

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2002 JUN 23 10 02 AM '02

CLERK

CLERK

No. 37596-6-II  
No. 81520-8  
SUPREME COURT  
OF THE STATE OF WASHINGTON

RICHARD and PENNY BORISH,

*Appellants,*

v.

KEITH R. and JODI T. OLSON; and  
KRISTY M. RUSSELL and JOHN  
DOE RUSSELL,

*Respondents.*

No. 81520-8  
Ct of Appeals No. 375966  
Sup Ct No. 06-2-04562-4

---

BRIEF OF RESPONDENTS KEITH AND JODI OLSON

---

Douglas S. Tingvall, WSBA #12863  
Attorney for Respondents Olson  
8310 154<sup>th</sup> Ave SE  
Newcastle WA 98059-9222  
RE-LAW@comcast.net  
(425) 255-9500

**ORIGINAL - FILED BY E-MAN ATTACHMENT**

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 4

    A. Should the Court overrule *Alejandre v. Bull*, which held that the economic loss rule bars negligent misrepresentation claims brought by a buyer against the seller?..... 4

    B. If not, does the economic loss rule under *Alejandre v. Bull* apply to professional negligence claims? ..... 4

II. ARGUMENT ..... 4

    A. Borish’s negligent misrepresentation claim against Olson is barred by the economic loss rule..... 4

    B. It is unnecessary for the Court to decide whether the economic loss rule bars fraud or fraudulent concealment claims, as Borish has not assigned error to the jury verdict in Olson’s favor on those claims. .... 6

    C. Even if the Court were to overrule *Alejandre*, the jury’s finding that that Borish did not justifiably rely upon any misrepresentation by Olson negates Borish’s negligent misrepresentation claim, as well as their fraud and fraudulent concealment claims..... 7

    D. Olson is entitled to attorney’s fees and costs on appeal. .... 8

III. CONCLUSION ..... 9

**TABLE OF AUTHORITIES**

*Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).....4, 5, 6, 7, 8  
*Carlile v. Harbour Homes, Inc.*, \_\_\_\_ Wn. App. \_\_\_\_, 194 P.3d 280 (No. 61419-3-I, October 20, 2008) .....6, 7

## I. INTRODUCTION

Borish's opening brief reads more like a law review article critiquing *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), than an appellate brief, as it urges the Court to make sweeping changes in the law far beyond the scope of the issues presented by this appeal. The sole issues before the Court are:

- A. Should the Court overrule *Alejandre v. Bull*, which held that the economic loss rule bars negligent misrepresentation claims brought by a buyer against the seller?
- B. If not, does the economic loss rule under *Alejandre v. Bull* apply to professional negligence claims?

## II. ARGUMENT

### A. Borish's negligent misrepresentation claim against Olson is barred by the economic loss rule.

Borish recognizes that *Alejandre* "extinguished any claim for negligent misrepresentation." Appellant's Brief at 1. Borish's negligent misrepresentation claim against Olson falls squarely within the holding of *Alejandre*. Borish argues that the Court should "reconsider" the economic loss rule and recognize negligent misrepresentation as an "exception."

Borish reiterates the same arguments the Court rejected in *Alejandre*. In essence, Borish asks the Court to overrule *Alejandre* less than two years after it was decided! The analysis in *Alejandre* is sound and need not be reiterated here. *Alejandre* should not be overruled.

A question left unanswered by *Alejandre* is whether the economic loss rule applies to professional negligence claims between parties who have no contractual relationship, such Borish and Russell.

The touchstone of the economic loss rule is the opportunity to bargain for and allocate risks through contract. “[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses.” 159 Wn.2d at 868. “[T]he economic loss rule applies where the parties could or should have allocated the risk of loss, or had the opportunity to do so.” 159 Wn.2d at 870.

“The economic loss rule maintains the ‘fundamental boundaries of tort and contract law.’ . . . Where economic losses occur, recovery is confined to contract ‘to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. . . . If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity.’ . . . A manufacturer or seller sets prices in contemplation of, among other things, potential contractual liability. . . . If tort liability is expanded to include economic damages, parties would be exposed to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate

class.’ . . . ‘A bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary.’ . . . In addition, the economic loss rule prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain.”

