

No. 74447-0-I

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

STEVEN AND KAREN DONATELLI, *Plaintiffs/Appellants*,

v.

D.R. STRONG CONSULTING ENGINEERS, INC.,
Defendant/Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This is the second appeal related to the dispute between Appellants Donatelli and Respondent D.R. Strong, the first being Respondent's interlocutory appeal, eventually to the Washington Supreme Court, of a denial of its motion for partial summary judgment on Appellants' negligence claim. Here, Appellants request review and reversal of two pre-trial decisions of the trial court that do not follow opinion and direction handed down the above-mentioned first appeal, as well as reversal and remand on the post-trial award of fees and costs to Respondent. The lower court incorrectly ruled that Appellants' Negligence and Negligent Misrepresentation claims were subject to dismissal prior to trial, and after trial, the trial court failed to follow established case law when it awarded attorney fees to Respondent for attorney time spent on non-contractual aspects of the case.

II. ASSIGNMENTS OF ERROR.

- A. The trial court erred when it granted Respondent's request for partial summary judgment, thereby dismissing Appellants' claim of negligence on or about January 14, 2015.

- B. The Trial court erred when it granted Respondent's motion for partial summary judgment, thereby dismissing Appellants' claim of negligent misrepresentation on or about May 22, 2015.
- C. The trial court erred in the amount of attorney fees and costs awarded to Respondent on or about November 30, 2015.

III. STATEMENT OF THE CASE.

A. Statement of Facts and Procedural History.

This case has been before this Court previously, in which the Court affirmed the trial court's initial denial of Respondent's summary judgment on the Appellants' Negligence cause of action, and that opinion was subsequently affirmed by the Washington Supreme Court. *See Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013), *affirming Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 163 Wn.App. 436, 261 P.3d 664 (2011). Those opinions outline the general dispute and factual circumstances between the Parties giving rise to this dispute.

Appellants hired Respondent to provide professional engineering services and project management of a small development project, and Respondent failed to track and adhere to critical deadlines imposed by King County Code, going so far as to completely miss the expiration of the preliminary approval expiration deadline, failing to warn Appellants of

its approach and the consequences of non-compliance, and continuing to work and charge Appellants beyond said deadline as if it did not exist.

In the wake of that first appeal, Respondent sought again to have Appellants' Negligence and Negligent Misrepresentation causes of action dismissed through summary judgment in two separate motions/requests, which were granted on January 14, 2015, and May 22, 2015, respectively.

At trial, freed from having to explain—in the context of tort law and the duties an engineer owes to its clients—how it was permissible and acceptable for Respondent to fall asleep at the wheel and allow the preliminary short plat approval to expire without any warning or explanation to Appellants, Respondent was able to prevail on the breach of contract claim.

After trial, the trial court impermissibly failed to require Respondent to segregate fees it incurred defending solely against the tort claims, for which there is no basis for an award of fees, and issued the November 30, 2015 Judgment at a significant windfall to Respondent, who was awarded more in fees than it actually spent.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews summary judgment orders de novo and performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*,

151 Wn.2d 853, 860, 93 P.3d 108 (2004). The Court should examine the pleadings, affidavits, and depositions before the trial court and “take the position of the trial court and assume facts [and reasonable inferences] most favorable to the nonmoving party.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)).

Here, Appellants were the nonmoving party.¹ Thus, all facts and reasonable inferences must be viewed in the light most favorable to their position. Summary judgment is only proper if the record before the trial court establishes “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

B. THE TRIAL COURT IGNORED FACTS AND CASE LAW PRECLUDING THE DISMISSAL OF THE NEGLIGENCE CLAIM PRIOR TO TRIAL.

In its second attempt to have the Negligence claim dismissed, DR Strong proffered only heavily edited portions of deposition transcripts as its rationale for its request—there was no full briefing or proper cross-motion ever filed. In reality, a full view of the deponents’ testimonies

¹ Appellants did file a motion for partial summary judgment regarding the limitation on liability clause in the Parties’ contract, but the trial court’s January 14, 2015 order dismissing Appellants’ Negligence claim was the result of Respondent’s request in its responsive briefing for the same. Therefore, for purposes of review, Appellants were the non-moving party with respect to the dismissal of their Negligence claim.

clearly establishes the existence of a factual question regarding Respondent's duty to Appellants as their professional engineers, as does the case law on the subject that both Respondents and the trial court ignored.

