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DIVISION II

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STATE OF WASHINGTON  
No. 38984-3-II  
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DEPUTY

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

POULSBO GROUP, LLC

Appellant,

v.

TALON DEVELOPMENT, LLC

Respondent.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Poulsbo Group, LLC (“Poulsbo Group”) submits this reply to the Brief of Respondent submitted by Talon Development, LLC (“Talon Development”) on August 12, 2009. For all the reasons stated herein, as well as in the Opening Brief of Appellant, the trial court erred when it granted summary judgment in favor of Talon Development and denied Poulsbo Group’s motion for partial summary judgment. Poulsbo Group respectfully requests the trial court’s decision be reversed, Poulsbo Group’s motion for partial summary judgment be granted, and Poulsbo Group be awarded its attorneys’ fees and expenses as prevailing party on appeal.

## II. ARGUMENT

### A. **Talon Development breached its contractual duty to provide all documents related to Talon Glen.**

1. The only element of Poulsbo Group’s breach of contract claim that Talon Development disputes is proximate cause.

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). Here, there is no dispute that Talon Development entered into an enforceable contract with Poulsbo Group concerning the purchase and sale of Talon Glen. (CP 4, 21.) There is

no dispute that the contract imposed a duty upon Talon Development to provide “all” documents related to Talon Glen within three days of mutual agreement. (CP 341; Brief of Respondent at 9, 17.) There is no dispute that Talon Development failed to provide documents related to Talon Glen which reflected multiple communications Talon Development had with a neighboring landowner regarding utility improvements and sharing the improvement costs. (CP 280-82; Brief of Respondent at 17-21.)

Talon Development seeks to downplay its contractual obligation to provide documents. (*See* Brief of Respondent at 9 (omitting the term “all” from its recitation of the relevant contractual provision, as well as the phrase “[t]his includes *but is not limited to*” the six illustrative examples) (emphasis added); *id.* at 18 (arguing “the contract did not require that every piece of paper related to possible development costs be turned over”).) Talon Development cannot change the contractual language, however, simply by writing something different in its pleadings to this Court. The contract required Talon Development to provide the documents that Talon Development failed to provide. (*See* CP 341.)

Talon Development’s attempt at minimizing the significance of the undisclosed documents as “talk[ing] about possible development

costs” and not “the latecomer issue”<sup>1</sup> is disingenuous. Talon Development has no trouble classifying the latecomer’s issue as a development cost when it argues that Poulsbo Group “assumed the risk” of such costs. (See Brief of Respondent at 26.) Talon Development cannot have it both ways. Moreover, the “development costs” referred to in the undisclosed documents are the same costs that were later imposed by the latecomer’s assessment. (See CP 132-33, 264-72, 280-83.)

2. Talon Development’s failure to provide documents proximately caused damage to Poulsbo Group.

Talon Development’s arguments concerning proximate cause and foreseeability boil down to its belief that Poulsbo Group should have done more to find out if there was going to be a latecomer’s assessment.<sup>2</sup> (See Brief of Respondent at 17-18, 22-23, 27.) Contrary to Talon Development’s assertions, however, Poulsbo Group appropriately performed its feasibility study. (See Opening Brief of Appellant at 21-23 & citations to record therein.)

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<sup>1</sup> (Brief of Respondent at 18.)

<sup>2</sup> Talon Development argues that since Poulsbo Group asked about a latecomer’s assessment, Poulsbo Group was “aware of the issue.” (Brief of Respondent at 18, 23.) This argument is nonsensical. Knowing what a latecomer’s assessment is and knowing that Snowberry was pursuing one against Talon Glen are two very different things.