159 Wn.2d at 868 (citations omitted).

Here, a contractual relationship existed between Borish (buyer) and Olson (seller), but not between Borish (borrower) and Russell (lender’s appraiser). Borish treats the claims against Olson (seller) and Russell (appraiser) the same, when they are quite different. Both *Alejandro* and *Carlile v. Harbour Homes, Inc.*, \_\_\_ Wn. App. \_\_\_, 194 P.3d 280 (No. 61419-3-I, October 20, 2008), also cited by Borish, involved claims by the *buyer* against the *seller*. Neither case involved real estate professionals, such as real estate brokers, mortgage brokers, home inspectors, appraisers, or closing agents. Olson takes no position as to whether the economic loss rule bars Borish’s claim against Russell, but it would seem that the absence of a contractual relationship between Borish and Russell would render the economic loss rule inapplicable.

**B. It is unnecessary for the Court to decide whether the economic loss rule bars fraud or fraudulent concealment claims, as Borish has not assigned error to the jury verdict in**

**Olson's favor on those claims.**

The jury found in Olson's favor on Borish's claims of fraud and fraudulent concealment on the grounds that Borish did not justifiably rely upon any representation by Olson. Borish has not provided a verbatim or narrative report of proceedings or assigned error to the jury verdict. Therefore, the sufficiency of evidence to support jury verdict that Olson did not commit fraud or fraudulent concealment is not before the Court.

Much of Borish's opening brief is devoted to the academic question of whether the economic loss rule bars claims of fraud, as held in *Carlile v. Harbour Homes, Inc.*, \_\_\_ Wn. App. \_\_\_, 194 P.3d 280 (No. 61419-3-I, October 20, 2008), as well as negligent misrepresentation. Although the issue is interesting, it is not before the Court, as Borish's fraud and fraudulent concealment claims already were tried and rejected by the jury.

**C. Even if the Court were to overrule *Alejandre*, the jury's finding that that Borish did not justifiably rely upon any misrepresentation by Olson negates Borish's negligent misrepresentation claim, as well as their fraud and fraudulent concealment claims.**

The jury found that Borish did not justifiably rely upon any

misrepresentation by Olson. Justifiable reliance is an essential element of both fraud and negligent misrepresentation claims. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). The standard of proof for either fraud or negligent misrepresentation is clear, cogent and convincing evidence. Therefore, it is immaterial whether the misrepresentation was intentional or negligent. Without a finding of justifiable reliance, there is no reversible error. In other words, even if Borish's negligent misrepresentation claim against Olson had been tried and submitted to the jury, the outcome of the case would have been the same.

**D. Olson is entitled to attorney's fees and costs on appeal.**

The purchase and sale agreement ["REPSA"] between Olson and Borish provides in part as follows:

**"Attorneys' Fees.** If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses."

Trial Ex. 1.

Borish instituted suit against Olson concerning the REPSA. The fact that Borish's claims sounded in tort does not negate Olson's entitlement to fees.

"If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. An action is 'on a contract' if (a) the action arose out of the contract; and (b) if the contract is central to the dispute."

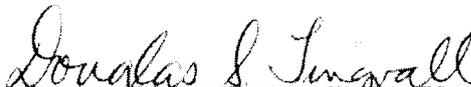
*Brown v. Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001)(buyer claimed misrepresentation and fraudulent concealment).

Here, the dispute arose out of the REPSA and the REPSA was central to the dispute. Therefore, Olson is entitled to an award of attorney's fees and expenses.

### III. CONCLUSION

The trial court correctly granted summary judgment dismissing Borish's negligent misrepresentation claim against Olson under *Alejandre*. The reasoning of *Alejandre* is sound and it should not be overruled. Whether the economic loss rule applies to professional liability claims affects only Russell, but not Olson. It is unnecessary to decide whether the economic loss rule applies to intentional torts, because the jury found no fraud or fraudulent concealment. The trial court's judgment should be affirmed as to Olson.

Respectfully submitted this 29<sup>th</sup> day of January, 2009.

  
Douglas S. Tingvall, WSBA #12863  
Attorney for Respondents Olson

RECEIVED  
SUPERIOR COURT  
STATE OF WASHINGTON

2009 JAN 29 10 42 AM '09

**DECLARATION OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that I successfully emailed a copy of this document to all other attorneys of record on January 29, 2009, at Newcastle, Washington.

Douglas S. Singvall