1. Professional Engineers Owe a Duty of Care to Their Clients Independent from Contractual Duties.

The whole point and purpose of the first appeal culminated in the confirmation, by the Washington Supreme Court, that gone are the days of a professional engineer (or any professional) being able to abrogate and circumvent professional malpractice or negligence claims by hiding behind a contract for services and the outdated Economic Loss Rule. *See Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013), *affirming Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 163 Wn.App. 436, 261 P.3d 664 (2011); *see also Jackowski v. Borchelt*, 151 Wn.App. 1, 14, 209 P.3d 514 (2009), *Boguch v. Landover Corp.*, 153 Wn.App 595, 224 P.3d 795 (2009) (stating that a client's claim against its hired professional for a breach of professional duties sounds in tort unless the complained of action involves a specific provision of the contract).

For decades, professional engineers have been held to owe duties of care to their clients and the general public stemming from the common

law and statutory requirements, regardless of the fact, and in many cases because of the fact, that the relationship between clients and professionals, most often begins with a contract. Engineers like Respondent are required by law to perform their duties with reasonable diligence, skill and ability. See *Jarrard v. Seifert*, 22 Wn.App. 476, 479, 591 P.2d 809 (1979). In *Burg v. Shannon & Wilson, Inc.*, 110 Wn.App. 798, 806, 43 P.3d 526 (2002), the court noted that RCW Chap. 18.43 and the regulations flowing therefrom—codified at WAC 197-27A-020, and 030—“indicate that professional engineers owe duties to the public, to their clients, and to their employers.” *Id.* at 807. Under *Burg* and WAC 197-27A-020(2), professional engineers like Respondent owe specific duties to their clients, such as to: “strive with the skill, diligence and judgment exercised by the prudent practitioner, to achieve the goals and objectives agreed upon with the client;” to “promptly inform the client or employer of progress and changes in conditions that may affect the appropriateness or achievability of some or all of the goals and objectives of the client;” to be “competent in the technology and knowledgeable of the codes and regulations applicable to the services performed;” and to “advise their . . . clients in a timely manner when, as a result of their studies and their professional judgment, they believe a project will not be

successful.” *Id.* These duties stem from the common law and from statute, sources outside a contract.

In the past, courts, as the trial court did in this case, defaulted to the position that claims against professionals, specifically professional engineers, could only sound in contract or tort, unless there were some unique circumstances. Now (and this is the change in the law that makes Respondent and its counsel so uncomfortable) the Independent Duty Doctrine changes the way courts are to look at these types of cases, so that, when law requires certain professionals, in this case engineers, to perform their duties to clients with reasonable care, skill, knowledge and diligence, negligent professionals are no longer shielded from their injured clients by the existence of a contract.

The ramifications of this, specifically for engineers who, as established above, do have duties to clients imposed on them by statutory and common law, are to be treated no differently than other similarly situated/regulated professionals, such as attorneys. To the extent a professional does not have duties imposed in the same way as doctors, lawyers, engineers, and real estate professionals, then it may be that there is no independent duty arising outside of a contract.

Here, by utterly failing to be aware of the King County Codes and restrictions related to the expiration of the short plat project Respondent

was hired to help complete--an undisputed fact-- there is sufficient evidence on the record to establish at least a factual question related to whether knowing and informing its client of such project critical deadlines is a duty imposed on professional engineers by common law or statute. *See* WAC 197-27A-020. Unlike in *Burg*, where the plaintiffs were not clients of the engineers, it is undisputed that the client-professional contractual relationship exists here.

2. The Trial Court Erred by Relying solely on the opinion of a Lay Witness to Establish, or Disestablish, the Existence of an Independent Duty.

