. King’s supplemental declaration (CP 1448-70) was considered by the trial court at the time of Summary Judgment in 2006 and incorporated by reference on summary judgment in 2008. CP 1040, 1259.

⁶ The June 9, 2003, contract between Elcon and EWU is included at CP 179-209 and CP 1103-20.

arbitrator awarded Elcon \$1,837,496.00. CP 1132-33. The award included the full amount of Elcon's contractually recoverable direct costs (including overhead and profit), as well as Elcon's cost of liability insurance, WSST, and bond cost.⁷ CP 1132. After the arbitration, Elcon pursued several tort claims against EWU including defamation, publication in a false light, fraud, tortious interference with a contractual relationship, and violation of civil rights under 42 U.S.C. § 1983. CP 17-33, 359-76.

In 2006, EWU sought summary judgment on Elcon's tort claims, relying primarily on the "economic loss rule." CP 359-76. EWU argued, as it has throughout this case, that the economic loss rule precludes tort actions arising from the subject matter of a contract between the parties. *Berschauer/Phillips Const. Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994). CP 359-76.

In an order dated August 28, 2006 (based on a letter opinion dated July 19, 2006), the trial court granted EWU's motion for summary judgment on Elcon's defamation, tortious interference with contractual relationship,

⁷ EWU had already paid Elcon \$946,293.36 on the contract. CP 1132-33. The arbitrator ordered EWU to pay Elcon an additional \$891,202.70. CP 1132-33. Elcon argued that the termination had been made for convenience. CP 895-979, 1132-33. EWU argued that the termination had been made for cause. CP 308, 1132-33, 1153-90. Elcon was awarded significantly less than the amount it sought. CP 309, 1132-33. The arbitrator also found that EWU could not claim termination for cause after it had terminated for convenience. CP 1000.

and civil rights claims.⁸ CP 1039-45. The trial court also held that it did not have jurisdiction to award pre-judgment interest on the arbitration award (on the grounds that a pre-judgment interest award would have been the “province of the arbitrator”). CP 1052. The trial court *did* determine that it had jurisdiction to award post-judgment interest on the arbitration award. CP 1052.

But, relying primarily on this court’s decision in *Alejandre v. Bull*, 123 Wn. App. 611, 98 P3d 844 (2004), the trial court denied EWU summary judgment on the fraud and publication in false light claims. CP 1039-45. EWU’s motion for discretionary review of the trial court’s fraud and false light decisions was denied by this court in 2006. CP 1056-58.

The Washington Supreme Court accepted review of this court’s decision in *Alejandre v. Bull* in 2005 (*See Alejandre v. Bull*, 154 Wn.2d 1012, 113 P.3d 1039 (2005)), and on March 1, 2007, the Supreme Court issued an opinion that reversed this court’s decision. *See Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).

After the Supreme Court’s decision in *Alejandre*, EWU asked the trial court to reconsider its decision on Elcon’s remaining tort claims.⁹

⁸ Elcon now appeals two of the claims which the trial court decided as a matter of law in 2006—the determination that Elcon’s tortious interference with contractual relationship claim was unsupported by admissible evidence, and its determination that it did not have jurisdiction to award pre-judgment interest. CP 1039-45, 1050.

⁹ CP 1088-1275.

Tornetta v. Allstate Ins. Co., 94 Wn. App. 803, 809, 973 P.3d 8 (1999) (an order denying motion for summary judgment is not final and may be reconsidered in the light of new case law). On reconsideration, the trial court found that the economic loss rule applied to Elcon's remaining tort claims because the damages Elcon seeks for fraud and false light are economic damages and because the damages Elcon seeks are the same damages the corporation sought in arbitration as compensation under the contract. CP 1382-87.

In the trial court, EWU also argued that Elcon's tort claims must be dismissed because, as in *Alejandre*, the corporation lacks evidence sufficient to establish the elements of fraud or publication in a false light and because Elcon is a corporation, not a person, and cannot, as a matter of law, bring a false light claim. CP 1264-67.

EWU respectfully requests that this court affirm the trial court's dismissal of Elcon's tort claims. Elcon has received the full benefit of its contract with EWU through arbitration. Further enrichment is barred by the economic loss rule.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly find that Elcon's relationship with EWU was contractual and correctly dismiss Elcon's fraudulent inducement and false light claims under the economic loss rule?
2. In the alternative, where Elcon failed to introduce admissible evidence establishing the nine elements required to prove fraud, did the trial court correctly dismiss Elcon's fraud claim as a matter of law?
3. In the alternative, where Elcon failed to introduce admissible evidence establishing false light and could not—as a corporation rather than a person—properly make such a claim, did the trial court correctly dismiss that claim as a matter of law?
4. Where Elcon completely failed to introduce admissible evidence establishing tortious interference with its contractual relationships, did the trial court correctly dismiss that claim as a matter of law?
5. Should Elcon's claim for statutory interest be dismissed because it was untimely?
6. Should EWU be awarded attorneys' fees and costs under RAP 18.1 because the contract between the parties specified that any dispute regarding the contract and its terms would be arbitrated rather than litigated?

III. COUNTERSTATEMENT OF THE CASE

A. Counterstatement Of Facts

In May 2003, EWU advertised for and accepted bids to refurbish two water wells, Well 1 and Well 2, located on EWU's Cheney campus. CP 306, 1097. The work included drilling new "points of withdrawal" (i.e., water wells) in the immediate vicinity of the two existing EWU

wells. CP 306, 1097. Elcon submitted the low bid of \$1,516,635.00, and was awarded the contract.¹⁰ CP 1094 ¶ 7, CP 1097 ¶¶ 17-18, CP 1099 ¶ 26, CP 1107.¹¹

Elcon experienced numerous problems and delays while attempting to drill the first of the two new points of withdrawal. CP 1098 ¶ 19.

The nominal drilling depth of both new wells was 750 feet, with a target capacity of 900 GPM each. CP 1097 ¶18.

Even though Elcon understood that nominal depth for a 750-foot well would be 750 feet plus or minus 15-20 percent (or a depth of up to 900 feet), CP 1196, Elcon refused to drill beyond 831 feet without a statement from EWU that it would guarantee to pay for any repairs on the corporation's equipment. CP 1098 ¶¶ 19-20.

Elcon was behind schedule, there were questions about whether the amount of water targeted had been achieved, and damage to the well had frustrated the ability to test the yield or to continue drilling. CP 1098 ¶ 20.

