

No. 38984-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

POULSBO GROUP, LLC

Appellant,

v.

TALON DEVELOPMENT, LLC

Respondent.

OPENING BRIEF OF APPELLANT

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STATE OF WASHINGTON
BY KSC
DEPUTY
COURT OF APPEALS
DIVISION II

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I. INTRODUCTION

Talon Development, LLC (“Talon Development”) stuck Poulsbo Group, LLC (“Poulsbo Group”) with an undisclosed bill for an \$85,849.19 assessment by misrepresenting facts and withholding documents that Talon Development was contractually obligated to provide.

Poulsbo Group’s claims for breach of contract, fraud, and breach of the implied duties of good faith and fair dealing should be reinstated. Poulsbo Group respectfully requests that the Court reverse the trial court’s grant of summary judgment in favor of Talon Development and its denial of Poulsbo Group’s motion for partial summary judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting Talon Development’s motion for summary judgment on Poulsbo Group’s breach of contract claim.

2. The trial court erred by denying Poulsbo Group’s cross-motion for partial summary judgment on its breach of contract claim.

3. The trial court erred by granting Talon Development’s motion for summary judgment on Poulsbo Group’s claim for breach of the implied duties of good faith and fair dealing.

4. The trial court erred by granting Talon Development's motion for summary judgment on Poulsbo Group's intentional misrepresentation claim.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Talon Development breached its duty to disclose documents? (Assignments of Error Nos. 1-2).

2. Whether Talon Development's breach resulted in damages to Poulsbo Group? (Assignments of Error Nos. 1-2).

3. Whether the contract's feasibility contingency addendum shields Talon Development from liability? (Assignments of Error Nos. 1-2).

4. Whether Poulsbo Group's right to relief for Talon Development's breach was waived? (Assignments of Error Nos. 1-2).

5. Whether Talon Development acted in bad faith in withholding information and failing to cooperate with Poulsbo Group's feasibility study? (Assignments of Error No. 3).

6. Whether the economic loss doctrine bars intentional misrepresentation claims? (Assignments of Error No. 4).

7. Whether Talon Development made material misrepresentations that Poulsbo Group reasonably and justifiably relied upon? (Assignments of Error No. 4).

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Talon Glen Development.

This case arises out of a 2007 sale of real property located in Poulsbo, Kitsap County, Washington, and the post-sale imposition of a “latecomer’s assessment” against that property (hereinafter, “Talon Glen”) in the amount of \$85,849.19.¹ (CP 3-6, 8-20, 21-22, 218-35.) The parties to this case were the seller (Talon Development) and the ultimate buyer (Poulsbo Group) in the transaction. (CP 4, 21.)

Talon Development began the process of subdividing Talon Glen in late 2005 or early 2006. Other subdivision plats neighbored Talon Glen. (CP 197-98.) Significantly for purposes of this litigation, Snowberry Enterprises, LLC (“Snowberry”) developed one such neighboring plat. (*Id.*) As a part of its development, Snowberry constructed certain street, sewer and water improvements that would ultimately serve to benefit Snowberry’s development, as well as Talon Glen and other properties. (CP 8-20, 131-135, 219.)

¹ “Latecomer’s assessments” are governed by Chapter 35.72 RCW and, generally speaking, result from agreements between developers and cities, towns, or counties whereby the developers agree to construct certain improvements and, in order to partially reimburse the developers, the applicable governmental entities agree to record assessments against properties that benefit from those improvements.

2. Negotiations with Snowberry and Undisclosed Emails.

In August 2006, prior to the sale and prior to any involvement by Poulsbo Group, Talon Development had numerous communications with Snowberry about the mutually beneficial improvements being installed by Snowberry, as well as about sharing in the costs of those improvements. (CP 132, 277-84.) On August 15, 2006, a design engineer working on behalf of Talon Development, Don Babineau of C.E.S. N.W., Inc., sent the following email to Snowberry:

What we would like to do is to have Olsen [Snowberry's engineers] design the sewer and water stubs and have [Snowberry's] contractor install them so that we do not have to tear up the road once it is built. We also will need the main water connection point designed and installed. This connection point is located adjacent to the lot line between lots 17 and 18. The sewer stubs are for lots 7 through 11 and 14 and 15. The water stubs are for lots 7 & 8, 9 & 10, 11 & 14, and 15 & 16. Our client, Talon Development, will pay for the design and installation of the water main connection and the water and sewer stubs.

(CP 280.) On August 16, 2006, Talon Development sent another email to Snowberry.

I heard from CES (our design engineers) that your contractor is ready to install water and sewer lines. I understand that CES is designing the locations of connection points for these utilities to access some of the planned lots on our Talon Glen development.

Can your contractor give us a cost estimate to make those connections with stubs out from under the road. (I'm assuming this would be water and sewer). We

would prefer to delay payment of any main line cost sharing until we actually develop the parcel.

(CP 281.) On August 17, 2006, Talon Development's engineers sent a third email to Snowberry.