In the wake of the first appeal, and in the processes of considering Respondent's second motion for summary judgment on the Negligence claim, the trial court alluded to "additional evidence" not before the Washington Supreme Court, in arriving at its decision to dismiss the Negligence claim. CP 333-339. However, the only evidence referred to by the trial court, was additional deposition testimony given by Mr. Donatelli that Respondent claims created an inconsistency. CP 209-211. As fleshed out by Appellants in their reply brief (again, there was not full briefing allowed on the issue related to the dismissal of the Negligence claim), the testimony, when read in context, does not eliminate the factual question about the duties owed to Appellants by Respondent. CP 311-316. In fact, the trial court seems to have made its decision on whether an independent

duty exists based on the lay opinion of a witness and without considering the extra-contractual sources in play that do establish a duty, regardless of the opinion either party may bring to the dispute. CP 333-339. The question of whether or not Respondent, a professional engineer, owed its client a duty of care outside the scope of any particular contract cannot be answered by one party's subjective opinion of whether or not all the "to do" items in a contract were accomplished. Yet this is exactly how Respondent and the trial court looked at the issue, wrongly using a confused answer to questions about Respondent "doing all the things" specifically called out in the contract to answer the question of whether any extra-contractual duties existed.

By way of illustration, consider Party A who contracts with Party B to perform any service, for instance to mow Party A's lawn. The Independent Duty Doctrine does not concern itself with the result of whether or not the lawn was technically mowed—that is purely a contractual issue. Rather, in cases where Party A is injured by something Party B does or does not do, the Independent Duty Doctrine requires the courts to consider the nature and identity of Party B within the context of the manner in which the contractual performance is undertaken. If Party B is a professional, ostensibly one who has obtained degrees and years of experience in lawn mowing, then the law imposes duties of care on said

professional to his/her clients who have hired Party B *because of his/her status as a professional*. Regardless of whether Party B can claim in some technical sense that it performed all the contractual “to dos”—that it mowed the lawn—the Independent Duty Doctrine allows Party A to bring a negligence claim based on the breach of extra-contractual duties of care.

Either the duties a professional engineer owes to its clients, as outlined in statute and in the case law, exist or they do not. These duties cannot be conjured into or rendered out of existence by the opinion of one party or the other. The trial court’s ruling undercuts the Independent Duty Doctrine, impermissibly applying the out-dated concepts from the Economic Loss Rule, and ignores the legal duties outlined above that engineers owe to their clients, and which Respondent breached.

Taken in a light most favorable to Appellants, the non-moving party, there is evidence sufficient to form a question of fact related to whether engineers’ (specifically Respondent’s) independent, extra-contractual duties to Appellants include specific actions undertaken by Respondents in this case. In particular, duties to know and adhere to county codes and to be aware of, track, and inform Appellants about project critical issues having to do with county regulations and applicable timelines.

As a result of the trial court's erred dismissal of the Negligence claim, Appellants were forced at trial to argue only that Respondent's obligation to know, be aware of, track, and inform Appellants of project-critical deadlines and regulations, such as the expiration of the preliminary short plat approval, were specifically outlined in the Parties' contract, when in fact those duties also arise outside of the contract and are imposed on all engineers with respect to their clients. Whether Respondent's failures constitute a breach of those duties is a factual question that Appellants should be allowed to take to the jury on remand.

C. RESPONDENT'S REPRESENTATIONS MADE TO INDUCE APPELLANTS NEGLIGENT MISREPRESENTATION.

On May 22, 2015, the trial court dismissed Appellants' Negligent Misrepresentation claim against Respondent on the narrow legal ground that the unchallenged representations Respondent made to Appellants were not of a presently existing fact, and therefore not legally sufficient, even if made as alleged, to constitute Negligent Misrepresentation. CP 506-507. In 2002, after working with Appellants on getting the Project pre-approved with King County, such that Respondent was quite familiar with the property itself and what needed to be done to get the proposed double short plat completed and recorded, Respondent made multiple representations about the time it would take to complete the Project and

Respondent's fees for its work on the Project. CP 466-468. None of these promises exceeded one and ½ years and the cost of \$50,000 alleged and addressed by the Washington Supreme Court in *Donatelli*. In fact, multiple representations were significantly lower, between \$17,000 and approximately \$33,000. CP 466-468.

The Donatellis relied on these representations pertaining to cost and time because they believed that DR Strong, who had worked on the property already and would know far better than he what it would take to get his particular Project done, was in the best position to know that information. CP 466-468. Additionally, the time and cost issues were of paramount import to Appellants as they made the decision to not only hire Respondent, but with moving forward with the Project at all. Had the time and cost representations been higher or longer, they simply would have sold the subject property in 2002 under the pre-approval without incurring any additional costs, resources, or time. CP 466-468.