¹⁰ By subsequent change order, the contract price was adjusted to include the cost of drilling through a sand interbed Elcon discovered. CP 1448-70. At arbitration the contract amount was calculated at \$1,555,668.90. CP 1132.

¹¹ The Declaration of Shawn King was submitted in support of EWU's 2006 motion for summary judgment. CP 302-358. The same document was included in support of the 2008 motion. CP 1093-1101. See also, CP 1448-70 (Mr. King's Supplemental Declaration).

On April 15, 2004, EWU exercised its right to terminate the contract for convenience under part 9.02 of the General Conditions of the contract. CP 1098 ¶¶ 21-22.

At the time EWU terminated the contract for convenience, the extent of the damage to the well was not apparent, and based on the information then available to EWU, it appeared that the well would be salvageable. CP 1098 ¶¶ 20-22.

Between May and October 2004, based on information derived from a high-resolution video and assessment of the extensive damage, it was determined that Well 1 was unusable and would need to be decommissioned. CP 162-4, 1099 ¶¶ 23-25.

On October 22, 2004, EWU issued a termination for cause letter pursuant to part 9.01 of the General Conditions. CP 1099 ¶ 25. A copy of the letter was provided to Elcon's bond surety. CP 1126-1130.

Ultimately, the arbitrator rejected EWU's termination for cause argument and proceeded with and determined the case under the termination for convenience provisions of the contract. CP 1132-33, 1134.

As of the time of termination, EWU had paid Elcon \$946,293.36. In June 2005, Elcon submitted its "Termination for Convenience Pay Request" seeking an additional \$1,845,715.63. CP 897-926, 1100 ¶ 27.

EWU disputed the amount of Elcon's claim and asserted that approximately \$550,000.00 was owed instead of the \$1.8 million plus claimed by Elcon. CP 1136-51, CP 1153-90.

The dispute over the amount due was arbitrated on November 14, 15, 16, and 23, 2005, by arbitrator James S. Craven, with both sides presenting evidence concerning the amount due. The arbitrator awarded Elcon an additional \$891,202.70.¹² CP 1132.

The contract documents required bidders, including Elcon, to investigate subsurface conditions and Elcon represented to EWU that before bidding, it had examined the site and had become familiar with subsurface conditions. CP 1095-96 ¶¶ 10-12, CP 1103-24.

These representations notwithstanding, Elcon did no independent investigation of the site or subsurface conditions, relying instead on EWU to provide information. CP 1193-94, CP 1212, ll. 8-9.

Elcon requested drilling logs from EWU, and EWU provided the well log for Well 2, the only drilling log EWU possessed. CP 1095 ¶¶ 9-10.

EWU did not provide Elcon or any bidder with the report entitled "Draft Report on Hydrogeological Investigation for Groundwater Supply Expansion Eastern Washington University," provided in to EWU in May

¹² For a total award under the contract of \$1,837,496. CP 1132.

2000 by Golder Associates, because this report had not taken into account the alternative of consolidating EWU's existing water rights and refurbishing existing Wells 1 and 2 and was not relevant to the project on which Elcon was invited to bid. CP 1096-97 ¶¶ 13-16, CP 316-56.

In October 2003, during the drilling operation being conducted by Elcon, some drill foaming agent apparently leaked through cracks in the basalt and into one of the wells that EWU was using and temporarily contaminated the campus water supply. CP 1100 ¶ 30. Media reports of this incident form part of the basis of Elcon's false light claims. CP 1100 ¶ 30, CP 1198-99.

While EWU provided a copy of the October 22, 2003, termination for cause letter to Elcon's bond surety, EWU made no claim against the bond or the surety.¹³ CP 1099 ¶ 25 CP 1201-08.

The same damages Elcon now seeks as fraud damages were previously sought in arbitration as compensation EWU owed to Elcon under the contract. CP 1215-33, 1136-51, 1153-90.

B. Procedural Posture

Elcon Construction, Inc. filed a summons and complaint against Eastern Washington University on November 3, 2004, and amended both documents on January 10, 2005. CP 1-16, 17-33. Elcon filed the

¹³ This allegation was the focal point of plaintiff's "interference with contractual relationship" claim which was dismissed on summary judgment in 2006.

litigation prior to the AAA arbitration required under § 8.02 of the General conditions of the contract between EWU and Elcon. CP 1-16, 92-94. The amended complaint alleged thirteen causes of action including claims for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, equitable estoppel, promissory estoppel, breach of warranties, doctrine of superior knowledge, negligent misrepresentation, fraud, defamation/libel, tortious interference with contractual relations, false light, and violations of 42 U.S.C. § 1983 based upon the Fourteenth Amendment. CP 25-33.

On December 16, 2005, AAA arbitrator James S. Craven entered a final award on Elcon's contract claims. CP 1132-33. The arbitrator subsequently found he did not have jurisdiction to amend the final award to include pre-judgment interest (based on a common law claim) or attorney's fees and costs.¹⁴ CP 1134.

On August 28, 2006, the Spokane County Superior Court awarded partial summary judgment to EWU on Elcon's tort claims, dismissing all but Elcon's claims for fraud and false light and finding the superior court's jurisdiction was limited to awarding post-judgment interest to Elcon. CP 1039-45.

¹⁴ Neither the arbitrator's nor the trial court's denial of attorney's fees has been appealed to this court.

EWU sought discretionary review of the trial court's denial of its motion for summary judgment on Elcon's remaining claims, arguing that they should be dismissed under the economic loss rule. CP 1056-58. This court denied discretionary review to EWU on January 5, 2007. CP 1056-58.

On April 4, 2008, EWU again moved for summary judgment on the basis of the change in the Washington Supreme Court case law regarding economic loss. CP 1088-1275.

On May 30, 2008, the trial court granted EWU's renewed motion for summary judgment. CP 1382-87.

Elcon appealed both partial awards of summary judgment (8/3/2006 and 5/30/2008) on June 25, 2008. CP 1388-403.

IV. ARGUMENT

A. Standard Of Review

When reviewing a trial court's decision on a motion for judgment as a matter of law, an appellate court applies the same standard as the trial court and reviews the grant or denial of the motion *de novo*. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

A motion for judgment as a matter of law must be granted "when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party."

