

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY for  
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NO. 40974-II

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

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KEY DEVELOPMENT INVESTMENT, LLC and TRINITY GLASS  
INTERNATIONAL, INC.,

Plaintiffs-Respondents/  
Cross-Appellant

v.

PORT OF TACOMA,

Defendant-Appellant/  
Cross-Respondent.

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REPLY BRIEF OF CROSS APPELLANT  
KEY DEVELOPMENT INVESTMENT, LLC

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## I. INTRODUCTION

The Supreme Court's ruling in *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010), fundamentally altered the analysis Washington courts must apply to tort causes of action in cases that also involve contractual relationships.

Relying on *Eastwood*, Plaintiff Key Development Investment, LLC ("Key") has cross appealed from the trial court's May 2010 order granting summary judgment for the Port of Tacoma on Key's tort claims for tortious interference, fraud, and negligent misrepresentation. After determining that Key and the Port had a contractual relationship under the Letter of Intent, the trial court dismissed each of Key's tort claims based solely on a bright-line application of the former "economic loss rule," which the court interpreted as barring tort claims by parties to a contract. CP 1043-44 (citing *Alejandre v. Bull*, 159 Wn.2d 674, 684, 153 P.3d 864 (2007)). It did so based on an understanding and application of the former economic loss rule that cannot survive the subsequent holdings of *Eastwood* and its companion case, *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010).

Despite this clarification of the law, the Port insists that the former rule of *Alejandre*, not *Eastwood*, controls this appeal. According to the Port, "the *Eastwood* court issued three opinions, none garnering a

majority,” and “the independent duty doctrine does not change or negate the economic loss rule: it merely gives the old rule a new name.” Reply Brief of Appellant/Brief of Cross-Respondent (“Opp. Br.”) at 9. To the contrary, although the Supreme Court did not reverse the *outcome* of its prior decisions in *Alejandre* and other individual cases, it abandoned the analysis that the Court had employed in *Alejandre* and that lower courts had subsequently followed. Seven Justices explicitly rejected the Court’s former focus on the nature of the loss, holding instead that courts now must determine whether defendant had *an independent legal duty* to avoid plaintiff’s alleged injury. *Eastwood*, 170 Wn.2d at 389-90. *Contra Eastwood*, 170 Wn.2d at 405 (Madsen, C.J., and Alexander, J., concurring) (Court should instead retain former analysis under *Alejandre* that “economic losses are distinguished from personal injury or injury to other property”).

As other courts have already recognized, *Eastwood* profoundly altered the legal landscape and superseded the rule the trial court relied upon in its May 28, 2010 summary judgment order. *See, e.g., Putz v. Golden*, 2010 WL 5071270, at \*13-14 (W.D. Wash. Dec. 7, 2010) (recognizing that *Eastwood* and *Affiliated* modulated not only the rule’s nomenclature, but also its formulation). This Court should decline the Port’s suggestion that it ignore the Supreme Court’s controlling authority

in *Eastwood*.

In addition to asking this Court to affirm the trial court's ruling regarding the former economic loss rule, the Port also asks the Court in the alternative to affirm summary judgment based on the Port's erroneous contention that it "owed no tort duties to Key that were independent of its contract with Key." Opp. Br. at 35. In doing so, the Port asks this Court to accept its version of numerous disputed factual issues. *See, e.g., id.* at 38 ("The Port established below that it had made no intentional misrepresentations to Key that might be considered use of 'improper means.'). The trial court made no such determination.