However, based on what he was told by Respondent regarding timing, costs, and that firm's collective ability to shepherd the Project to completion, Mr. Donatelli hired Respondent and moved forward with the Project. Respondent attacked the Negligent Misrepresentation claim only on those narrow legal grounds, and did not challenge the existence or content of the alleged representations.

1. Statements of future performance, estimates, predictions, and projections do form the basis for Negligent Misrepresentation in situations like the one at issue here.

In ruling to dismiss the Negligent Misrepresentation claim in this case, the trial court ignored the Washington Supreme Court's direct instructions to it and the Parties, as outlined in the first appeal. In *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013), the Supreme Court ruled that "the duty to avoid misrepresentations that induce a party to enter into a contract arises independently of the contract." *Id.* at 95. Although the *Donatelli* court acknowledged the historical frustrations between negligent misrepresentation and breach of contract, often caused by the former Economic Loss Rule, the Court reiterated that now, as the Independent Duty Doctrine has replaced the Economic Loss Rule, there are circumstances when these 'future projections' as Respondent would call them, can, do and should form the basis for Negligent Misrepresentation. *See Id.* at 95-97.

In *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 163-64, 744 P.2d 1032 (1987), the court held that

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject

to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id. at 161-62. In *Haberman*, the Court reversed the trial court's pre-trial dismissal of bondholders' negligent misrepresentation claims against professionals—including engineers—who had made projections and projections about the future need, cost, and feasibility of proposed power plants that bonds were being sold to build. *See id.* at 116, 119.² When, in the future, the cost, need and feasibility of those plants were not as promised or projected by these professionals, the *Haberman* Court held that those representations were actionable by those who had relied on them to their financial detriment.

Additionally, the first *Donatelli* court cited *Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69 (Colo. 1991) as a situation where a seller of goods and/or services can be held liable for false statements about future performance. In that case, the purveyor of specialized grain silos induced farmers into purchasing these silos based on representations about how the silos would perform once built and installed in the future. These

² The larger issue in *Haberman* was whether the predictions/projections could be used by bondholders because the statements themselves were made to a third party that published the information in materials used to promote the bonds. The court allowed the claims in no small part because the professionals making the representations, which turned out to be dead wrong, had a financial interest in making the statements and knew that others would rely on their projections financially.

promises of future performance were used by the provider to entice and induce a potential customer to execute a contract (which in this case even had an integration clause containing boilerplate language disclaiming any representations that had been made). *See id.* at 71 (cited with approval by *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 96, 312 P.3d 620 (2013)). When the farmer's cattle got sick and milk production dropped after feeding on grain stored in these silos, a jury trial resulted and the appellate court upheld the jury's finding that the representations made to the farmers were negligent, in no small part because the seller was the only one in position to know whether its projections were accurate when made. *See id.* at 77-73.

The third situation outlined by the first *Donatelli* Court that is instructive in the instant case is found in *Gilliland v. Elmwood Properties*, 391 S.E.2d 577 (S.C. 1990) (cited with approval by *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 96, 312 P.3d 620 (2013)), wherein a project owner's negligent misrepresentation claim against an architect, who represented that he *would* (in the future) design a project that would qualify for certain tax exempt bond funding and wrongly estimated construction costs, was wrongly dismissed by the trial court. *See id.* at 580. When the party making representations has a pecuniary interest in having the recipient rely on promises, statements,

future projections, estimates, made during contract negotiations, those statements, even if about “future performance” are actionable.

2. The cases Respondent Argued to the Trial Court Below do not Control.

Before the trial court, Respondent cited to and relied on multiple cases that predate the Washington Supreme Court’s direction in *Donatelli*, and fly in the face of the same.