Id. (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). “Substantial evidence” is evidence that is sufficient” “to persuade a fair-minded, rational person of the truth of a declared premise.”” *Davis*, 149 Wn.2d at 531 (quoting *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

In this case, there is no evidence or reasonable inference that might sustain a verdict for Elcon. EWU respectfully requests that this court affirm the trial court’s dismissal of the claims which Elcon has appealed to this court.

B. The Trial Court Correctly Dismissed Elcon’s Fraud Claim

1. Elcon’s Fraud Claim Is Barred By The Economic Loss Rule

Elcon’s fraud claim is based on its allegation that it was deceived by EWU’s failure to provide the Golder Report to bidders and that the failure constitutes fraud actionable apart from contract claims. Br. of Appellant, at 5-8, 20-34. There is no basis in law for this argument, nor does it have a rational basis. EWU was anxious to increase its campus water supply and to have Elcon successfully refurbish its two existing wells. Elcon’s suggestion that EWU fraudulently induced Elcon to bid on the refurbishment contract or fraudulently concealed information from Elcon ultimately makes no sense. All parties agree that EWU needed increased

water and entered into the contract with Elcon for the sole purpose of increasing its water. It defies logic to conclude that EWU would hire and pay Elcon more than \$1.5M to provide drilling work that would not achieve this unquestioned goal.

In 2007, the Washington Supreme Court considered and rejected a nearly identical claim without reaching the issue of whether such a claim would be precluded by the economic loss rule. *Alejandre*, 159 Wn.2d at 690-91. The court in *Alejandre* determined that plaintiff had no right to rely on the alleged misrepresentation because the plaintiff had failed in the duty to exercise diligence in investigation and inspection before relying on representations by the defendant. *Id.* Here, as in *Alejandre*, the undisputed facts are that Elcon, despite contractual and common law duties requiring it to thoroughly and independently investigate subsurface conditions before bidding, *exercised no diligence at all* and undertook virtually no investigation other than inquiring of defendant. CP 1193-95. CP 1211-13.

In *Alejandre* the plaintiff purchased a home with a defective septic system. Testimony indicated the drain field was clogged and could not be repaired and that this was made known to the seller before she sold the property to the plaintiffs. *Alejandre*, 159 Wn.2d at 680. The seller failed to disclose the problem to the buyers, instead telling them that any

problems with the system had been repaired. When the buyers discovered the problem and that the seller had been told about the problem, they sued for fraud and negligent misrepresentation. After plaintiff's rested, the trial court granted the seller's motion for judgment as a matter of law on the grounds that the claims were barred by the economic loss rule and that plaintiff's evidence was not sufficient to support her claims.

On appeal, this court reversed the trial court's order, holding that the plaintiffs had submitted sufficient evidence and that "the economic loss rule does not apply because the parties' contract did not allocate risk for fraudulent or negligent misrepresentation claims." *Alejandre*, 123 Wn. App at 626.

Disagreeing with this court's conclusion that the economic loss rule would not apply unless the contract specifically allocated the risk for fraud or negligent misrepresentation, the Supreme Court reversed:

The Court of Appeals held, however, that if the parties fail to specifically allocate a risk of loss in their contract, the economic loss rule does not apply as to that risk. *Alejandre*, 123 Wn. App. at 626. . . This holding is inconsistent with the weight of authority and with *Berschauer/Phillips*.

In *Berschauer/Phillips*, we stated that our holding limiting the recovery of economic loss due to construction delays ensures "that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts." *Berschauer/Phillips*, 124 Wn.2d at 826....We did not say, however, that the parties will be held to their

bargained-for remedies only if they explicitly addressed any or all potential economic losses and allocated the risks associated with them.

Alejandre, 159 Wn.2d at 686-87.

Here, the trial court erroneously denied summary judgment to EWU in its 2006 ruling because it was following the rationale announced in this court's 2004 decision in *Alejandre*. In 2006, the trial court ruled that the "tort claims asserted by [Elcon] are independent of the contract" and that economic loss rule did not apply because the contract did not specifically allocate the risk associated with the claimed economic loss. CP 1017-20. Under the Washington Supreme Court's decision in *Alejandre*, which overruled this court's decision and rejected the limiting rationale employed by this court, the trial court's July 2006 decision was an error that was corrected by the trial court in May 2008. The economic loss rule does apply here.

In May 2008, the trial court correctly found that Elcon's fraud claim must fail, even though Elcon attempted to avoid *Alejandre* by claiming fraud in the inducement. Elcon's claim must fail because Elcon admits that the damages it seeks for fraud are exactly the same as Elcon claimed as compensatory under the contract. *See*, CP 1136-41, 1143-51, and 1223-26. The Supreme Court in *Alejandre* stated in footnote 6 at page 690:

The Alejandres urge the court to hold that the economic loss rule does not apply to claims of fraud in the inducement, and they argue their fraud claims are claims of fraud in the inducement. We are aware that some courts recognize a broad exception to the economic loss rule that applies to intentional fraud. *E.g.*, *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill.2d 326, 337, 843 N.E.2d 327, 300 Ill. Dec. 69 (2006) (citing *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 88-89, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982)). **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.** *See, e.g.*, *Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 209 Mich.App. 365, 532 N.W.2d 541 (1995) (leading case); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 884-87 (8th Cir.2000); *Rich Prods.*, 66 F.Supp.2d at 977; *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So.2d 532, 537 (Fla.2004). We need not address the question whether any or all fraudulent representation claims should be foreclosed by the economic loss rule because we resolve the Alejandres' fraudulent representation claims on other grounds (emphasis added).

While it is notable that the Supreme Court passed on the opportunity to create a fraud exception to the economic loss rule, it is equally significant to the instant case that the court cited *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 532 N.W.2d 541 (1995) as the leading case among those creating such an exception. The *Huron* court decided to recognize fraud in the inducement as a narrow

exception to the economic loss rule but in so doing indicated that *the conduct complained of and the damages sought to be recovered had to be completely distinct from the contract* before the exception would apply.

The court stated:

The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. *Public Service Enterprise Group, Inc. v. Philadelphia Elec. Co.*, 722 F. Supp. 184, 201 (D.N.J., 1989). With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.

Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim.... [It] is undergirded by factual allegations identical to those supporting their breach of contract counts.... This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract. . . .

Huron, 532 N.W.2d at 545.