Poulsbo Group addressed Talon Development's criticisms in its opening brief (pages 19-23) and will not belabor each of those points again here, but one blatant mischaracterization by Talon Development must be corrected. Talon Development argues vaguely that "Mr. Jack admits he did not inquire" and that "[t]his is dispositive." (Brief of Respondent at 24.) This assertion is, as far as Poulsbo Group can gather, aimed once again at criticizing Mr. Jack for not asking Mike Lund specifically about a "latecomer's assessment." Talon Development's suggestion that Poulsbo Group sat idly by, however, without bothering to inquire into development costs – including a possible latecomer's assessments – is insulting and wrong. Poulsbo Group reviewed what documents Talon Development did provide. (CP 355-357.) It spoke with City of Poulsbo officials regarding site restraints, city requirements, and anticipated difficulties. (CP 220, 355-57.) It checked the City's utility service connection fees online. (CP 358-60.) It also specifically asked – twice – whether there would be a latecomer's assessment. (CP 220).

Talon Development apparently thinks Poulsbo Group should have asked the same questions, over and over, to anyone and everyone, no matter how many times it was previously represented to Poulsbo Group that there was not going to be any latecomer's assessment. The

law does not require a person to continually “beat a dead horse” in order to double and triple check the truthfulness of what the person has already been told multiple times.

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, 646 P.2d 771 (1982) (“[P]urchasers of property have a right to rely on the sellers’ and their agents’ representations.”).

Talon Development does not rebut this well-established authority. It fails to address it at all.<sup>3</sup>

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<sup>3</sup> Even if the Court found that genuine issues of material fact remain on the element of proximate cause, the trial court’s summary dismissal of Poulsbo Group’s claim must be reversed. See CR 56(c).

3. Poulsbo Group has not asserted a negligent misrepresentation claim.

Talon Development argues that “[t]he economic loss rule bars claims for negligent misrepresentation arising from a contract” and “Poulsbo Group’s claimed losses are purely economic losses and therefore barred.” (Brief of Respondent at 19.) Poulsbo Group has not asserted a negligent misrepresentation claim; rather, it seeks recovery for Talon Development’s breach of contract. Talon Development appears to misconstrue the economic loss rule. The rule does not bar recovery for all economic loss, or preclude contractual remedies.

The economic loss rule maintains the “fundamental boundaries of tort and contract law.” Where economic losses occur, recovery is confined to contract[.]

*Alejandre v. Bull*, 159 Wn.2d 674, 682, 153 P.3d 864 (2007) (quoting *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994)) (internal citations omitted).

4. Poulsbo Group did not “waive” its claim for breach of contract.

Talon Development next argues, incorrectly, that Poulsbo Group “waived” its rights under the contract. (Brief of Respondent at 28.) “[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)).

As stated in Poulsbo Group's opening brief, the portion of the Optional Clauses Addendum relied upon by Talon Development for its "waiver" argument required Talon Development to provide preliminary plat approval prior to the expiration of the feasibility study. (CP 341.) That provision did not require that the "Findings, Conclusions and Decision" document from the January 19, 2007 hearing be given to Poulsbo Group as Talon Development suggests. Moreover, the obligation imposed by that clause was separate and distinct from Talon Development's duty to provide Poulsbo Group with all documents related to Talon Glen. (*See id.*)

Poulsbo Group was notified that preliminary plat approval was obtained. As Mr. Jack testified, Poulsbo Group also knew what the conditions of approval were because the engineers showed Mr. Jack the requirements on the project drawings. (CP 361-62.) If there were any changes to those conditions, new drawings would have been required.<sup>4</sup>

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<sup>4</sup> Talon Development repeatedly cites Craig Deaver's supplemental declaration for the proposition that "any reasonable developer doing due diligence under a purchase and sale agreement for a preliminary plat would want to see the hearing examiner's decision because it would contain the conditions of approval." (CP 326.) There is no foundation in the record, however, demonstrating that Mr. Deaver has pertinent expertise on the subject that he is purporting to opine about.

(*Id.*) Preliminary plat approval was secured and that contractual requirement was satisfied. Nothing was waived.