Citing to *Micro Enhancement v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 40 P.3d 1206 (Div. 3 2002), and its progeny, Respondent encouraged the trial court to ignore the Supreme Court’s view of negligent misrepresentation in the context of the Independent Duty Doctrine and support the outdated Economic Loss Rule. *Micro Enhancement* would likely be decided differently today given the focus that court had on keeping representations wrapped up in the contract, but because the opinion itself is not specific about what the representations were nor whether they were material to the inducement of the contractual relationship that ensued, all we are left with is some language that Respondent wants used in a vacuum. Respondent has taken the position, contrary to the Supreme Court, that all statements made during negotiations and “selling” its services are to be consumed into the contract, but that is not the law—future conduct and promises related

thereto can and do form the basis for negligent misrepresentation, especially when the maker of these promises have, or hold themselves out as having the necessary expertise in the subject arena as to warrant recipients' reliance thereon. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 96, 312 P.3d 620 (2013)).

Similarly, *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn.App. 192, 49 P.3d 912 (Div. 1 2002) and the source-cases cited therein like *Havens v. C.D. Plastics, Inc.*, 124 Wn.2d 158, 876 P.2d 435 (1994), contain situations that, under the Supreme Court's view of negligent misrepresentation in the era of the Independent Duty Doctrine, would likely have had different results. In *Murphy*, if the defendant's promises and assurances to procure the insurance at issue in the case had been a material factor that induced plaintiff into entering into the contract, and if the inducement into the contract benefited the county financially, then under this newer legal framework, the cause of action would have survived. The same analysis applies to *Havens*, where the promises in play there dealt with how long a potential employee was going to be employed.

In *Elliott Bay Seafoods, Inc. v. The Port of Seattle*, 124 Wn.App. 5, 98 P.3d 491 (Div. 1 2004), the trial court there dismissed the negligent misrepresentation claim against the port because there was no evidence

that the Port misrepresented its intent create a mixed-use type space at the port (which would ostensibly be good for plaintiff's proposed store) and not a home port for a cruise liner. However, in that case, the appellate court noted that there was never any dispute over the fact that even in the mixed-use plan that plaintiff/potential-lessee saw, using the space for a home port was always what the Port wanted to do—so when it was able to secure a contract with a cruise liner and develop the pier accordingly, nothing had been misrepresented. *See id.* at 8.

The idea of estimates being actionable as deceptive practices, and the *Donatelli* decision is right in line with long-established principles.

A contractor does not provide “estimates” or representations as to completion or repair dates merely to be helpful to the purchaser, but to influence the purchaser to buy the contractor's product or to rely upon the contractor's services to remedy defects in the product. The purchaser will likely rely upon such “estimates.” The overly casual or unfounded “estimate” thus entails a foreseeable risk of injury to the purchaser.

Keyes v. Bollinger, 31 Wn.App. 286, 291, 640 P.2d 1077 (Div. 1, 1982).

Even though the *Keyes* case dealt with a contractor's estimates in the context of the consumer protection act, the deceptive nature, or the potentially deceptive and inductive effect a contractor, architect, financial analysts, or engineer's future estimates can have on potential customers is something long-recognized in Washington. *See id.* In that case, the

defendant argued unsuccessfully that his estimates of future performance were not deceptive or unfair because there were circumstances in construction that went beyond his control. The court noted the degree and amount to which that contractor was incorrect in his estimates played a significant factor in the court holding that the estimates were actionable as deceptive. *See id.* The court cited other cases where outside forces caused delays, even forces such as weather, holding that even if outside factors may affect a contractor's ability to honor estimates, "they are matters far more within the contractor's knowledge and experience than within the purchaser's knowledge and experience." *Id.* at 292.

In this case, the representations alleged regarding cost and time estimates promised to Mr. Donatelli were integral in his decision to not only move forward with the Project beyond the pre-approval stage, but to specifically hire Respondent. They are of the type specifically called out by the Washington Supreme Court as actionable as Negligent Misrepresentation, and the trial court's dismissal should be reversed, and the case remanded for a new trial. The purely legal reasoning presented to the trial court and adopted thereby go against the most recent and clear direction by the Washington Supreme Court on the matter. That Court has already once approved the Negligent Misrepresentation claims as legally valid, and the trial court's subsequent dismissal is not based on any valid

legal theory. Projections of the kind made by Respondent, can and do constitute Negligent Misrepresentation. *See (cited with approval by Donatelli v. D.R. Strong Consulting Engineers, Inc., 179 Wn.2d 84, 96, 312 P.3d 620 (2013).*

D. THE TRIAL COURT WRONGLY AWARDED ATTORNEY FEES TO RESPONDENT FOR TIME SPENT ON MATTERS NOT COVERED BY THE CONTRACTUAL ATTORNEY FEE PROVISION, AND AT RATES HIGHER THAN THOSE CHARGED BY RESPONDENT’S COUNSEL.