It is my understanding that your engineer is backed up and may not be able to make the changes. However, I am not sure the city will accept revised plans from CES. In my opinion, the best way is to handle this through a change order process. The changes in my opinion are rather minor. There are 7 sanitary service stubs at 50' long. In addition there are 10 water services that are needed. Please see the attached map (in PDF format) for specifics. I think the engineering work could be completed in 3-4 hours. I am sure my client will be in contact with you to discuss the cost associated with the engineering and construction of these improvements.

(CP 282.)

According to Snowberry's representative, Holly White, Snowberry also had at least a "half a dozen" telephone calls with Talon Development during the summer of 2006 regarding these issues. (CP 132.) Snowberry had hoped to secure Talon Development's participation in the cost of construction at that time in order to avoid the necessity of a latecomer's agreement. (*Id.*) According to Ms. White:

At the time when I spoke with Tom [Smith, one of Talon Development's two members], I assumed then that there would be no connections [for Talon Glen] to my main water and sewer lines because of the fact that this Ordinance exists disallowing any pavement cuts in pavement less than 10 years old, which Tom was aware of. So at the time, I decided it would not be necessary to put together a Latecomer's Agreement so that Talon could participate in the cost to construct all of these sewer and water lines that they're now intending to cut into. I'd proposed that we do it then in order to avoid

the Latecomer's Agreement, which is a long, lengthy process...

(*Id.*)

Ultimately, Talon Development chose not to contribute any money to the improvements and Snowberry proceeded to install the sewer and water mains and pave its right-of-way adjacent to Talon Glen at Snowberry's own cost. (CP 132-42, 197-99, 281, 298-303.)

3. The Events of January 19, 2007.

Three key events relative to this litigation occurred on January 19, 2007. First, Talon Development executed the Vacant Land Purchase and Sale Agreement (the "Agreement") for the sale of Talon Glen. (CP 218-233, 304, 334-51.) The Optional Clauses Addendum to that Agreement required Talon Development to provide the buyer with all documents related to Talon Glen within three days of mutual acceptance of the Agreement, *i.e.*, by January 22, 2007. (CP 341.) Talon Development did not provide the three emails described above in section IV(A)(2). (CP 219.) Nor did Talon Development provide Poulosbo Group with any documents disclosing Talon Development's discussions with Snowberry, or the fact that Snowberry expected reimbursement for the costs of improvements that would benefit Talon Glen. (*Id.*)

Second, a hearing was held on January 19, 2007, concerning Talon Development's request for preliminary plat approval for Talon Glen. (CP 105-46.) At the hearing, Ms. White, on behalf of Snowberry, requested that the City of Poulsbo require Talon Development to participate in a latecomer's agreement as a condition to preliminary plat approval. (CP 141.) Specifically, Ms. White testified in relevant part as follows:

So ... I would still be of the position that a Condition should be added requiring the applicant [Talon Development] to participate in a Latecomer's Agreement, regardless of the City's ability to complete the processing of that Agreement prior to construction.

...

I will put it together. I will put together the Latecomer's Agreement because ... I think that ... it is fair and if Talon [Development] is going to participate ... with the benefits from the sewer line and water line ... main lines that I have installed, then they should also participate in the cost of it.

(CP 141-42.) While a latecomer's agreement was not made a condition of preliminary plat approval, Ms. White was advised to submit a latecomer agreement application to the City of Poulsbo and was told that the City would facilitate enforcement. (CP 141-45.) Representatives of Talon Development, including its member Tom Smith and engineer Craig Deaver, attended the hearing. (CP 150, 304.) No one from Poulsbo Group was present. (See CP 105-47, 150.) Talon

Development never informed Poulsbo Group about Ms. White's testimony or the issues she raised. (CP 304-05.)

Third, Talon Development also executed a Seller Disclosure Statement on January 19, 2007. (CP 220, 273-74.) In the Seller Disclosure Statement, Talon Development checked the box marked "no" to each of the following questions:

Are there any encroachments, unrecorded boundary agreements, boundary disputes or claims by neighbors pertaining to the Property?

Are there any pending or existing assessments against the Property?

(*Id.*) As of January 19, 2007, Snowberry had not formally submitted its latecomer's agreement application, but based upon Ms. White's testimony and Talon Development's prior communications with Snowberry, Talon Development knew the application was forthcoming and knew that Snowberry claimed entitlement to reimbursement for the improvements benefitting Talon Glen. (*See* CP 142, 280-84, 352.)

4. Poulsbo Group is Specifically Told, Twice, that There Would Be No Latecomer's Assessment.

On at least two occasions, Poulsbo Group specifically inquired about the possibility of a latecomer's assessment on Talon Glen. (CP 220.) Randy Dubois, one of Talon Development's members, was the first to tell John Jack, member of Poulsbo Group, that there would not be any latecomer issues with respect to Talon Glen. (*Id.*) While Mr.

