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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 83690-6

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ELCON CONSTRUCTION, INC.,

Petitioner,

v.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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## I. STATEMENT OF THE CASE

In 2003, Eastern Washington University (Eastern) received long awaited approval from the Department of Ecology (DOE) allowing Eastern to increase production of two campus water wells. Eastern negotiated a contract with Elcon Construction to refurbish the wells. CP 1106-1107. The contract required Elcon to drill new withdrawal points at each well and make them operational. CP 357, 1097. The contract estimated the depth of the wells to be 750 feet, and Elcon understood that 750 feet was the “nominal” depth of the two wells.<sup>1</sup> CP 357, 1097, 1196. The contract did not limit the depth of the wells to 750 feet, providing for deeper wells if necessary:

“Depth of each well is estimated to be 750 feet. Should water of sufficient quantity and quality be encountered at lesser depths, drilling may be stopped by the Owner. *Likewise, the owner may direct the depth to be increased in order to obtain sufficient water.*”

CP 357 (emphasis added). Elcon’s CEO testified that he had never bid on a well with a “nominal depth.” To him, nominal meant “plus or minus 15, 20 per cent maybe.” CP 1196-97. In its bid, Elcon certified that 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

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<sup>1</sup> Nominal\adj.: . . . “of, being or related to a designated or theoretical size that may vary from the actual. Webster’s Ninth New Collegiate Dictionary (1984), Merriam Webster, Inc., Springfield, MA.

preliminary to and during the performance of the Work.”

CP 313, 1113. *See also*, CP 1095-96 ¶¶10-12; CP 1103-24.

The contract’s “Instructions to Bidders” placed responsibility on the contractor to investigate the site and subsurface conditions. The contract specified that asking the owner for information did not relieve the contractor of this duty and risk:

D. No statement made by any officer, agent, or employee of the Owner or [Architect/Engineer] in relation to the physical condition pertaining to the site of the work will be binding on the Owner or A/E.

CP 1114, §1.03. The “General Conditions” of the contract also placed the duty on Elcon to investigate the site and subsurface conditions:

Contractor makes the following representations to the Owner:

2. Contractor has carefully reviewed the Contract Documents, visited and examined the project work site, become familiar with 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 the performance of the work or the cost or the difficulty thereof.

4. Contractor is able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the Work and perform the obligations required by the Contract Documents and has sufficient experience and competence

to do so.

CP 1123-1124, §1.03. Eastern accepted Elcon's bid and agreed to pay \$1,516,635 for completion of the wells. CP 1107, CP 1099 ¶26.

Elcon chose not to investigate the drilling site or subsurface conditions. Instead, Elcon delegated the duty to its subcontractor which did nothing other than "inquire about it" with Eastern. CP 1193-1194. Mr. Franchiseur of subcontractor Intermountain Drilling testified:

Q. Did you do any independent investigation into what subsurface conditions might be?

A. We made a couple of phone calls, but, no, no real investigation, no.

CP 1212.

The date for substantial completion was June 12, 2004. CP 1105. In July 2003, work started on Well 1. CP 1138, CP 1105. The project did not go well. Drilling stopped soon after it started when the drill shaft broke off and had to be fished out of the hole. CP 1155. Delay and equipment problems intensified when a subsurface layer of sand was encountered. CP 1098 ¶19; CP 1155-1156. By April 2004, work on the first well was stalled and over-budget, and work on the second had not even started. Having already paid Elcon \$946,000, Eastern stopped the

work and terminated the contract for convenience.<sup>2</sup> CP 1098- 99.

Although the contract required arbitration, Elcon filed suit claiming breach of contract. CP 1-16, 93. In addition to contract claims, Elcon's amended complaint alleged negligent misrepresentation, fraud, defamation, publication in a false light, interference with a contractual relationship and violation of the corporation's civil rights. CP 25-33. Eastern's motion to enforce the arbitration clause was granted. CP 221-222. In arbitration, Elcon pursued an award of \$1.85 million in addition to the \$946,000 it had already been paid. CP 897-926, 1100 ¶27.