Poulsbo Group had no idea the document summarizing the hearing examiner's "Findings, Conclusions and Decision" would unexpectedly include testimony from Holly White raising the latecomer's issues that Talon Development chose not to inform Poulsbo Group about. Poulsbo Group had no reason to. Talon Development did not produce the documents disclosing its earlier discussions with Snowberry Enterprises about the shared improvements and their attendant costs, nor had Talon Development seen fit to inform anyone about Holly White's testimony at the hearing. Poulsbo Group did not intentionally and voluntarily give up any rights. There was no waiver.

5. Talon Development's merger argument is without merit.

The trial court found unpersuasive Talon Development's argument that Poulsbo Group's breach of contract claim was somehow barred by the merger doctrine, but Talon Development repeats the argument here. (Brief of Respondent at 37-38; CP 403-04.) The doctrine of merger is not applicable here.<sup>5</sup> Poulsbo Group's breach of

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<sup>5</sup> If the Court were to find that the merger doctrine applied, it would have to reverse the trial court's award of attorneys' fees to Talon Development. (*See* CP 389-91, 403-04); *Barber v. Peringer*, 75 Wn. App. 248, 253-54, 877 P.2d 223 (1994) (recognizing where the underlying real estate contract merges into the deed, so too does the attorneys' fee provision).

contract claim does not relate to the conveyance of title, but to Talon Development's failure to comply with the collateral contract requirement to provide documents.

Where a contract of sale provides for the performance of acts other than the conveyance, it remains in force as to such other acts. 26A C.J.S. Deeds § 195; *see Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248-49, 450 P.2d 470 (1969); *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 914, 146 P.3d 935 (2006) (Purchase and sale agreement provisions do not merge into a deed where they are “collateral contract requirements that are not contained in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent of the obligation to convey.”) (quoting *Barber v. Peringer*, 75 Wn. App. 248, 251-52, 877 P.2d 223 (1994)); *Brown v. Johnson*, 109 Wn. App. 56, 60, 34 P.3d 1233 (2001); *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 423, 843 P.2d 545 (1993).

**B. Talon Development breached the implied duties of good faith and fair dealing.**

Talon Development's unsupported denials that it “did not act in bad faith” does not entitle it to summary judgment. (*See* Brief of Respondent at 21.) As stated in Poulsbo Group's Opening Brief, Talon

Development failed to act in good faith in connection with two substantive contract terms. (Opening Brief of Appellant at 26-27.) 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.

It is undisputed that Talon Development failed to provide any documents to Poulsbo Group that disclosed Talon Development's negotiations with Snowberry Enterprises regarding the subject improvements and costs. (CP 219-20.) Moreover, the evidence is clear that Talon Development knew that Snowberry Enterprises expected to be reimbursed for the improvements and that Holly White was preparing the application for a latecomer's agreement. (CP 141-42; 150, 304.) Nevertheless, when Poulsbo Group specifically asked Talon Development and its representatives about whether there would be a latecomer's assessment, Talon Development not only hid the ball, but affirmatively told Poulsbo Group there would be no latecomer's assessment – even after sitting in and listening to Holly White's testimony at the January 19, 2007 hearing. (CP 220.)

**C. This Court should hold that the economic loss doctrine does not bar intentional fraud claims.**

The economic loss doctrine in Washington is in a state of uncertainty. Division I and Division II of the Court of Appeals appear to disagree about the doctrine's application to intentional fraud claims. Compare *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008) (doctrine bars claims of intentional misrepresentation), with *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009) (fraud and fraudulent concealment claims fall outside the scope of the doctrine), and *Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008) (negligent misrepresentation barred by doctrine, but sufficient findings supported plaintiffs' fraud claims).