Respondent prevailed on the Contract claim at trial, and under the contract was entitled to an award of attorney fees and costs associated with defending the breach of contract claims. There is no claim for fees by virtue of a statute or on any other basis. Respondent, through counsel, initially submitted a request for an award of fees and costs award in the amount of \$208,217.98, CP 606-609, and Appellants objected, arguing that \$104,499.88 of the requested fees were not awardable under the contract because said fees were easily identifiable as being spent on the defense against the tort claims in the case. CP 679-686. The trial court subsequently instructed Respondent to reduce its fees request by eliminating fees associated with defending against the Negligent Misrepresentation claim. CP 740-743. In response, Respondent’s counsel *increased* his rate, retroactive to the start of the case years before.

Appellants objected to this tactic to avoid reducing the award as called for by the trial court, CP 764-768, but the trial court allowed the change and, on November 30, 2015, issued a judgment for costs and fees in the amount of \$221,778.38. CP 780-782.

1. Under controlling case law, Respondent is not entitled to a fee award that includes fees incurred in defending against the tort claims raised in this case.

Whether or not fees associated with allegations that may sound in both contract and tort are recoverable by a prevailing party is controlled by *Boguch v. Landover Corp.*, 153 Wn.App. 595, 224 P.3d 795 (Div. 1 2009).

Whether a party is entitled to attorney fees is an issue of law that we review de novo.” *Little v. King*, 147 Wn.App. 883, 890, 198 P.3d 525 (2008) (citing *Tradewell Group, Inc. v. Mavis*, 71 Wn.App. 120, 126, 857 P.2d 1053 (1993)), affirmed, 160 Wash.2d 696, 161 P.3d 345 (2007). A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein only if a party brings a “claim on the contract,” that is, only if a party seeks to recover under a specific contractual provision. If a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship. *Hemenway v. Miller*, 116 Wn.2d 725, 743, 807 P.2d 863 (1991); *Burns v. McClinton*, 135 Wn.App. 285, 310–11, 143 P.3d 630 (2006), review denied, 161 Wn.2d 1005, 166 P.3d 718 (2007); *G.W. Constr. Corp. v. Profl Serv. Indus., Inc.*, 70 Wn.App. 360, 366, 853 P.2d 484 (1993).

[A]n action is on a contract for purposes of a contractual

attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.” Tradewell Group, 71 Wn.App. at 130, 857 P.2d 1053 (citing Seattle–First Nat’l Bank v. Wash. Ins. Guar. Ass’n, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); W. Stud Welding, Inc. v. Omark Indus., Inc., 43 Wn.App. 293, 299, 716 P.2d 959 (1986)). Stated differently, an action “sounds in contract when the act complained of is a breach of a specific term of the contract, without reference to the legal duties imposed by law on that relationship.” G.W. Constr., 70 Wn.App. at 364, 853 P.2d 484 (citing Yeager v. Dunnavan, 26 Wn.2d 559, 562, 174 P.2d 755 (1946)). “If the tortious breach of a duty, rather than a breach of a contract, gives rise to the cause of action, the claim is *not* properly characterized as breach of contract.” Owens v. Harrison, 120 Wn.App. 909, 915, 86 P.3d 1266 (2004) (emphasis added) (citing G.W. Constr., 70 Wn.App. at 364, 853 P.2d 484).

Id. at 615-16.

The Court in *Boguch* held that the claims brought against the professional defendant, with whom the plaintiff had a contractual relationship, did not arise out of the contract because the alleged duties existed outside of the contract. The same analysis applies here because Appellants’ Negligence, Negligent Misrepresentation and CPA claim, arose independent of the contract in question. As the *Boguch* Court went on

When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, *but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act*

which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it.

Id. at 617 (citations omitted) (emphasis in original). Thus, Appellants' claims that Respondent was negligent or made negligent misrepresentations or violated the Consumer Protection Act are tort claims and not claims on the contractually defined professional services.