At arbitration, Eastern focused on the contract, Elcon's failure to investigate the site, and lack of expertise and proper equipment to perform the job. CP 1153-1164. Elcon argued in arbitration that Eastern owed more than the contract price because Eastern had not provided Elcon with the Golder Report, a 2000 study done to identify options to expand Eastern's water supply to meet future needs for more water than its then existing 900 GPM water right would satisfy. CP 1096, 1138. The report contained general information about the geology of Cheney and the surrounding area and recommended a new off campus well to meet future needs. CP 320-321, 340. The report discussed the existing capacities of

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<sup>2</sup> Eastern later tried to change this to a termination for cause, which would have limited the claims Elcon could make and allowed offsets for expenses caused by defects in Elcon's performance. The arbitrator denied the requested change.

Wells 1 and 2 but did not discuss drilling new withdrawal points for Wells 1 and 2 because drilling new withdrawal points required DOE approval and Eastern's request that the DOE allow consolidation of its water rights so 900 GPM could be pumped from either well had been pending for 12 years, had not been acted on, and Eastern had no reason to expect action in the foreseeable future. CP 1096-1097, CP 316-341, CP 1096. The Golder Report, which contained general, publicly available information, not information specific to the drilling sites or the subsurface conditions below the drilling site, contained a compilation of well log data available to the public through well logs from DOE. CP 1097, CP 320-321, CP 341. Well 1 was drilled before 1915 and had no drilling log. The log for Well 2 was provided to Elcon. CP 1095-1097, CP 1212. In arbitration Eastern argued Elcon's duty to investigate and that the report contained public information equally available to Elcon. CP 1096-1097, 1160.

The damages Elcon requested at arbitration included all direct costs, overhead and profit on all work done on the project, separately calculated under the termination for convenience clause. CP 1139-1140, 1145-1149. Although covering only work on the unfinished Well 1, the claim exceeded the contract price for *both* wells by \$1.3 million. CP 1138-1140. In December 2005, the arbitrator awarded Elcon \$891,000, in addition to the \$946,000 previously paid, and denied Elcon's post-award

motion for pre-judgment interest. CP 1132-1134.

Not satisfied with the arbitrator's award, Elcon sought the difference between the amount claimed in arbitration and the amount awarded by the arbitrator<sup>3</sup> by pursuing a claim for fraud in the inducement for not providing the Golder Report. CP 1193-1198, CP 8-9. Elcon also sued for interference with a business relationship because Eastern sent a copy of a letter warning of possible termination for cause to Elcon's surety, and for publication in a false light based on a media report that a foaming agent used in drilling had contaminated the campus water supply. CP 1-16, CP 17-33, CP 1195-1208. Based on *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), and a finding that Elcon failed to establish the elements of fraud or false light publication, the trial court granted summary judgment dismissing Elcon's tort claims. Relying on *Alejandro*, the Court of Appeals affirmed. This Court granted review.

## II. ISSUES

1. Whether Eastern had an independent duty to disclose publicly available information about subsurface conditions in the Cheney area when its well drilling contract with Elcon allocated the duty to investigate and assume the risk of subsurface conditions to Elcon and diligent performance

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<sup>3</sup> In discovery responses in the instant case, Elcon stated its "fraud" damages were "at least \$954,512.87. These damages represent the difference between the total costs incurred by Elcon as a result of EWU's fraud less the portion of the costs paid by EWU." Subtracting the \$891,000 awarded in arbitration from the \$1.845 million claimed in arbitration results in \$954,000 – the amount first claimed as contract damages and now claimed as fraud damages. CP 1216, CP 1223-1224.

of the contractual duty to investigate subsurface conditions would have revealed the information Elcon claims was concealed?

2. Whether Elcon failed to introduce evidence sufficient to establish the elements of fraud in the inducement when diligent performance of its contractual duty to investigate site conditions would have revealed the information Elcon claims was concealed?
3. Whether copying Elcon's surety with a letter giving Elcon notice the contract was being terminated for cause can constitute intentional interference with a business relationship when no improper purpose was shown and no action was taken against the surety's bond?
4. Whether Elcon, as a corporation, had standing to bring a claim for publication in a false light and if so whether there was sufficient evidence to establish the elements of publication in a false light?
5. Whether Elcon's claim for pre-judgment interest on its arbitration award was properly dismissed because it was untimely and unliquidated?<sup>4</sup>