Talon Development cites *Cox v. O'Brien*,<sup>6</sup> a case pre-dating *Jackowski*, and argues that “the *Cox* Court specifically adopted the *Carlile* Court’s reasoning and holding – that the economic loss rule bars fraud claims.” (Brief of Respondent at 29.) Talon Development is overstating the Court’s decision in *Cox*. Reviewing the facts recited in the decision, it does not appear that there was any dispute that the “unknown structural damage” at issue in that case was – in fact – “unknown” by the buyer and the seller. *Cox*, 150 Wn. App. at 27, 34,

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<sup>6</sup> 150 Wn. App. 24, 206 P.3d 682 (2009).

206 P.3d 682 (stating “both parties appear to concede that the economic loss rule applies and that the loss at issue here is the structural damage within the walls of the home, undiscovered until after the home sale closed and the Coxes moved in”). Thus, Poulsbo Group cannot tell if (or how) any *intentional* misrepresentation claim was even at issue in *Cox*. This Court should follow *Steinke* and *Jackowski* and hold that the economic loss doctrine does not bar claims of intentional fraud.

**D. Genuine issues of material fact preclude summary dismissal of Poulsbo Group’s intentional misrepresentation claim.**

Finally, Talon Development argues that Poulsbo Group cannot make out a prima facie claim of intentional misrepresentation as a matter of law. (Brief of Respondent at 31-37.) Talon Development is incorrect and the trial court erred when it summarily dismissed Poulsbo Group’s intentional misrepresentation claim.

First, without citation to any evidence, Talon Development attempts to disclaim knowledge of any latecomer’s issue. (*See* Brief of Respondent at 32-33 (“At all times prior to closing, no one from Talon believed there would be a latecomers’ assessment”; “The latecomers’ agreement application was unknown to all until the city provided notice in August 2007 – long after closing.”).) These representations are not true. It is undisputed that Talon Development representatives attended

the January 19, 2007 hearing in which Holly White testified with unmistakably clarity:

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.) Talon Development's protestations of ignorance are simply not credible.

Talon Development also argues that even if it made knowing and intentional misrepresentations, Poulsbo Group was not entitled to rely upon them. (*See* Brief of Respondent at 34-37.) Poulsbo Group already addressed Talon Development's flawed logic in its Opening Brief. (Opening Brief of Appellant at 32-24.) As previously set forth, the facts and the law do not support Talon Development's position. *E.g., McRae*, 32 Wn. App. at 177, 646 P.2d 771 (“[P]urchasers of property have a right to rely on the sellers’ and their agents’ representations.”).

Talon Development also dusts off its criticism of Mr. Jack's feasibility investigation and argues that "where a purchaser discovers evidence of a problem, the purchaser is obligated to inquire further." (Brief of Respondent at 35-36.) There are two principal flaws with this argument.

First, Talon Development is, once again,<sup>7</sup> attempting to equate Poulsbo Group's awareness of what a latecomer's assessment is, with knowledge that Snowberry was seeking a latecomer's assessment against Talon Glen. Poulsbo Group never "discovered evidence of a problem," it simply knew what a latecomer's assessment was and asked if there would be one. Second, Talon Development completely fails to address the legal authorities cited by Poulsbo Group which contradict Talon Development's argument given Talon Development's affirmative misrepresentations.

[O]ne 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

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<sup>7</sup> See *supra* note 2.

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). Poulsbo Group did inquire – Talon Development and its representatives just did not tell the truth.

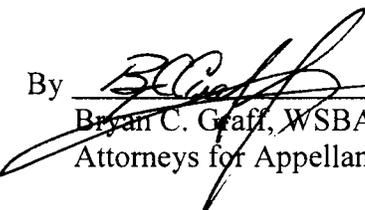
### III. CONCLUSION

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 September, 2009.

RYAN, SWANSON & CLEVELAND, PLLC

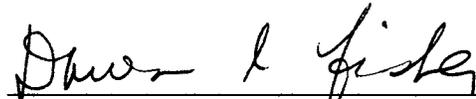
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**DECLARATION OF SERVICE**

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

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