In this case, the trial court correctly held that the conduct complained of is not extraneous to the contract but a significant part of the fabric of the contract. The contract documents include, among other things, instructions to bidders and general conditions which allocate responsibility for determining foreseeable subsurface conditions.

CP 1103-24. The contract clearly and unequivocally made inspection of and familiarity with subsurface conditions a contractual duty of Elcon's, not EWU. CP 1103-24, particularly 1113 and 1114.

Instructions to Bidders Paragraph 1.03 – Examination of Site and Conditions provides in pertinent part:

A. By submission of a proposal, the Bidder acknowledges:

1. That it has taken steps reasonably necessary to ascertain the nature and location of the Work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the Work or its cost. . . including but not limited to:

...

2. That it has satisfied itself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the owner, as well as from the drawings and specifications made a part of these Contract Documents.

General Conditions Paragraph 1.01 – Definitions, provides in pertinent part:

E. "Contract Documents" means the Advertisement for Bids, Instructions to Bidders, completed Form of Proposal, General Conditions, Modifications to the General Conditions, Supplemental Conditions, Public Works Contracts, other Special Forms, Drawings and Specifications, and all addenda and modifications thereof.

General Conditions Paragraph 1.03 – Execution and Intent provides in pertinent part:

1. The Contractor has carefully reviewed the Contract Documents, visited and examined the Project site, become familiar with the local conditions in which the Work is to be performed, and satisfied itself as to the nature, location, character, quality and quantity of the Work, the labor, materials, equipment, goods, supplies, work, services, and other items to be furnished and all other requirements of the Contract Documents, as well as the surface and subsurface conditions, and other matters that may be encountered at the Project site or affect performance of the Work or the cost or difficulty thereof.

Elcon's fraud allegations against EWU here are "undergirded by factual allegations identical to those supporting their breach of contract counts" and the damages claimed here are the same as those claimed in the contract action.¹⁵ See, CP 1136-41, 1143-51, and 1223-26. Because of the identity of factual claims and damage issues raised in the contract and fraud claims, no recognized fraud exception should apply, and the economic loss rule bars the fraud claim.

In addition, allowing Elcon to proceed here would run afoul of the *Alejandro* decision's strong policy statement in favor of enforcement of

¹⁵ While Elcon did not get every dollar it sought in the contract claim which was disputed by EWU as "inflated," it nevertheless claimed the same damages. There is no authority for the proposition that failure to prove every dollar of damage claimed to the satisfaction of the arbitrator sets the damages claimed but not awarded apart as damages resulting from fraud in the inducement.

contracts by ignoring the contractual provisions requiring that Elcon become familiar with subsurface conditions and allocating responsibility for knowledge of subsurface conditions to Elcon:

As one court stated: 'Courts should assume that parties factor risk allocation into their agreements and that the absence of comprehensive warranties is reflected in the price paid. Permitting parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.' (*citations omitted*).

In fact, if a court permits a tort claim on the ground that the parties have not expressly allocated a particular risk, it interferes with the parties 'freedom to contract'...to permit a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of the parties to allocate the risks of their own transactions' " (*citations omitted*). " '[t]he effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for-limited liability' (*citations omitted*).

Alejandre, 159 Wn.2d at 688. *See also, Basin Paving Company v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 66-68, 27 P.3d 609 (2001), where contractor's claim for extra work under the contract based on subsurface conditions that differed from owner's pre-contract test borings was denied because contractor had responsibility under the contract for determining foreseeable subsurface conditions.

Since the responsibility for ascertaining subsurface conditions was allocated by contract to Elcon, the economic loss rule as explained in the Supreme Court's decision in *Alejandre*, applies and bars Elcon's fraud claim.

2. In The Alternative, Elcon's Fraud Claim Fails As A Matter Of Law Because Elcon Cannot Produce Admissible Evidence Sufficient To Establish The Elements Of Fraud

The trial court correctly awarded summary judgment to EWU because Elcon failed to come forward with evidence sufficient to establish each element of the claim alleged. This court should affirm on the same grounds. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325-26, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In *Alejandre*, the Supreme Court did not reach the issue of fraud because the court determined that the facts alleged by the buyer were not sufficient to establish the buyer's right to rely on the seller's allegedly fraudulent conduct.¹⁶ *Alejandre*, 159 Wn.2d at 689-91. The facts assumed by the court to be true in *Alejandre* included the allegation that the defendant, the seller of a residence, knowingly concealed facts about the septic system, including a statement by a plumber that the drain field was plugged and would never operate properly and that the home should

¹⁶ All nine elements of fraud, including the right to rely, must be established by clear and convincing evidence. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 126, 86 P.3d 1175 (2004).

be connected to the city sewer system. The *Alejandre* court concluded that even though such misrepresentations occurred, evidence of fraud was insufficient in light of the buyer's duty to fully inspect the premises before agreeing to purchase. The court determined that in such circumstances, fraud could not be established because, absent diligent inspection, the buyer had no right to rely on the condition of the premises as represented by the seller:

The "right to rely" element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations. *Id.* at 698, 399 P.2d 308; *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958). As explained, the Alejandres were on notice that the septic system had not been completely inspected but failed to conduct any further investigation and indeed, accepted the findings of an incomplete inspection report. Having failed to exercise the diligence required, they were unable to present sufficient evidence of a right to rely on the allegedly fraudulent representations.

Alejandre, 159 Wn.2d at 690.

In this case, as in *Alejandre*, Elcon had no right to rely on EWU to provide it with accurate information about the subsurface conditions at the drilling site because the contract documents specifically allocated this responsibility to Elcon. Accordingly, Elcon, having done nothing more than request information such as drilling logs from EWU, cannot establish that it did any more than the buyer in *Alejandre* did, and, therefore cannot

establish a “right to rely.” In accordance with *Alejandre*, Elcon’s fraud claim should be dismissed for insufficient evidence.

C. The Trial Court Correctly Dismissed Elcon’s False Light Claim Against EWU

The Washington State Supreme Court has definitively established that a common law right to privacy exists in Washington “and that *individuals* may bring a cause of action for invasion of that right.” *Reid v. Pierce County*, 136 Wn.2d 195, 206, 961 P.2d 333 (1998) (emphasis added). Following the *Restatement (Second) of Torts*, Washington recognizes four types of invasion of privacy claims: (1) intrusion; (2) disclosure; (3) false light; and (4) misappropriation. *See Mark v. Seattle Times*, 96 Wn.2d 473, 497, 635 P.2d 1081 (1981). Here the only invasion of privacy claim plead by Elcon is a false light claim. CP 32.