Jack does not remember the exact date of this conversation, it occurred prior to Poulsbo Group's purchase of Talon Glen. (*Id.*)

On February 15, 2007, during the feasibility period, Mr. Jack also asked Talon Development's engineer, Craig Deaver, whether there would be any latecomer's fees assessed against Talon Glen. (CP 220, 325.) Notably, Mr. Deaver had attended the January 19, 2007 hearing on Talon Development's preliminary plat application and he had heard and responded to Ms. White's testimony in which she testified that Snowberry was going to submit an application for a latecomer's agreement. (CP 150, 156.) Mr. Deaver told Mr. Jack, however, that there would be no latecomer's assessment on Talon Glen. (CP 220, 325.) Poulsbo Group's purchase of Talon Glen closed on March 30, 2007. (CP 219.)

5. The Latecomer's Assessment.

On February 23, 2007, Snowberry formally submitted a Latecomer Agreement Application to the City of Poulsbo. (CP 352.) The Poulsbo City Council approved the latecomer's agreement with Snowberry on October 17, 2007. (CP 219.) The total amount assessed against Talon Glen was \$85,849.19. (CP 219, 271.)

B. Proceedings Below

Poulsbo Group filed its Complaint against Talon Development on December 6, 2007. (CP 3.) Poulsbo Group asserted claims for (1) breach of contract, (2) breach of the implied duty of good faith and fair dealing, and (3) fraud/intentional misrepresentation. (CP 3-7.)

Following discovery, Talon Development moved for summary judgment on October 16, 2008. (CP 24-42.) Poulsbo Group cross-moved for partial summary judgment on December 1, 2008. (CP 205-17.) Oral argument on the motions was held on January 16, 2009. (RP 1-31.) On February 6, 2009, the Superior Court of Kitsap County entered a Memorandum Opinion granting Talon Development's motion for summary judgment and denying Poulsbo Group's cross motion for partial summary judgment. (CP 375.)

The trial court did not explain its ruling in detail. (*Id.*) Talon Development advanced several legal theories against Poulsbo Group's claims. With respect to Poulsbo Group's breach of contract claim, Talon Development argued that (1) the Agreement "allocated the risk" of the latecomer's assessment to Poulsbo Group; (2) the "merger doctrine" barred Poulsbo Group's claim; (3) Poulsbo Group "waived" its claim by closing the sale while allegedly knowing it did not receive documents; and (4) Talon Development's failure to disclose the

documents described in section (IV)(A)(2) did not lead to a “foreseeable loss.” (*E.g.*, CP 311-12.) Following presentation of Talon Development’s Order Granting Defendant’s Motion for Summary Judgment and Judgment for Attorney’s Fees, the trial court clarified that the merger doctrine did not bar Poulsbo Group’s breach of contract claim. (CP 403.) The court did not expand upon any of the other theories advanced by Talon Development, however, and Poulsbo Group, therefore, addresses each of those arguments below.

Talon Development contested Poulsbo Group’s claim for breach of the duty of good faith and fair dealing on the basis that the Agreement purportedly did not require Talon Development to disclose all its knowledge regarding Talon Glen. (CP 321.) Talon Development also generally denied it acted in bad faith.

Talon Development opposed Poulsbo Group’s fraud claim on three grounds. First, Talon Development argued that Poulsbo Group’s fraud claim was barred by the economic loss doctrine. Second, Talon Development asserts that all of its representations were true at the time they were made. Finally, Talon Development argued that the parties’ contract prohibited Poulsbo Group from relying upon any oral representations and/or that Poulsbo Group’s reliance upon Talon

Development's representations was not justifiable. (*See* CP 24-42, 310-24.)

Poulsbo Group respectfully submits that Talon Development's arguments are flawed. The trial court erred in granting Talon Development's motion for summary judgment and denying Poulsbo Group's motion for partial summary judgment. The trial court's Order Granting Defendant's Motion for Summary Judgment and Judgment for Attorneys' Fees should be reversed, Poulsbo Group's motion for partial summary judgment on its breach of contract claim should be granted, and the case should be remanded for further proceedings.

V. AUTHORITY

A. Standard of Review.

An appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). The standard of review is de novo. *Id.* Like the trial court, the appellate court must view all facts and reasonable inferences in the light most favorable to the non-moving party. *Id.*

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories, and admissions in the record, together with any affidavits, "show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). When reviewing the denial of a motion for summary judgment, the court engages in the same analysis. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

B. The Trial Court Erred by Granting Talon Development’s Motion for Summary Judgment and Denying Poulsbo Group’s Cross-Motion for Partial Summary Judgment on the Breach of Contract Claim.

1. Talon Development Breached its Duty to Disclose All Documents Related to Talon Glen.

A breach of contract occurs where the contract imposes a duty, the duty is breached, and the breach proximately causes damage. *E.g.*, *Nw. Indep. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995); *Lehrer v. DSHS*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000). “The failure to perform fully a contractual duty when it is due is a breach of contract.” WPI 302.01.