### III. ARGUMENT

#### A. Standard of Review

Summary judgment is reviewed de novo, considering the same evidence presented below, and viewing the facts in the light most favorable to Elcon. If there is no genuine, material issue of fact and Eastern is entitled to judgment as a matter of law, summary judgment

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<sup>4</sup> Elcon's Petition for Review included the lower court's denial of the claim for prejudgment interest. Eastern does not address the issue in supplemental briefing but adheres to the arguments and authorities cited in the Answer to Elcon's Petition for Review including *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986) and *Kiewitt-Grice v. State*, 77 Wn. App. 867, 873, 895 P.2d 6 (1995).

should be granted. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Questions of law are reviewed de novo. *Id.* Whether a tort duty exists is a question of law. “[T]he court defines the duty of care and the risks of harm falling within the duty’s scope.” *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 395, 241 P.3d 1256 (2010). If a duty is found, the Court must “decide if the tort duty should no longer apply to certain circumstances or events.” *Id.* at 416.

**B. Elcon Had a Contractual Duty to Investigate Site Conditions and Eastern Owed No Independent Duty To Disclose The Golder Report**

Elcon argues that despite the contract, Eastern had an independent duty to produce the Golder Report that overrides the negotiated terms of the contract. The argument is incorrect for two reasons. First, the duty to investigate the condition of the drilling sites and subsurface conditions is allocated exclusively and specifically to Elcon by the contract. Second, even if there were an independent duty overriding the terms of the contract, it did not apply to the Golder Report which contained general, publicly available information, not information specific to the drilling sites or the subsurface conditions below the drilling sites.

The contract specified that it was Elcon’s responsibility to have:

...visited and examined the project work site, become familiar with 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,...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 the performance of the work or the cost or the difficulty thereof.

CP 1123-1124 (Emphasis supplied). Had Elcon performed this duty, it would have found a wealth of public information about the geology in the Cheney area and the Grande Ronde Basalt.<sup>5</sup> Well logs showing what drillers encountered when drilling in the area were available on the DOE's website,<sup>6</sup> or at its regional office in Spokane. CP 321, 343-344. Subcontractor Intermountain's Glen Frachiseur admitted he "looked at some well logs that we thought might pertain to that area, but there were none right on – right on that campus." No other drillers were consulted and no further effort was made to perform the contractual duty to become familiar with site and subsurface conditions. CP 1212.

In determining whether a tort duty applies despite the contract, mixed considerations of logic, common sense, justice, policy, and precedent guide the Court. *Eastwood*, 170 Wn.2d at 389. "The court defines the duty of care and the risks of harm falling within the duty's scope." *Id.* at 394. When contracts allocate risks and duties otherwise allocated by tort law, contractual duties prevail and there is no applicable

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<sup>5</sup> For example, The U.S. Geological Survey publishes articles and information such as those referenced in the Golder Report, CP 341, on its website, [www.usgs.gov](http://www.usgs.gov).

<sup>6</sup> The Department of Ecology's searchable database of well logs can be found at: <http://apps.ecy.wa.gov/welllog/textsearch.asp#>

independent tort duty. *Id.* at 389-390, citing *Alejandre*, 159 Wn.2d at 686; *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 451-452, 243 P.3d 521 (2010); *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 828, 881 P.2d 986 (1994).

Allowing Elcon to ignore its contractual responsibility to investigate and determine subsurface conditions at the well sites and claim “concealment” of general knowledge of Cheney area geology is inconsistent with precedent. In *Eastwood*, discussing the independent disclosure duty in real estate transactions, the Court pointed out that the duty applies only to material facts known to the seller, not those “readily observable upon reasonable inspection by the purchaser.” *Eastwood*, 170 Wn.2d at 390-391. There is no duty to disclose facts available to both parties exercising due diligence. Silence is not fraud “when it relates to matters equally open to common observation or visible to the eye or where they are discoverable by the exercise of ordinary diligence, or where the means of information are as accessible to one party as to the other.” *Lincoln v. Keene*, 51 Wn.2d 171, 174-175, 316 P.2d 899 (1957).