Elcon is not entitled to recover damages under a false light theory for at least three reasons. First, a corporation cannot bring a claim for publication in a false light because such a claim is only available to natural persons. Second, Elcon cannot provide sufficient, competent evidence to establish each element of a false light claim. Finally, the economic loss rule prohibits Elcon from seeking the same damages it previously sought in arbitration.

1. The Trial Court Correctly Found That Elcon Construction, Inc., As A Corporation, Cannot State A Claim For Publication In A False Light Because This Type Of Claim Is Only Available To A Natural Person

Although no Washington case has specifically addressed the question of whether a corporation may bring an action under a false light theory, the question has been addressed by the *Restatement (Second) of Torts*.¹⁷

Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.

Restatement (Second) of Torts § 652I (1977).

This rule excludes a false light claim on behalf of a corporation, as explained by the comments to the Restatement:

A corporation, partnership, or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion covered by §§ 652B to 652E [seclusion, appropriation, publicity, false light]. It has, however, a limited right to the exclusive use of its own name or identity in so far as they are of use or benefit, and it receives protection from the law of unfair competition. To some limited extent this may afford it the same rights and remedies as those to which a private individual is entitled under the rule stated in § 652C [appropriation].

Restatement (Second) of Torts § 652I Cmt. C (1977).

¹⁷ With regard to invasion of privacy claims, Washington Court's look to the *Restatement (Second) of Torts* for guidance. See *Reid*, 136 Wn.2d at 205 (citing § 652D and § 652H with approval); *Eastwood*, 106 Wn.2d at 471 (citing § 652E with approval); *Mark*, 96 Wn.2d at 497 (citing § 652A and § 652B with approval).

The *Restatement's* approach is consistent with the United States Supreme Court's holding that a corporation has no right of privacy. *See United States v. Morton*, 338 U.S. 632, 651-52, 70 S. Ct. 357, 94 L. Ed. 401 (1950). This approach is also consistent with the understanding that a false light claim is primarily intended to compensate a person for injured feelings or mental suffering. *See Eastwood v. Cascade Broadcasting Company*, 106 Wn.2d 466, 471, 722 P.2d 1295 (1986) (discussing the differences between a defamation claim and a false light claim).

Here the only plaintiff is Elcon Construction, Inc., a Washington corporation. CP 17. As discussed by the *Restatement*, Elcon, as a corporation, has no personal privacy interests. Allowing Elcon to bring a cause of action for publication in a false light, where it is impossible for Elcon to have injured feelings or mental suffering, cuts against the very nature of a false light claim. Thus, this Court should follow the *Restatement (Second) of Torts* and dismiss Elcon's false light claim.

2. The Trial Court Correctly Found Elcon Lacks Sufficient Evidence To Establish Each Element Of A False Light Claim Against EWU

The burden for establishing uncontroverted facts initially rests with the moving party. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301

(1998)). A party can meet this burden by setting forth its version of the facts and alleging that there is no genuine issue, or the party can meet this burden by pointing out that the non-moving party does not have sufficient evidence to support its case. *Guile v. Ballard Community Hospital*, 70 Wn. App 18, 21, 851 P.2d 689 (1993) (citing *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988) and *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)). The burden then shifts to the opposing party to set forth specific facts creating a genuine issue of material fact for trial. CR 56(e). Speculation, argumentative assertions, and conclusory statements are not sufficient to meet the non-moving party's burden. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997), and *Blomster v. Nordstrom, Inc.*, 103 Wn. App 252, 260, 11 P.3d 883 (2000) (citing *PUD of Lewis County v. WPPSS*, 104 Wn.2d 353, 361, 705 P.2d 1195 (1985), *corrected*, 713 P.2d 1109 (1986)). Allegations in affidavits must be based upon personal knowledge, be admissible, be sworn to by a competent witness and cannot contradict clear, sworn testimony without an explanation. CR 56(e); *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045, 1048 (1989) (citing *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 412, 553 P.2d 107 (1976)).

Here Elcon does not have sufficient evidence to establish each element of a false light claim.

The Washington State Supreme Court has described the requirements of a successful false light claim:

A false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.

Eastwood, 106 Wn.2d at 470-71 (citing *Restatement (Second) of Torts* § 652E (1977)).

Publicity, in the context of a false light claim, requires that the falsity be communicated to a substantial number of people. *LaMon v. City of Westport*, 44 Wn. App. 664, 669, 723 P.2d 470 (1986) (citing *Restatement (Second) of Torts* §§ 652E, 652D, Cmt. A (1977)). The *Restatement* explains this requirement by comparing the publicity element of a false light claim with the publication element of a defamation claim:

“Publicity,” as it is used in this Section, differs from “publication,” as that term is used in § 577 in connection with liability for defamation. “Publication,” in that sense, is a word of art, which includes any communication by the defendant to a third person. “Publicity,” on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of

public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

*Restatement (Second) of Torts § 652D, Cmt. A.*¹⁸

In addition to the requirement of publicity, a false light claim requires that the message communicated to the public attributes “characteristics, conduct, or beliefs that are false” *Eastwood*, 106 Wn.2d at 471. Finally, a false light claim requires evidence of a knowing or reckless disregard for the falsity of the publication. *Eastwood*, 106 at 471. The United States Supreme Court has interpreted this same language in the defamation context to require, “. . . sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *See Rye v. Seattle Times Co.*, 37 Wn. App. 45, 54, 678 P.2d 1282 (1984) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968)).

Elcon lacks sufficient evidence to establish that any false communication made to the public at large was made by an agent of EWU who seriously doubted the truth of the communication. Elcon argues that EWU’s October 22, 2004, letter to Elcon is sufficient to support its false

¹⁸ Although § 652D deals with a claim for Publicity Given To Private Life, Comment “a” regarding the meaning of publicity is equally applicable to the meaning of publicity in a false light claim. *See Restatement (Second) of Torts § 652E, Cmt. a (1977)* (“On what constitutes publicity and the publicity of application to a simple disclosure, see § 652D, Comment a, which is applicable to the rule stated here.”)

light claim. CP 852-53. That letter is not sufficient and does not create a material issue of fact on this issue.