Talon Development admits a valid contract exists between the parties. (CP 4, 21.) The Agreement required Talon Development to provide all documents related to Talon Glen on or before January 22, 2007. (CP 341.) Talon Development failed to do so. (CP 219, 280-83.) At a minimum, Talon Development does not – and cannot – contest the fact that it did not provide Poulsbo Group with the emails discussed in section (IV)(A)(2) between Talon Development, its engineers and

Snowberry. (*Id.*) If Talon Development had provided those documents as it was contractually required to do, they would have disclosed Snowberry's installation of the relevant improvements, the liability for reimbursing Snowberry for associated costs, as well as Talon Development's decision to delay such cost sharing. (*Id.*)

In short, the undisputed material facts show that Talon Development owed a duty to produce all documents related to Talon Glen and failed to produce all the documents, thereby breaching that contractual duty.

2. Talon Development's Breach Resulted in Damages to Poulsbo Group.

In addition to establishing a duty and breach, a breach of contract claim also requires that the plaintiff establish resulting damage. *Lehrer*, 101 Wn. App. at 516, 5 P.3d at 727; *Nw. Indep. Forest Mfrs.*, 78 Wn. App. at 712, 899 P.2d at 9 (stating breach must proximately cause damage to the claimant); *see also* WPI 303.01. The evidence shows that Poulsbo Group would not have purchased Talon Glen if Talon Development had provided all the documents it was contractually required to provide, including those that would have

disclosed the issues concerning Snowberry's improvements and the discussions regarding sharing the relevant costs.² (CP 219-20.)

a. Poulsbo Group's Damages were Foreseeable.

Talon Development argues that its failure to disclose the emails did not lead to a "foreseeable loss." (CP 322.) In support, Talon Development cites to WPI 303.01, which provides:

Actual damages are those losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

- (a) in the ordinary course of events, or
- (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

Contrary to Talon Development's assertions, it was foreseeable at the time the Agreement was entered into that a failure by Talon Development to provide documents regarding Talon Glen would damage Poulsbo Group and frustrate its ability to accurately assess development costs. The whole point was to obtain full disclosure from the seller. Poulsbo Group's damages followed in the ordinary course of events from Talon Development's breach. Talon Development did not

² To the extent the Court finds that genuine issues of material fact remain regarding whether Talon Development's breach proximately caused damages to Poulsbo Group, Poulsbo Group renews the request it made to the trial court for a determination of breach pursuant to CR 56(d), leaving issues of causation for trial on remand.

provide documents that would have disclosed Snowberry's installation of the relevant improvements, and the liability to reimburse Snowberry for costs associated with constructing improvements that benefitted Talon Glen. The documents were not provided, Poulsbo Group remained ignorant of those facts when it closed the transaction on March 30, 2007 and, as a result, Poulsbo Group has been forced to shoulder the cost of the latecomer's assessment. (See CP 218-21.) Moreover, based upon its previous communications with Snowberry and its election not to voluntarily share in the costs and avoid a subsequent latecomer's agreement, Talon Development had reason to know that Poulsbo Group's damages would follow from the breach.

b. The Undisclosed Emails are not "Stale," "Inconsequential," or "Irrelevant."

Talon Development also argues that non-disclosed emails were "stale" or "a year old." (CP 322.) Talon Development's assertions are factually inaccurate. The three undisclosed emails that Poulsbo Group has uncovered to date which, had they been produced, would have disclosed these issues and the probability of liability for the Snowberry improvements, were all sent in mid-August 2006, which was five months prior to Poulsbo Group's agreement to purchase Talon Glen. (CP 280-83.)

In addition, Talon Development's characterization of the emails as "inconsequential" or "irrelevant" is dead wrong. The fact is that in connection with its contractual obligation to provide all documents related to Talon Glen, Talon Development provided no documents to Poulsbo Group that disclosed these facts or liability for the costs of the Snowberry improvements. (CP 219.) None of the documents that were provided disclosed Talon Development's decision to delay such cost sharing, or to pass-on that liability. (*Id.*) The undisclosed emails, had they been produced, would have disclosed those facts. (CP 280-83.)

c. Poulsbo Group was not Provided a Copy of the Hearing Examiner's Decision.

Finally, Talon Development argues that the undisclosed emails became irrelevant because Poulsbo Group was provided with a copy of the hearing examiner's Findings, Conclusions and Decision from the January 19, 2007 hearing which "disclosed even more information."³ (CP 322.) The problem with that argument is that Poulsbo Group was not, in fact, given a copy of the document. (CP 219, 361-64.) Talon Development is unable to provide any evidence to the contrary. Rather, the only competent evidence in the record is John Jack's testimony that

³ The Findings, Conclusions and Decision, which summarized Ms. White's testimony, issued on January 31, 2007. Talon Development's document production had been due, pursuant to the Agreement, over a week earlier on January 22, 2007.

the document was not provided and that he had never seen it prior to the commencement of this litigation. (*Id.*)

3. Poulsbo Group did not Assume the Risk of Undisclosed Documents or the Latecomer's Assessment.

Talon Development next argues that it cannot be held liable for breach of contract because the Agreement's Feasibility Contingency Addendum "allocated the risk" to Poulsbo Group. (CP 317-19.) Talon Development is incorrect. The Feasibility Contingency Addendum, as amended, provides as follows:

Feasibility Contingency. Buyer shall verify [by March 7, 2007] (the "Feasibility Contingency Expiration Date") the suitability of the Property for Buyer's intended purpose, including, but not limited to, whether the Property can be platted, developed and/or built on (now or in the future) and what it will cost to do this. The Feasibility Contingency SHALL CONCLUSIVELY BE DEEMED WAIVED unless Buyer gives notice of disapproval on or before the Feasibility Contingency Expiration Date. If Buyer gives a timely notice of disapproval, then this Agreement shall terminate and the Earnest Money shall be refunded to Buyer. Buyer should not rely on any oral statements concerning feasibility made by the Seller, Listing Agent or Selling Licensee. Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry shall include, but not be limited to: building or development moratoria applicable to or being considered for the Property; any special building requirements, including setbacks, height limits or restrictions on where buildings may be constructed on the Property; whether the Property is affected by a flood zone, wetlands, shorelands or other environmentally sensitive area; road, school, fire and any other growth migration or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or a building permit; sufficient

water, sewer and utility and any services connection charges; and all other charges that must be paid.

(CP 342.)

a. *One Who Undermines a Feasibility Study Cannot Use the Feasibility Contingency as a Shield.*

Talon Development has not identified a single case, nor is Poulsbo Group aware of one, in which a feasibility clause such as this was held to bar a breach of contract claim, particularly one alleging breach of a contractual obligation to disclose information. The point behind specifically bargaining for Talon Development's obligation to provide Poulsbo Group with all of its documents was to help facilitate Poulsbo Group's feasibility study. Talon Development should not be allowed to use the feasibility contingency as a shield when its actions undermined Poulsbo Group's feasibility study.

Neither of the cases cited by Talon Development supports its position that Poulsbo Group assumed the risk of the latecomer's assessment under the circumstances here, or that Talon Development cannot be held liable for its breach of contract. The principal case relied upon by Talon Development, *Scott v. Petett*,⁴ involved the doctrines of mutual mistake and frustration of purpose, neither of which are at issue here.

⁴ 63 Wn. App. 50, 816 P.2d 1229 (1991).

In *Scott*, the buyer sought rescission of a purchase and sale agreement, or alternatively a reduction in the purchase price, claiming mutual mistake and frustration of purpose after learning there were wetlands on the property complicating efforts to rezone. *Scott*, 63 Wn. App. at 54-61, 816 P.2d at 1233-1236. The court in *Scott* recognized that “a party seeking to avoid the contract must not have borne the risk of mistake.” *Id.* at 57, 816 P.2d at 1234. Similarly, the court stated “the doctrine of frustration of purpose is inapplicable when one of the parties to a contract has been allocated the risk of impracticality or frustration.” *Id.* at 60, 816 P.2d at 1236.

Here, Poulsbo Group is not seeking to avoid its Agreement. This is not a mutual mistake or frustration of purpose case. It is a case about damages caused by Talon Development’s breach of its contractual obligation to provide Poulsbo Group with documents.

The other case cited by Talon Development, *Felt v. McCarthy*,⁵ is also a frustration of purpose case. In *Felt*, the buyers defaulted on a promissory note and when the sellers sued to enforce the note, the purchasers sought to discharge their payment obligations under the doctrine of frustration. *Id.* at 204-07, 922 P.2d at 91-92. The buyers claimed that their plans to rezone and develop the property were

⁵ 130 Wn.2d 203, 922 P.2d 90 (1996).

frustrated by subsequent wetlands regulations. *Id.* at 207, 922 P.2d at 92. The court rejected the buyers' frustration defense on several grounds. The court found the buyer's frustration was not sufficiently "substantial." *Id.* at 210, 922 P.2d at 94. In addition, the contract, which the buyers drafted, "placed no requirements" on the sellers to help secure a rezoning, and the sellers did not share in the buyers' assumption that the buyers' plans would be successful. *Id.* at 209-10, 922 P.2d at 93-94. Once again, this is not a frustration of purpose case. The Agreement, here, did place requirements on Talon Development – specifically a duty to provide Poulsbo Group with all documents related to Talon Glen. Talon Development failed to do so.

b. Poulsbo Group Performed an Appropriate Feasibility Study.

Poulsbo Group did not disregard its rights under the feasibility contingency as Talon Development suggests. Poulsbo Group reviewed all the documents Talon Development did provide. (CP 355-357.) Mr. Jack spoke with City of Poulsbo officials, including the City's Senior Field Inspector, Mike Lund, regarding site restraints, and temporary erosion sediment control plans. (CP 220, 355-57.) He inquired about other requirements that the City might impose, and any difficulties that the City could foresee. (*Id.*) Poulsbo Group also verified applicable

utility service connection fees on the City of Poulsbo's website.⁶ (CP 358-60.)

Talon Development makes much of the fact that Mr. Jack did not specifically ask Mr. Lund about a "latecomer's assessment," and ridicules Poulsbo Group's reliance on the City's website to assess utility service connection fees. (CP 316.) As a practical reality, a buyer cannot ask everyone every question. More importantly, nothing in the Feasibility Contingency Addendum prohibited Poulsbo Group from verifying applicable fees and obtaining other information online. (*See* CP 342.) Poulsbo Group performed a reasonable and appropriate feasibility study and would have discovered the liability issues surrounding Snowberry's improvements if Talon Development would have honored its promise to disclose all documents.

