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DIVISION ONE
MAY 18 2010

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JAMES H. JACKSON and C.R. HENDRICK,
a marital community,

Plaintiffs-Appellants,

v.

TRENCHLESS CONSTRUCTION SERVICES, L.L.C., a Washington Limited Liability Company, and QPS, INC., a Washington Corporation doing business as "QUALITY PLUMBING",

Defendants-Respondents,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Michael Trickey)

APPELLANTS' SUPPLEMENTAL BRIEF REGARDING *BORISH V. RUSSELL*

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I. INTRODUCTION

Throughout this litigation, Respondents Trenchless and QPC, Inc. have insisted that the economic loss rule bars Appellants James Jackson and his wife C.R. Hendrick from bringing their tort claims against them. CP 124-27, 145-47, 488, 509-10. However, Mr. Jackson and Ms. Hendrick have steadfastly maintained that the economic loss rule cannot be applied in this case for several reasons, the most important of which is that there was never a contract between the parties. Thus, Mr. Jackson and Ms. Hendrick have no contract remedies against the Respondents. CP 441-42, 466. Although this rule appears to be clear in the large body of Washington cases on the economic loss rule, the trial court made no direct ruling concerning the economic loss rule and the economic loss rule was reintroduced by the respondents in this appellate proceeding. *See* QPS Response Brief, p. 31-37; Trenchless Response Brief, p. 31-33.

On May 4, 2010, the Washington Court of Appeals, Division 2, decided in the case *Borish v. Russell*, --- P.3d ----, 2010 WL 1756699 (Wn. App. Div. 2) that where there is no contractual relationship between the parties, the economic loss rule cannot be applied to bar plaintiff's tort claims. *Borish* applies here. In this

case, there was no contract between Mr. Jackson and Ms. Hendrick and the Respondents. Thus, following *Borish*, this Court should likewise find that the economic loss rule cannot be applied to bar the Appellants' tort claims.

II. ARGUMENT

A. *Borish v. Russell* Holds That The Economic Loss Rule Cannot Be Applied Where There Is No Contractual Relationship.

The plaintiffs in *Borish v. Russell*, --- P.3d -----, 2010 WL 1756699 (Wn. App. Div. 2), purchased a waterfront home. *Borish*, 2010 WL 1756699 at 1. On their disclosure statement, the sellers indicated that there were no "zoning violations, nonconforming uses, or any unusual restrictions on the property that would affect future construction or remodeling" and there were no "conversions, additions or remodeling" to the home. *Id.* The sellers also indicated that the home was not a manufactured or mobile home. *Id.*

After several bids, the buyers and sellers reached a mutually agreed price and an inspection was performed. *Id.* The Borishes' lender hired an appraiser, Russell, to appraise the property. *Id.* In her report, the appraiser determined that "[t]he subject property is a good quality one story dwelling in good

condition" and that it was not a manufactured home. *Id.* Soon afterwards, the sale of the home was closed. *Id.* at 2.

A month later, the Borishes hired an engineer to review the home for their remodel and was told by the engineer that the home appeared to be "a highly modified trailer home." *Id.* A subsequent inspection by the Department of Labor and Industries also found that the home "appear[ed] to be an altered manufactured home." *Id.* These findings prevented the Borishes' remodel because the home was not structurally sound. *Id.*

The Borishes filed suit against both the sellers and Russell, the appraiser, for fraud, negligent misrepresentation, violation of the Consumer Protection Act, and other claims. *Id.* The Borishes only specified economic damages. *Id.* Following our Supreme Court's decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), Russell successfully moved for summary judgment on the negligent misrepresentation claim, arguing that the economic loss rule applied to her. *Id.* At trial, the sellers also prevailed and were awarded attorney fees.

One of the Borishes' arguments on appeal was that the trial court erred in its application of the economic loss rule to their claim against Russell because there was no contractual

relationship between the Borishes and Russell. *Id.* at 5. The Division 2 appellate court agreed, noting that it was the Borishes' lender, not the Borishes who contracted with Russell for the appraisal of the property and that "[t]he record contains no evidence of any contractual relationship between the Borishes and Russell." *Id.* The court therefore concluded that "the economic loss rule cannot support summary judgment dismissing the Borishes' negligent misrepresentation tort claim against Rusell." *Id.*

Providing legal support for the *Borish* opinion was another recent Division 2 opinion which also holds that "the economic loss rule does not apply when there is no contract." *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110, 1120 (2009) (citing *Alejandre*, 159 Wn.2d at 681). In addition, the *Borish* court also cites, quotes, and discusses *Alejandre v. Bull*, which has also been cited, quoted, and discussed at length by Mr. Jackson and Ms. Hendrick as support for why the economic loss rule is not applicable in this case. CP 443-46, 467.

B. Because There Is No Contract Between The Parties, The Court Must Find That The Economic Loss Rule Does Not Apply.

Since summary judgment, the Appellants have maintained that the economic loss rule cannot be applied in the present case because neither of the Respondents had any contractual relationship with them. CP 441-42, 466. Appellants repeated this argument in their Opening Brief and reply briefs. *See* Appellants' Opening Brief, p. 1-3; Appellants' Reply to Trenchless' Response Brief, p. 17-22; Appellants' Reply to QPC, Inc.'s Response Brief, p. 6-9. If it was not clear enough in existing Washington cases that the economic loss rule cannot be properly applied to this case, it is even clearer following the recent Division 2 opinions in *Borish* and *Water's Edge*.

Based on all of this case law regarding the economic loss rule, the Court must rule that the economic loss rule does not apply to bar Mr. Jackson and Ms. Hendrick's claims because there was no contractual relationship between them and the Respondents. For this reason, all of the Respondents' arguments for the application of the economic loss rule must be rejected.

III. CONCLUSION

The *Borish* decision affirms and follows the body of Washington cases regarding the economic loss rule. Where there is no contractual relationship, there can be no application of the economic loss rule. For this reason, the Court should find that the economic loss rule cannot be applied to bar the Appellant's claims.

Respectfully submitted this 18th day of May, 2010.

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