The letter was sent to a single entity (Elcon) and was not provided to a substantial number of people as required by Washington case law. CP 852-53. Further, nothing in the letter can be shown to be false, or even highly offensive to a reasonable person. Further, Elcon has no evidence demonstrating that the author of the letter “entertained serious doubts as to the truth” of the letter. The lack of evidence regarding publicity, falsity and reckless disregard prevents Elcon from establishing a false light claim based upon the letter to its surety.

Second, Elcon will claim that alleged statements by EWU, that it would take Elcon’s bond, create a genuine issue of material fact for a false light claim. CP 1239. The evidence relied upon by Elcon is insufficient to overcome summary judgment. Elcon relies solely on a Declaration from Glen Frachiseur. CP 1239. Mr. Frachiseur’s declaration states in conclusory fashion that “During the project, I learned that EWU was telling other well drillers that Elcon and Intermountain were not performing the work correctly and that EWU was going to ‘take their bond,’ kick us off of the project and have H20 Drilling complete the well.” *Id.* Mr. Frachiseur’s allegations are inadmissible because he fails to provide a proper foundation for how he “learned” of these alleged

statements and they appear to be hearsay. *See* CP 602, 801-02. The proper party to testify to these alleged statements would be the “other well drillers” who were allegedly told these statements by EWU. Elcon has presented no such declarations. Moreover, Mr. Franchiseur’s declaration fails to detail how many “other well drillers” were told these alleged statements. Thus the publicity element is again lacking. Elcon also lacks evidence to establish that the speaker “entertained serious doubts as to the truth” of the statement.

Finally, Elcon will claim that a newspaper article regarding the well contamination creates a genuine issue of material fact for a false light claim. CP 1246, 1249-50. While the newspaper article satisfies the publicity requirement of a false light claim, other elements remain lacking. For example, Elcon cannot point to any statement attributed to any employee of EWU that is false. Nor can Elcon point to any statement that would be highly offensive to a reasonable person. Certainly, Elcon cannot point to any evidence that the speaker “entertained serious doubts as to the truth” of any statements made.

Given these deficits, Elcon’s false light claim must be dismissed for lack of sufficient evidence of each element of the claim.

3. The Trial Court Also Correctly Found That The Economic Loss Rule Bars Elcon's False Light Claim Against EWU

Assuming for the sake of argument that Elcon could bring a false light claim and that Elcon could provide sufficient evidence to establish each element of a false light claim, the economic loss rule bars Elcon from proceeding on its false light claim because the alleged damages arise from the contractual relationship and are not independent of the contract. See discussion in Part B, *supra*.

D. The Trial Court Correctly Dismissed Elcon's Claim That EWU Tortiously Interfered With the Corporation's Contractual Relationships

On February 24, 2006, after the arbitrator had entered his final award, EWU moved for summary judgment Elcon's tort causes of action. CP 359-76. On August 28, 2006 (after a letter ruling on July 19, 2006), the trial court dismissed Elcon's tortious interference with a contractual relationship claim on the grounds that the only evidence supporting the claim that Elcon had been intentionally damaged by EWU was inadmissible hearsay. CP 856, 1018. EWU requests that this court affirm the trial court's dismissal of this issue. Elcon has failed to produce material facts sufficient to support a prima facie case of tortious interference with a contractual relationship or business expectancy.

Tortious interference with a contractual relationship or business expectancy requires Elcon to establish five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) evidence that EWU had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that EWU interfered for an improper purpose or used improper means; and (5) that Elcon experienced resultant damage. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992); *Roger Crane & Assocs. v. Felice*, 74 Wn. App. 769, 777-78, 875 P.2d 705 (1994). The third element of the test—intentional or purposeful interference—requires that the interference be purposely improper. *Schmerer v. Darcy*, 80 Wn. App. 499, 505, 910 P.2d 498 (1996). Intentional interference also requires an improper objective or the use of a wrongful means that in fact cause injury to the plaintiff's contractual relationship. *Schmerer*, 80 Wn. App. at 505. Exercising one's legal interests in good faith is not improper interference. *Schmerer*, 80 Wn. App. at 506 (citing Restatement (Second) of Torts § 773 (1977)). *Leingang v. Pierce County Med. Bur., Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997).

The factual allegation Elcon relied upon in asserting its tortious interference claim is made in the corporation's first amended complaint

where the corporation asserts: "On October 22, 2004, EWU also informed Elcon that EWU was contacting Elcon's surety regarding the termination and to make arrangements for the completion of the project." CP 24-25, 853.

On October 22, 2004, EWU wrote to Elcon to explain that, although it had initially terminated its contract with Elcon for the Well 1 and Well 2 refurbishment project "pursuant to Part 9.02 of the General Conditions" as a termination for convenience, that, subsequently, after EWU learned that "Well 1 sustained a substantial amount of damage over the entire length of the casing in addition to the damage at the bottom" and that high resolution video demonstrated that "virtually every welded joint has sustained some amount of damage," EWU determined it would terminate its contract with Elcon "for cause" pursuant to Part 9.01 of the General Conditions. CP 852-53. One of the parties EWU copied on the October 22, 2004, letter was the First National Insurance Company of America, Elcon's surety. CP 853.

This contact with Elcon's surety was not wrongful. Elcon was required to purchase a bond by the contract it entered into with EWU. Since Elcon and EWU were pursuing the remedies provided for in their contract to resolve a disputed claim, for EWU to inform Elcon's surety of

the basis for the dispute would have been no more than a proper exercise of its contractual rights.

Elcon alleges no facts establishing that EWU induced a breach or termination of its contract with its surety, or that any contact made by EWU with Elcon's surety caused damage to Elcon. Elcon also failed to demonstrate that EWU intentionally "interfered" for an improper purpose or used improper means, or that the letter resulted in any damage to Elcon.

EWU had a legitimate economic reason to notify the surety of what EWU considered to be a breach and a potential claim.

According to W. Keeton, *Prosser and Keeton on Torts* § 129, at 436 (5th ed. 2005):

The defendant is ... permitted to interfere with another's contractual relations to protect his own present existing economic interests, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded. He is not free, under this rule, to induce a contract breach merely to obtain customers or other prospective economic advantage; but he may do so to protect what he perceives to be existing interests. . . .