In *Alejandre*, the buyer’s contractual duty to inspect the property being purchased led this Court to conclude that the seller had no independent duty to disclose a defect that would have been discovered by the buyer’s proper inspection. The buyer could not justifiably rely on the

seller's description of the defective septic system when the buyer's inspection was inadequate. *Alejandre*, 159 Wn.2d at 689-690<sup>7</sup>; *see also*, *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009), (no justifiable reliance when buyer fails to inspect and inspection would have revealed defect); *Cox v. O'Brien*, 150 Wn. App. 24, 35-36, 206 P.3d 682 (2009), *review denied*, 167 Wn.2d 1006 (2009) (no fraudulent concealment of known rot condition when buyer waived inspection that would have revealed it); *Simpson Timber Co. v. Palmberg Const. Co.*, 377 F.2d 380, 385 (1967) (failure to disclose knowledge of subsurface conditions to contractor not fraudulent when information was not peculiarly in the knowledge of owner and was readily obtainable by contractor, citing *Lincoln v. Keene*).

Logic, common sense and justice weigh strongly in favor of holding Elcon to its contractual duty to investigate subsurface conditions. Elcon complains that because Eastern did not provide the Golder Report, it was deprived of knowledge that it could encounter sand while drilling in the Grande Ronde Basalt. Yet Elcon and its subcontractor made little

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<sup>7</sup> The court also noted that fraud in the inducement claims are usually recognized "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 performance." *Alejandre*, 159 Wn.2d at 690. Here the conduct complained of is a significant part of the fabric of the contract and the damages claimed are the same as the contract damages claimed. *See Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 532 N.W.2d 541, 545 (1995).

effort to research the publicly available information to determine the conditions at the well sites. CP 1212. Allowing Elcon's claim for "concealing" knowledge that was publicly available, when Elcon did no investigation and the contract charged Elcon with the duty to investigate, conflicts with the negotiated terms of the parties' agreement, and defies logic, common sense and justice.

Policy considerations also favor rejection of Elcon's claims. This Court has consistently recognized that it is sound public policy, where construction contracts are involved, that parties must be free to allocate risks and duties, including tort risks and duties, and must be able to rely on these allocations as reasonable business expectations established by contract. *See, e.g. Stuart v. Coldwell Banker Commercial Group*, 109 Wn.2d 406, 745 P.2d 1284 (1987); *Berschauer*, 124 Wn.2d at 826; *Alejandre*, 159 Wn.2d at 688; *Eastwood*, 170 Wn.2d at 390-391, 414-416 (Chambers, J. concurring.) The need to ensure "certainty and predictability" in allocating risk, applies in this case where the contract clearly and specifically spelled out that Elcon was being compensated to assume the duty of ascertaining subsurface conditions that might be encountered at the site. Elcon had a contract duty to independently investigate the work site and determine whether it had the equipment and expertise to complete the job on time, for the agreed price. CP 1123-1124.

Like any other party, Eastern must be able to enter construction contracts secure in the knowledge that contractors that assume the risk of inspecting the job site will be held to their contract duty and not allowed to disregard the contract and deflect their duty back upon Eastern under the guise of a tort action. This policy was recognized and fully discussed in *Berschauer*, where the Court recognized the tort of negligent misrepresentation but declined to apply the tort duty in the context of a public construction contract, holding the parties' contractual allocation of risks and duties was paramount:

We hold that when parties have contracted to protect against potential economic liability, as is the case in the construction industry, *contract principles override the tort principles* in §552 and thus, purely economic damages are not recoverable. Citations omitted.

There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. In cases involving construction disputes, the contracts entered into among the various parties shall govern their economic expectations.

*Berschauer*, 124 Wn.2d at 828. (Emphasis supplied). See also: *Affiliated FM*, 170 Wn.2d at 452:

[P]rivate parties can best order their own relationships by contract. The law of contracts is designed to protect contracting parties' expectation interests and to provide incentives for parties to negotiate toward the risk distribution that is desired or customary.... In contrast, tort law is a superfluous and inapt tool for resolving purely commercial disputes.... If aggrieved parties to a contract

could bring tort claims whenever a contract dispute arose, certainty and predictability in allocating the risk would decrease and impede future business activity.”