Moreover, Poulsbo Group specifically inquired of Talon Development and Talon Development's engineer whether there would be any latecomer's assessments. Talon Development does not dispute that Poulsbo Group was told each time that there would be no latecomer's fees. Poulsbo Group submits that these "positive, distinct

⁶ *Cf. Scott*, 63 Wn. App. at 52-53, 816 P.2d at 1232 (rejecting buyer's mistake and frustration defenses where buyer was specifically advised the property had to be rezoned and failed to conduct "studies or investigations on the suitability of the property for its intended use").

and definite representations” from Talon Development relieved Poulsbo Group of any further duty to inquire on that topic. *See Douglas Nw., Inc. v. Bill O’Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 679, 828 P.2d 565, 577 (1992) (“A party to whom a positive, distinct and definite representation has been made is entitled to rely on that representation and need not make further inquiry concerning the particular facts involved.”); *accord Rummer v. Throop*, 38 Wn.2d 624, 633, 231 P.2d 313, 319 (1951).⁷

4. Poulsbo Group did not Waive its Breach of Contract Claim.

Finally, Talon Development argues that it should not be held liable for its breach of contract because Poulsbo Group “waived” the claim. (CP 320.) Talon Development bases its argument on a portion of the Agreement’s Optional Clauses Addendum, which, as amended, provides:

Seller to provide [preliminary] plat approval before the expiration of feasibility study. If final plat approval is not complete the feasibility time period shall extend to a period of 5 days after final plat approval is delivered to purchaser. If plat approval is subjectively unsatisfactory

⁷ Poulsbo Group acknowledges that the Feasibility Contingency Addendum states that “Buyer should not rely on any oral statements concerning feasibility made by the Seller, Listing Agent or Selling Licensee.” Poulsbo Group does not believe, however, that this clause does away with the well-established common law rule set forth in *Rummer*, or that parties can contractually give themselves free license to commit fraud.

to purchaser, then purchaser has the option to terminate this agreement.

(CP 341, 344.)

According to Talon Development, this clause required that the document entitled “Findings, Conclusions and Decision” from the January 19, 2007 hearing be provided to Poulsbo Group. (*See* CP 320.) Talon Development further argues that it was “the one document” that would have informed Poulsbo Group of Snowberry’s claim for reimbursement and that, by closing the transaction without insisting the document be provided, Poulsbo Group waived any right to relief. (*Id.*) Talon Development is incorrect.

As an initial matter, the hearing examiner’s Findings, Conclusions and Decision was not the only document that would have disclosed Snowberry’s claims. The emails that Talon Development failed to provide would have alerted Poulsbo Group to the issue well before closing. (*See* CP 280-83.) Additionally, what the clause required of Talon Development was to provide preliminary plat approval before the expiration of the feasibility study, not any particular document. (*See* CP 341.) With respect to the conditions of approval, Mr. Jack testified that Poulsbo Group knew what they were because the engineers showed him the requirements on the project drawings. (CP 361-62.) If changes were made, new drawings would be

required. (*Id.*) Poulsbo Group did not waive its right to approve the conditions to preliminary plat approval and, notably, the hearing examiner had refused to make a latecomer's agreement such a condition. (CP 145.)

In short, there was no waiver. “[W]aiver is the ‘intentional and voluntary relinquishment of a known right.’” *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 426 n.10, 191 P.3d 866, 875 n.10 (2008) (quoting *Panorama Residential Protective Ass’n v. Panorama Corp. of Wash.*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982)). Poulsbo Group did not know that Talon Development had withheld documents, nor did Poulsbo Group intentionally give up its right to insist on full disclosure. Poulsbo Group did not know that Snowberry was claiming an entitlement to reimbursement or that it was submitting an application for a latecomer's agreement.⁸ Poulsbo Group did not know at that time that Talon Development had breached the contract, and did not voluntarily give up any right to relief.

For all these reasons, Poulsbo Group respectfully submits that the trial court erred in granting Talon Development's motion for

⁸ Talon Development did not see fit to mention Ms. White's testimony during the January 19, 2007 hearing, even when Mr. Jack later specifically asked Mr. Deaver about the possibility of any latecomer's assessments.

summary judgment and denying Poulsbo Group's cross-motion for partial summary judgment on the breach of contract claim.

C. The Trial Court Erred by Granting Talon Development's Motion for Summary Judgment on Poulsbo Group's Claim for Breach of the Implied Duties of Good Faith and Fair Dealing.

"Every contract carries with it an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of performance." *E.g.*, *Ross v. Ticor Title Ins. Co.*, 135 Wn. App. 182, 190, 143 P.3d 885, 888 (2006), *rev'd in part on other grounds*, 162 Wn.2d 493, 172 P.3d 701 (2007); *accord Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007). These implied covenants do not add substantive terms to the parties' contract. The duties of good faith and fair dealing "require[] only that the parties perform in good faith the obligations imposed by their agreement." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356, 360 (1991).