In any event, this Court must consider all facts and reasonable inferences regarding the Port's summary judgment motion in the light most favorable *to Key* as the nonmoving party. *See Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). This means that for purposes of summary judgment, the Court must accept Key's version of events. That version demonstrates that the Port violated legal duties it owed to Key and Trinity independently of any contract terms or obligations. Both before and after the parties signed the Letter of Intent, the Port knew that Key would probably sell or lease the Property to someone else if Key thought a sale to the Port was uncertain. To prevent that from happening, the Port misrepresented facts and withheld essential

information from Key while the Port was making up its mind about whether to go through with condemning the Superlon site – because the Port wanted to keep its options open until it was confident that it could avoid relocating Superlon. *See, e.g.*, CP 157-58 ¶¶ 6, 9 (So Dec.) (Port repeatedly and falsely represented to representative of Key and Trinity that Superlon’s property had to be taken for the Port’s terminal redevelopment project, and that Superlon had to be relocated out of the Port of Tacoma). Because the trial court erred as a matter of law in ruling that the former economic loss rule barred Key’s three tort causes of action, this Court should reverse the trial court’s May 28, 2010 Order, and remand Key’s tort claims for trial, together with Plaintiffs’ other claims.

## **II. RESPONSE TO PORT’S OBJECTION REGARDING RECORD**

Rather than acknowledge the impact of *Eastwood* on the trial court’s summary judgment ruling, the Port opens its Opposition Brief by pounding the table – accusing Key and Trinity of seeking to mislead the Court by their citations to Plaintiffs’ Statement of Uncontested Facts-Corrected (“Statement”). *See, e.g.*, Opp. Br. at 1. The Court should reject the Port’s objection for three independent reasons.

*First*, the Statement is properly part of the trial record, was considered by the trial court, and was duly designated in the clerk’s papers

at CP 1690-1727. The Port chose not to contest most of the facts set forth in the Statement in the trial court. Parties routinely use such annotated statements identifying both material factual disputes and the parties' supporting evidence. *See, e.g., In re Detention of Boynton*, 152 Wn. App. 442, 448-49, 216 P.3d 1089 (2009) (State filed a detailed summary of facts with attachments in conjunction with petition to commit defendant). Indeed, numerous trial courts *require* these submissions in order to frame the issues presented by summary judgment motions. *See, e.g.,* E.D. Wash. LR 56.1; C.D. Cal. LR 56-1, 56-2. Some of the citations in Key's Opening Brief refer to the Statement itself. *See, e.g.,* Opening Brief at 4 (citing Statement for the fact that the Port publicly announced its plans to redevelop the Blair Peninsula container terminal). Other citations refer to the underlying documentation. *Id.* at 4 (citing to Condemnation Petition at CP 1145-65 for fact that the Port initiated a condemnation action against the Superlon property on August 8, 2007). In each instance, Key and Trinity acted transparently, consistently with the rules, and in good faith.

*Second*, the Port's accusations regarding Key's citations are unfounded. For example, without providing any basis for its objection, the Port asks the court to strike every fact supported by citation to the summary, including "'representations' allegedly made by Port employees" set out on page 38 of Plaintiffs' Opening Brief. Opp. Br. at 28. The basis

for the factual assertions on that page are the declaration of Chong So, CP 157 ¶ 6, and supporting testimony at CP 1171, 1127, 1133, 1136. Mr. So, an employee representing both Trinity and Key, was intimately involved in the negotiations between the Port and Key, and is uniquely qualified to offer testimony detailing the misrepresentations the Port made to both Trinity and Key. It is not surprising that the Port would like to strike his statements.

The Port also repeatedly contends that Key and Trinity misrepresented Mr. Bauder's testimony in Plaintiffs' Opening Brief by stating that the Port withheld material information because it was "concerned that if Trinity knew what was going on, Trinity might sell the property to someone else." Opp. Br. at 21 (citing Key's Opening Brief at 35). The Port contends that the testimony was actually Mr. Emerson's, and that Mr. Emerson said no such thing. Opp. Br. at 21. However, the record relied upon by Key shows that when Mr. Bauder was asked at his deposition whether Mr. Emerson had withheld information for that reason, he responded "yes." CP 1390-1391 (cited in Statement at CP 1713-14 ¶ 117). An affirmative answer to a leading question is admissible as testimony to that effect. *See, e.g., Schultz v. Kolb*, 189 Wash. 187, 191, 64 P.2d 79 (1937) (relying on testimony of witness in the affirmative to leading question concerning ability to pay taxes).