EWU had a good faith belief that it could convert the termination from one of convenience to one for cause. CP 1099-100. That an arbitrator subsequently ruled that, on the facts presented, EWU could not convert to cause once it had already sent notice of intent to convert for convenience does not make the letter false, in bad faith, or otherwise

wrongful. CP 852-53. The letter Elcon relies on simply cannot be said to show intentional interference for an improper purpose. *Id.*

Elcon has also failed to meet its burden to present facts that would show damage. The primary evidence Elcon relied upon in opposing EWU's motion for summary judgment on its tortious interference claim was the hearsay evidence asserted by Brook Ellingwood of Elcon, who asserted only: "My bonding company informed me that because of EWU's communications, that I would be unable to get a bond for anything other than short term duration purposes." CP 856, 1253.¹⁹ This inadmissible hearsay is unsupported. The declaration submitted by the bonding company's agent, Walter W. Weller, says nothing substantive that would support a claim for tortious interference.²⁰ CP 849-53. Because Elcon fails to show facts that could establish the third, fourth, or fifth elements of the tort, this claim also fails as a matter of law.

Elcon has been unable to make a prima facie case of tortious interference with a contractual relationship since it was first required to do

¹⁹ The third clerk's paper reference Elcon relies upon on appeal (CP 1353) was prepared by Elcon in January 2008, more than eighteen months after the trial court dismissed its tortious interference claim and should, consequently, be excluded by this court as irrelevant to the decision made by the trial court in July 2006. Under RAP 9.12, this court is limited to those documents before the trial court in 2006 at the time of summary judgment.

²⁰ Notably, neither the Weller declaration does authenticate or assert the truth of statements contained in the purported email included at CP 1253. On appeal, Elcon claims for the first time—and without basis—that CP 1253 is a business record.

so in 2006. EWU respectfully requests that this court affirm the trial court's dismissal of this claim.

E. Elcon's Claim For Statutory Interest Must Be Dismissed Because It Was Untimely

1. Relevant Facts

The contract which Elcon entered into with EWU provided :

All claims arising out of the Work shall be resolved by arbitration. The judgment upon the arbitration award may be entered, or review of the award may occur, in the superior court having jurisdiction thereof. No independent legal action relating to or arising from the Work shall be maintained.

CP 93 (¶ 8.02 C of Elcon / EWU Contract). (Emphasis added.)

Furthermore,

Claims between Owner and Contractor, Contractor and its Subcontractors, Contractor and A/E, and Owner and A/E shall, upon demand by Owner, be submitted in the same arbitration or mediation.

CP 93 (¶ 8.02 D of Elcon / EWU Contract).

In April 15, 2004, EWU terminated its contract with Elcon for convenience pursuant to part 9.02 of the General Conditions of the parties' contract. CP 852-53. On October 22, 2004, after EWU had the opportunity to view an independent high resolution video of the entire length of Well 1, EWU sought to treat its termination of the contract as a termination for cause under Part 9.01(D) of the contract's General

Conditions because of the “substantial amount of damage” visible in the video, including damage to “virtually every welded joint.” CP 162-64, 852-53.

In its October 22, 2004, letter, EWU advised Elcon that it was “not entitled to receive further payment on the Project, if any, until the work has been accepted and a full accounting of EWU’s damages has been determined.” CP 853.

After a long delay in which Elcon filed suit against EWU, but failed to either mediate its claim with EWU or to contact the American Arbitration Association as the contract required in order to initiate arbitration (CP 93, ¶ 8.02 B), the parties participated in a four day arbitration (November 14, 15, 16, and 23, 2005). CP 1132-33. At arbitration, Elcon requested payment of between \$1,547,048.68 and \$1,845,715.63. CP 1140. EWU requested that payment to Elcon be limited to \$550,000, with setoffs for nonconforming work.²¹ CP 1163, 1153-64. The arbitrator awarded \$891,202.70 to Elcon (noting that EWU had already paid Elcon \$946,293.36). CP 1132.

The arbitrator decided all of the issues raised by the parties. The award concluded by stating: “This FINAL AWARD is full resolution of all claims and counterclaims, and issues submitted to this arbitration.

²¹ “In this case, EWU is left with a bore hole that is worse than worthless.” CP 1164.

CP 1133-34. All claims not expressly granted herein are hereby denied.”

CP 1132-33. Elcon did not request pre-judgment interest or attorney’s fees or post-judgment interest at arbitration. CP 1136-41, 1143-50. It made no request for statutory interest and made no mention of the prompt pay act. CP 1136-41, 1143-50.

On December 22, 2005, six days after the arbitrator had entered the final arbitration award, Elcon filed a motion for award of attorney’s fees, costs and pre-award common law interest. CP 387, 428. Elcon made no request for statutory interest at this time. CP 387, 428. On January 30, 2006, the arbitrator determined that he lacked “post-Final Award jurisdiction to address these issues pursuant to RCW 7.04 et sequitur, and AAA rules.” CP 387, 1134.

In the trial court’s August 28, 2006, order (based upon its July 19, 2006, letter ruling), it awarded post-judgment interest to Elcon, but found that it did not have jurisdiction to award pre-judgment interest. CP 1047, 1051-52.

The proper conclusion to be drawn from these facts is not that the trial court erred but either that Elcon erred when it failed to request pre-award interest at the time of the arbitration, or that Elcon correctly knew at the time of the arbitration that no pre-judgment interest could be award on an amount that was disputed in good faith by EWU. RCW 39.76.020(4).

2. Argument

a. Elcon Failed To Demonstrate Errors Justifying A Modification Of The Arbitration Award

The trial court ruled correctly in August 2006 when it found that it did not have jurisdiction to alter the arbitrator's final award.

A superior court's limited review of an arbitration award does not allow for adding pre-judgment interest. *Westmark Properties, Inc v. McGuire*, 53 Wn. App. 400, 766 P.2d 1146 (1989); *see also Dayton v. Farmers Ins. Group*. 124 Wn.2d 277, 279-80, 876 P.2d 896 (1994) (superior court did not have the power to award attorney's fees that were not provided in an arbitration award). RCW 7.04.170 provides three exclusive situations that permit the modification of an arbitration award.

In any of the following cases, the court shall, after notice and hearing, make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(2) Where the arbitrators have awarded upon a matter not submitted to them.

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy. The order must modify and correct the award, as to effect the intent thereof.

RCW 7.04.170.