In *Cox*, buyers sued sellers for failing to disclose structural rot in a home. Buyers waived the structural inspection called for in the contract, opting for a more limited inspection. After taking possession and discovering rot, buyers recovered contract damages from the inspector and sought damages for negligent misrepresentation and fraud against sellers. The Court of Appeals dismissed the misrepresentation/fraud claims, noting that the contract covered the claims, the buyers waived the inspection that would have exposed the defects, and had recovered a substantial portion of their loss from the inspector. *Cox*, 150 Wn. App. at 34-36. Applying *Alejandre*, the court held the economic loss rule barred the claims. *Id.*

Like plaintiffs in *Alejandre* and *Cox*, Elcon failed in its contract duty to inspect and investigate. Elcon chose not to obtain public information, including numerous logs of wells drilled in the Cheney area which would have informed them about sand interbeds in the Grande Ronde Basalt. Allowing Elcon to first pursue economic losses resulting from encountering the sand layer in a contract action, then, when disappointed in the arbitrator’s award, to seek the difference between the amount sought in arbitration and the amount awarded in arbitration in a

tort action defies contract law and is repugnant to the fundamental notion that litigants are “entitled to one bite of the apple.” *See Reninger v. Dep’t of Corrections*, 134 Wn.2d 437, 454, 951 P.2d 782 (1998).

The contract at issue spelled out the expectations, risks, duties and economic remedies and the compensation for undertaking those risks and duties. Elcon obtained a handsome contractual remedy of \$1.8 million for work and expense due to the sand encountered in drilling Well 1. The general information contained in the Golder Report would not have informed Elcon about the subsurface conditions at the two well sites. The report contained a basic description of the geology of the region – general facts any competent Spokane area well driller would know – compiled in large part from the United States Geological Survey’s publicly available reports. CP 320, CP 341. The Hydrogeology and Geologic Summary sections of the report were “based primarily on published reports and selected driller’s logs obtained by file review at the Department of Ecology’s (DOE) Eastern Regional Office in Spokane.” CP 321, 343-345. In short, there was nothing in the Golder Report that Elcon or Intermountain could not have obtained through the investigation required by the contract. Subjecting Eastern to tort liability for economic loss covered by the contract would frustrate the policy of protecting contractual expectancy and replace the predictability of bargained for exposure with

“indeterminate liability.” *Berschauer*, 124 Wn.2d at 827.

**C. Elcon Failed To Establish the Elements of Fraud In the Inducement**

To establish fraud, nine elements, including the right to rely, all must be established by clear and convincing evidence.<sup>8</sup> *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965); *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 126, 86 P.3d 1175 (2004). In *Alejandre*, the Court did not reach the issue of fraud because the facts alleged by the buyer were insufficient to establish the buyer’s right to rely on the seller’s allegedly fraudulent conduct. *Alejandre*, 159 Wn.2d at 689-91. The Court affirmed dismissal even though the seller concealed facts about prior problems with the septic system, concluding that even though misrepresentations occurred, a diligent inspection would have uncovered the defect. The buyers could not show justifiable reliance when they failed to do a diligent inspection before purchasing. “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 690.

Eastern did not conceal information and Elcon had no right to rely

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<sup>8</sup> Plaintiff must prove: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent that it be acted on by the person to whom the representation is made; (6) ignorance of its falsity on the part of the person to whom the representation is addressed; (7) reliance on the truth of the representation; (8) the right to rely upon it; and (9) consequent damage. *Williams*, 65 Wn.2d at 697.

on Eastern to provide publicly available information about the subsurface conditions at the drilling site, when the contract allocated subsurface investigation to Elcon. Elcon delegated the duty to its sub, which “made a couple of phone calls but no, no real investigation, no.” CP 1212.

**D. The Publication In A False Light And Tortious Interference Claims Were Properly Dismissed**

**1. Only natural persons have standing to bring a “publication in a false light” claim.**

Elcon lacks standing to assert a “publication in a false light” claim because the action is only available to natural persons. 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 such claim pleaded by Elcon is a false light claim. CP 32. “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). The rule excludes a false light claim by a corporation:

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]. . .

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

The *Restatement* is consistent with the U. S. Supreme Court's holding that corporations have no right of privacy, and consistent with the premise that false light claims are intended to compensate for injured feelings or mental suffering. See *U.S. v. Morton Salt Co.*, 338 U.S. 632, 651-52, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 471, 722 P.2d 1295 (1986). Dismissal is proper because Elcon is a corporation.