Boguch also instructs how to deal with cases where fees are only recoverable on some claims or causes of action: When “attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.” *Id.* at 620, citing *Mayer v. City of Seattle*, 102 Wn.App. 66, 79–80, 10 P.3d 408 (2000). Exceptions to the rule requiring segregation of time does not apply when the contract is not the basis for the tort claims (even if the existence of the contract may have given rise to the claimed common law or statutory duties owed to the plaintiff). *See Boguch*, 153 Wn.App. at 620-621.

As in *Boguch*, Appellants' tort claims could have been and indeed were resolved without reference to specific terms of the contract, and “the party claiming an award of attorney fees has the burden of segregating its

lawyer's time." *Id.* Respondent did not properly segregate its time, and the Court's issuance of an award without such segregation was in error. In addition to eliminating time spent defending the Negligent Misrepresentation claim, the trial court should be instructed to order Respondent to eliminate time spent specifically and solely on the Negligence claim, including the motions for summary judgment, motion for discretionary appeal, and the entire first appeal.

A review of how Respondent structured its piece-meal attacks of the tort claims makes it quite simple to segregate out the fees as outlined above and in Appellants' original objection to the fee award. CP 679-686. Respondent did not concern itself with the contract claim for several years while arguing, unsuccessfully, that the Economic Loss Rule barred the negligence and negligent misrepresentation claims. All the work on the first appeal in this case and on the summary judgment motions related to the tort claims should be segregated out as not awardable under the contract and *Boguch*. To do so in this case will not require the creation or implementation of any artificial methods of segregating the time spent on these matters, as the line dividing time and resources spent on the various causes of action is clean and natural.

2. There is no basis for the trial court to allow counsel for Respondent to increase his rates retroactively.

In response to the trial court's instruction to reduce the fee award initially requested by Respondent, counsel for Respondent retroactively raised his own rates starting at the beginning of the case, ostensibly to counteract the court's reduction of time he spent for Respondent on the case that was spent on matters for which there is no fee recovery. Counsel's tactic, and indeed the trial court's acceptance of it, does not follow the law.

Applicable Lodestar methodology allows for a rate adjustment only when justified because of the existence of a contingency fee arrangement, or when there is a demonstration that the work done by an attorney was significantly better than what his clients should have expected given the rate charged. *Bowers v. Transamerica Title Ins. Co.* 100 Wn.2d 581, 598-601, 675 P.2d 193 (1983). This case was not defended on contingency, nor was there a showing below that any particular adjustment beyond what was charged, should be applied to Appellants. Indeed, under the Lodestar methodology Respondent claims to adhere to, what an attorney *actually* charges his clients should be given significant deference and the Courts will generally allow the market to determine the reasonableness of an attorney's rate. Appellants do not argue that any particular rate alleged was not market-approved, but counsel for the prevailing party, nor the party itself, should not be entitled

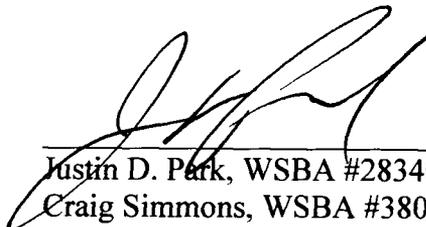
to a windfall by now retroactively changing counsel's rate. Counsel had every opportunity during the case to choose his rate. Having actually billed at \$215 per hour, any recovered fees should accurately reflect the fees incurred. An attorney fee award should not be used as a device to create a windfall or damages claim against a party.

V. CONCLUSION

Respondent failed Appellants. It failed to use professional knowledge and skill to perform the services it was hired to do. The two pre-trial rulings dismissing Appellants' tort claims did not follow controlling case law, and work to severely undercut the Independent Duty Doctrine. Regardless of a witness's ability to articulate it, the existence of an engineer's duties to its clients exist independent of contract, and Washington law, as well as the factual circumstances before the trial court, demand that Appellants' Negligence and Negligent Misrepresentation claims be allowed to go to trial on remand to the lower court. Further, Appellants ask that the Court remand the attorney fee issue to the trial court, instructing it to order Respondent to segregate all time spent defending against the tort claims.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

ROMERO PARK P.S.



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