Here, Talon Development failed to act in good faith in connection with at least two substantive terms of the Agreement. Namely, Talon Development owed a contractual duty to provide all documents related to Talon Glen, and Talon Development also had a

duty to cooperate with Poulsbo Group in connection with the feasibility contingency.

When Poulsbo Group specifically asked about latecomer's issues, Talon Development was not forthcoming. Each time Mr. Jack was told there would be no latecomer's assessment. Meanwhile, Talon Development knew that Snowberry expected to be reimbursed for the improvements and that it was preparing an application for a latecomer's agreement. "Under certain circumstances, even as between a seller and buyer dealing at arm's length, the seller may have a duty to disclose a material fact likely to affect a prospective buyer's judgment as to whether the buyer should purchase the property." *Ross*, 135 Wn. App. at 190, 143 P.3d at 888.

Talon Development should have disclosed what it knew and it should have produced the documents that would have enabled Poulsbo Group to uncover on its own Snowberry's claims for reimbursement of improvements costs. Talon Development's failure to do so breached the implied covenants of good faith and fair dealing.

D. The Trial Court Erred by Granting Talon Development's Motion for Summary Judgment on the Intentional Misrepresentation Claim.

1. The Economic Loss Doctrine does not Bar Claims of Intentional Fraud.

Relying upon *Carlile v. Harbour Homes, Inc.*,⁹ Talon Development argues that Poulsbo Group's intentional misrepresentation claim is barred by the economic loss doctrine. In *Carlile*, Division I did hold, for the first time, that the economic loss rule bars claims of intentional misrepresentation. *Carlile*, 147 Wn. App. at 205-06, 194 P.3d at 286. Poulsbo Group submits, however, that Division I's holding conflicts with this Court's decision in *Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008). The *Carlile* decision is also in conflict with numerous other jurisdictions. *See, e.g., Alejandre v. Bull*, 159 Wn.2d 674, 690 n.6, 153 P.3d 864, 872 n.6 (2007) (collecting cases).

In *Stieneke*, the plaintiffs asserted claims of negligent misrepresentation, fraudulent concealment, and fraud. *Id.* at 555-563, 190 P.3d at 66-70. Defendants asserted an economic loss doctrine defense. *Id.* at 555, 190 P.3d at 66. This Court held that the plaintiffs' negligent misrepresentation claim was barred by the economic loss

⁹ 147 Wn. App. 193, 194 P.3d 280 (2008). Petitions for review to the Supreme Court have been filed by the parties in *Carlile* and the case remains pending.

doctrine, but sufficient findings supported plaintiffs' claims based on fraud. *Id.* at 559, 190 P.3d at 68. Recognizing, however, that the trial court did not find whether the fraud claims were established by "clear, cogent, and convincing evidence, the Court remanded on that issue. *Id.*

This Court has it right. The economic loss rule should not be applied to claims for intentional fraud. Contracting parties should not be required to anticipate that the other party will defraud them, nor should they have to include anti-fraud provisions within their contracts simply to preserve the protections which the law of fraud ensures.

It does not further the interests underlying the economic loss rule to apply it to claims of fraud. *See, e.g., Alejandre*, 159 Wn.2d at 682-83, 153 P.3d at 868 (recognizing the economic loss rule confines recovery to contract to ensure that allocation of risk and potential future liability is based upon what the parties bargained for). Parties do not – and should – have to assume they will be defrauded. Parties control their intentional acts and, therefore, their potential liability. An allocation of risk between contracting parties with respect to fraud makes little sense because risk requires an element of fortuity and intentional acts are not fortuitous.

The issue is not freedom to contract, but of minimally acceptable standards of conduct. The benefit of the bargain is defined

by contract, but the right to seek redress for fraud has long been imposed by law. This balance has served us well and should not be cast aside by a misguided application of the economic loss rule.

2. Talon Development's Representations Were Untrue.

Talon Development's statements were not true at the time they were made as Talon Development suggests. (*E.g.*, CP 36.) Specifically, four representations are at issue. The first two misrepresentations, each falsely asserting there would be no latecomer's assessments on Talon Glen, were made orally to John Jack. One was made by Talon Development's managing member, Randy Dubois, the other by Talon Development's engineer Craig Deaver. (*See* CP 220.)

The other two representations were in writing and were provided to Poulsbo Group in the seller disclosure statement that Talon Development issued on January 19, 2007. Talon Development answered "no" to each of the following questions:

Are there any encroachments, unrecorded boundary agreements, boundary disputes or claims by neighbors pertaining to the Property?

Are there any pending or existing assessments against the Property?

(CP 273-74.)

There was a claim by a neighbor, Snowberry, for reimbursement of improvement costs, and it should have been disclosed. Having not disclosed it, Talon Development argues for a narrow interpretation of the seller disclosure statement, such that the first question is confined to boundary issues alone. Poulsbo Group submits the question is a little broader. Limiting the question only to boundary issues would render the last part of the question superfluous. “An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279, 1283 (1980).