Even if Elcon had standing, it could not establish the elements of the action. "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." *Id.* at 470-71. Publicity, in the context of a false light claim, requires communication 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)).<sup>9</sup>

In addition to publicity, false light requires communication that attributes "characteristics, conduct, or beliefs that are false" and evidence

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<sup>9</sup> 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.")

of a knowing or reckless disregard for the falsity of the publication. *Eastwood*, 106 Wn.2d at 471. Elcon failed to establish any false communication made to the public, by an agent of Eastern who seriously doubted the truth of the communication. Elcon cannot point to any false statement attributable to any Eastern employee, or highly offensive to a reasonable person. Finally, there is no evidence that any Eastern agent “entertained serious doubts as to the truth” of any statement made.

**2. Providing notification to Elcon’s surety did not tortiously interfere with the contractual relationship.**

Elcon claims tortious interference with a contractual relationship based on Eastern’s sending of a copy of its termination for cause letter to Elcon’s surety. The claim requires Elcon to establish: (1) existence of a valid contractual relationship or business expectancy; (2) that Eastern had knowledge of that relationship; (3) intentional interference causing breach or termination of the relationship or expectancy; (4) interference for an improper purpose or by improper means; and (5) resultant damage. *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992). Intentional interference must be shown to be purposefully improper, with an improper objective or the use of wrongful means that in fact cause injury to a contractual relationship. *Schmerer v. Darcy*, 80 Wn. App. 499, 505, 910 P.2d 498 (1996). Exercising one’s

legal interests in good faith is not improper interference. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997).

Here, Eastern provided Elcon written notice that because Well 1 sustained substantial damage over the entire length of the casing, in addition to the damage Elcon caused at the bottom, Eastern was terminating the contract “for cause” pursuant to the General Conditions. CP 852-53. Since Eastern was pursuing contractual remedies that could involve the bond, Eastern copied Elcon’s surety. CP 853. Notifying the surety was a proper, good faith exercise of Eastern’s legal rights and obligations. The bond was not cancelled nor was any claim made against it. CP 1201-1202. Elcon established no facts showing that Eastern’s contact with the surety induced a breach or termination of the contract with its surety, intentionally “interfered” for an improper purpose, used improper means, or that contact with the surety damaged Elcon.<sup>10</sup> Since Elcon cannot establish these elements, dismissal is proper.

#### IV. CONCLUSION

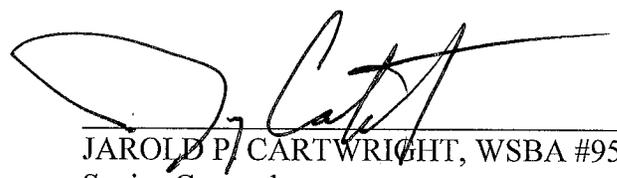
Eastern respectfully requests the Court of Appeals be affirmed.

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<sup>10</sup> The primary evidence Elcon relied on in opposing Eastern’s motion for summary judgment on its tortious interference claim was hearsay evidence asserted by Brook Ellingwood of Elcon, who stated: “My bonding company informed me that because of Eastern’s communications, that I would be unable to get a bond for anything other than short term duration purposes.” CP 856, 1253. This inadmissible hearsay is unsupported. The declaration submitted by the bonding company’s agent, Walter Weller, says nothing substantive that would support a claim of tortious interference. CP 849-53.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of April, 2011.

ROBERT M. MCKENNA  
Attorney General



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Senior Counsel  
Attorney for Respondent Eastern Washington  
University

1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their counsel of record  
3 on the date below as follows:

4  US Mail Postage Prepaid to John Black  
5 Kevin Roberts  
6 Michael Tucker  
7 Dunn & Black Attorneys at Law  
8 10 North Post, Suite 200  
9 Spokane, WA 99201

8  Legal Messenger

9  Fed Ex Overnight

10  Via Facsimile to: 455-8734

11 I certify under penalty of perjury under the laws of the state of Washington that the  
12 foregoing is true and correct.

13 DATED this 4<sup>th</sup> day of April, 2011, at Spokane, WA.

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16 N. K. K. G. A. M. O. N.