The Washington Supreme Court has clarified that “unless the award on its face shows [the arbitrator's] adoption of an erroneous rule, or mistake in applying the law, the award will not be vacated or modified,” *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995).

In *Westmark, id.*, Division Two examined the propriety of a superior court's award of pre-judgment interest during a confirmation hearing when the arbitrator had failed to make such an award. The appellate court held that pre-judgment interest could not be awarded when the arbitrator failed to so provide:

Inasmuch as the court was foreclosed from going behind the face of the [sic] award, it had no basis for determining whether the amount awarded met the test for pre-judgment interest; this was part of the merits of the controversy, forbidden territory for a court.

Westmark, 53 Wn. App. at 404.

b. The Trial Court Did Not Have Jurisdiction To Amend The Arbitrator's Award

Elcon does not allege errors that would satisfy the statutory grounds for modifying the arbitration award. By asking this court to force

the trial court to add interest to the award, Elcon asks this court to enter into the “forbidden territory” of the arbitrator's jurisdiction.

The rule precluding a superior court from adding interest to an arbitration award was confirmed in the case of *Wash. Dept. of Corrections v. Fluor Daniel, Inc.*, 130 Wn. App. 629, 126 P.3d 52 (2005).

The *Fluor Daniel* case is similar to that presented here. The parties arbitrated a dispute over claims relating to the construction of a public works project. Like Elcon, Fluor Daniel asked the superior court to add interest to the final award when it moved the court to confirm the award. The only difference between what Fluor Daniel sought and what Elcon seeks is that Fluor Daniel did not ask the court to add pre-award / pre-judgment interest. Division One reversed the superior court's decision to add post-judgment interest²² after the arbitration award was issued. In *Fluor Daniel*, Division One held that only the arbitrator may assess interest prior to confirmation and entry of judgment.

c. Elcon Is Not Entitled To Statutory Interest Under The Prompt Pay Act

Even if a superior court could add pre-judgment interest to a final arbitration award that did not include interest, Elcon does not qualify for interest under the authorities it relies upon.

²² EWU has not cross appealed the trial court's award of post-judgment interest to Elcon.

RCW 39.76.020 of the Prompt Pay Act specifically provides that:

RCW 39.76.010 does not apply to the following:

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(4) 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.

In the present case, the AAA arbitration between Elcon and EWU was based upon a clearly understood, good faith dispute between the parties. An award of pre-judgment interest under the statute would have violated the statutory exception articulated in RCW 39.76.020.

d. Elcon Is Also Not Entitled To Interest Based On Washington's Common Law

Elcon's original request for interest in this case was based on common law rather than statute. CP 428, 1134. That request would have been appropriately denied by the arbitrator even if it had been timely.

"Under the common law, a claim is liquidated only if its amount is readily determinable and it is possible to determine the exact amount without reliance on opinion or discretion. *Hansen v. Rothaus*, 107 Wn.2d 468, 472. 730 P.2d 662 (1986). "Where a defendant has challenged the reasonableness of the amount awarded for extra work arising outside of

the contract, the award is unliquidated, 'because reliance upon opinion and discretion [is] necessary in determining the reasonableness of the amounts expended.'" *Kiewit-Grice v. State*, 77 Wn. App. 867, 873, 895 P.2d 6 (1995). "A claim is unliquidated if the principal must be arrived at by a determination of reasonableness." *Id.* at 873. "[A] defendant should not be required to pay pre-judgment interest in cases where he is unable to ascertain the amount owed." *Id.* at 873.

Elcon's claim was clearly not readily determinable without reliance on opinion or discretion. At the arbitration, Elcon submitted testimony through an expert accountant witness that it was entitled to \$1,547,048.68, while Elcon continued to claim entitlement to \$1,845,715.63. CP 895-979. EWU presented expert testimony that, at most, Elcon might be entitled to \$525,457.57 less whatever offset was due for defective work. CP 1153-64. The arbitrator's award was actually for an amount different from that which either party calculated. As in the *Kiewit-Grice* case, there was no way EWU could have determined that the amount eventually awarded was the amount due.

F. EWU Should Be Awarded Attorneys' Fees And Costs Under RAP 18.1 Because The Contract Between The Parties Specified That Any Dispute Regarding The Contract And Its Terms Would Be Arbitrated Not Litigated

This case was filed in November 2004, more than a year before Elcon requested the AAA arbitration that was the exclusive remedy provided for in the contract between the parties. CP 93. This costly litigation could and should have been avoided. EWU respectfully requests that this court award it its reasonable attorneys' fees and costs under RAP 18.1. CP 93.

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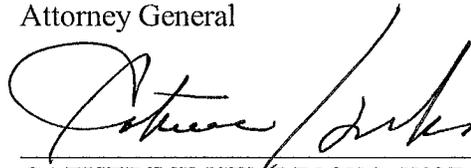
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V. CONCLUSION

Elcon seeks the same damages here that the AAA arbitrator refused to award after a four day arbitration. These damages—which related directly to the subject matter of the contract and to the parties expected performance of that contract²³--are barred by the economic loss rule. EWU respectfully requests that this court affirm the trial court's determination that Elcon may not receive compensation far in excess of the amount it was entitled to receive under its contract.

RESPECTFULLY SUBMITTED this 18th day of March, 2009.

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University

²³ *Alejandro v. Bull* at 690, fn6.

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the undersigned date I arranged for the original and one copy of the preceding Amended Respondent's Brief to be filed, by prepaid First Class Mail, in Division III of the Court of Appeals at the following address:

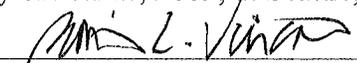
Court of Appeals of Washington, Division III
500 N. Cedar Street
Spokane, WA 99201

And, that I arranged for a copy of the preceding Amended Respondent's Brief to be served on counsel for appellant at the address below, by prepaid First Class Mail:

Kevin W. Roberts
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111 N. Post Street, Suite 300
Spokane, WA 99201-0907

Finally, I certify that I e-mailed an electronic copy of the Amended Respondent's Brief and Certificate Of Service to Jarold P. Cartwright and Carl P. Warring of the Spokane Attorney General's Office. Messrs. Cartwright and Warring are associated on this appeal with Sr. Counsel Catherine Hendricks of the Seattle AGO, and I have permission to serve them by e-mail.

DATED this 18th day of March, 2009, at Seattle, WA.


PATTI L. VINCENT