Whether or not an assessment was “pending” as of January 19, 2007 depends upon the meaning given to the term. Black’s Law Dictionary provides the following definition of “pending”:

1. Throughout the continuance of; during <in escrow pending arbitration>.
2. While awaiting; until <the injunction was in force pending trial>.

Black’s Law Dictionary 1169 (8th ed. 2004).

Poulsbo Group admits that Snowberry had not yet formally submitted its application for a latecomer agreement as of January 19, 2007. The evidence also shows, however, that Snowberry and Talon Development had already communicated numerous times

about Talon Development participating in Snowberry's costs of construction. Ms. White also testified on January 19, 2007, that Snowberry was going to submit its application for a latecomer's assessment. The City of Poulsbo and Talon Development were – or at least should have been – “awaiting” the application.

3. Poulsbo Group was Entitled to Rely Upon Talon Development to Tell the Truth.

Contrary to Talon Development's suggestions, Poulsbo Group was also entitled to rely upon the truthfulness of Talon Development's affirmative representations. Talon Development's argument is based largely on the statement in the Feasibility Contingency Addendum that “Buyer should not rely on any oral statements concerning feasibility made the Seller, Listing Agent or Selling Licensee.” (CP at 35.) Notably, even if that language is enforceable and not merely advisory,¹⁰ it is restricted by its own terms to oral statements and does not preclude any reliance upon Talon Development's written representations. More importantly, the settled law of this state provides that Poulsbo Group was entitled on rely upon the truthfulness of Talon Development's statements.

¹⁰ Cf. *Kwiatkowski v. Drews*, 142 Wn. App. 463, 473, 176 P.3d 510, 515 (2008) (finding reliance unreasonable where party agreed in the contract that the party “made an independent decision to enter this AGREEMENT, without relying on representations of any other party”).

The rule is followed at the present time in practically all American jurisdictions, in respect to transactions involving both real and personal property, that one to whom a positive, distinct, and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved. This rule is a corollary to the broad principle of a general right of reliance upon positive statements. Under this rule, it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and misled the complaining party. Under such circumstances, it is immaterial that the means of knowledge are open to the complaining party, or easily available to him, and that he may ascertain the truth by proper inquiry or investigation.

Rummer v. Throop, 38 Wn.2d 624, 633, 231 P.2d 313 (1951) (quoting *Cunningham v. Studio Theatre*, 38 Wn.2d 417, 229 P.2d 890, 894 (1951)); accord *Westby v. Gorsuch*, 112 Wn. App. 558, 575, 50 P.3d 284 (2002); see also *McRae v. Bolstad*, 32 Wn. App. 173, 177 (1982) (“[P]urchasers of property have a right to rely on the sellers’ and their agents’ representations.”).

The case relied upon by Talon is not to the contrary. *Williams v. Joslin*, 65 Wn.2d 696, 698, 399 P.2d 308, 309 (1965), simply stands for the proposition that one’s “reliance must be reasonable under the circumstances” and that the party to whom the representation is made must use diligence with respect to the representations that he or she is given. *Id.* at 698, 399 P.2d at 309. In that case the court found the buyer had no right to rely upon oral misrepresentations because he was

provided with documentation that demonstrated the representations he was given were untrue. *Id.* Here, the documentation that would have revealed the true state of affairs was withheld from Poulsbo Group and Poulsbo Group made reasonable inquiries.

E. Poulsbo Group Should be Awarded its Reasonable Attorneys' Fees and Expenses.

Pursuant to RAP 18.1, Poulsbo requests an award of reasonable attorneys' fees and expenses as prevailing party on appeal. An award of reasonable attorneys' fees and expenses to the prevailing party is authorized by the parties' Agreement. (CP 336.)

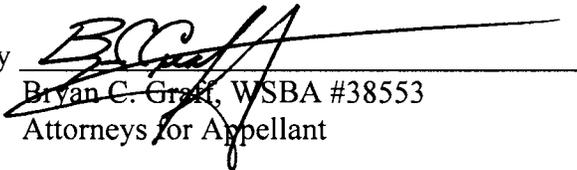
VI. CONCLUSION

The trial court erred in granting Talon Development's motion for summary judgment and denying Poulsbo Group's motion for partial summary judgment. The trial court's Order Granting Defendant's Motion for Summary Judgment and Judgment for Attorneys' Fees should be reversed, Poulsbo Group's motion for partial summary judgment on its breach of contract claim should be granted, and

Poulsbo Group should be granted its attorneys' fees as the prevailing party on appeal.

DATED this 11th day of June, 2009.

RYAN, SWANSON & CLEVELAND, PLLC

By 
Bryan C. Graft, WSBA #38553
Attorneys for Appellant

DECLARATION OF SERVICE

I declare that on the 11th day of June, 2009, I caused the foregoing document to be served on counsel for Respondent, as noted, at the following address:

Via Email & First Class Mail
Mr. David P. Horton
Law Office of David P. Horton, Inc. P.S.
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Dawn L. Fisher, Legal Assistant

Dated: June 11, 2009

Place: Seattle, WA

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