Similarly, the Port characterizes as a “misrepresentation” Key’s restatement of the Port’s position that “unlike Trinity Key was a party to the transaction with the Port.” Opp. Br. at 43 n.5. But the Port premised its summary judgment argument on its contention that it *had* entered into a contract with Key. *See, e.g.*, Brief of Appellant at 9 (acknowledging that trial court’s ruling regarding former economic loss rule was premised on its finding that the Letter of Intent “was a contract” between Key and the Port). Thus, despite the Port’s recent contention otherwise, Key accurately restated the Port’s position.

*Third*, the Port’s Objection asks the Court to adopt the Port’s version of the parties’ factual disputes, and to ignore the evidence and inferences presented by Key that contradict the Port’s assertions. *See, e.g.*, Opp. Br. at 38. Key has appealed from the lower court’s order granting summary judgment, and the Court must therefore consider all facts and reasonable inferences in the light most favorable to Plaintiffs, not the Port. *See Korslund*, 156 Wn.2d at 177.

Key and Trinity properly relied on the assertions and inferences set forth in the Statement, as well as on the underlying factual materials referenced in the Statement. For example, the Port challenges Key’s characterization of the parties’ communications by citing a declaration filed by the Port Real Estate Manager that conflicted with his previous

deposition testimony. Opp. Br. at 21. But a party may not avoid summary judgment by submitting declarations that contradict earlier deposition testimony of the same witness. *See Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (any inference drawn from affidavit contradicting prior testimony is not reasonable). Similarly, the Port refers to witness declarations characterizing what they understood about Key's negotiations with other potential purchasers and lessees. Opp. Br. at 5-6. But Key submitted testimony from other witnesses regarding those negotiations that establish that Key and Trinity acted in reliance on the Port's representations and conduct. For example, when asked what explanation he gave to Mr. Widman for declining his offer, Mr. Lee explained that "We were not interested in that deal from Mr. Widman because we had a deal with the Port." CP 1439. *See also* CP 158-59 ¶¶ 7, 11-14 (Key also declined lease opportunities in reliance on Port). For purposes of determining whether summary judgment was appropriate, this Court must accept Key's version of disputed factual issues. The Court should reject the Port's objection to Plaintiffs' citations.

### III. REPLY ARGUMENT ON KEY'S CROSS APPEAL<sup>1</sup>

#### A. Under *Eastwood*, Plaintiffs May Assert Tort Claims Based On Independent Legal Duties Owed By A

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<sup>1</sup> Pursuant to RAP 10.1(f) and 10.3(c), this Reply Brief is limited to Key's cross-appeal from the trial court's order granting the Port's motion for summary judgment dismissing Key's three common law tort causes of action.

**Defendant -- Regardless The Parties' Contractual Relationships.**

The Port's strategy in responding to Key's cross appeal is simple: ask the Court to turn a blind eye to the Supreme Court's ruling in *Eastwood*. See, e.g., Opp. Br. at 9 ("The independent duty doctrine does not change or negate the economic loss rule: it merely gives the old rule a new name."). Like the trial court's pre-*Eastwood* ruling, the Port relies on the former formulation of the economic loss rule, contending that if parties have signed a contract, they cannot assert tort claims seeking damages for commercial harms. Opp. Br. at 9, 48. (citing *Alejandre* analysis); see also CP 1043-44 (summary judgment order citing *Alejandre*, 159 Wn.2d at 684).

The Port willfully misconstrues the impact of *Eastwood* and *Affiliated* on courts' analysis of tort claims. For example, in *Putz v. Golden*, a federal district court from the Western District of Washington recognized that in *Eastwood*, the Washington Supreme Court reinterpreted prior jurisprudence and rejected the broad application of the economic loss rule as barring recovery for tort damages "whenever [they] arise out of a relationship governed by contract." 2010 WL 5071270, at \*13-14 (Robart, J.). The court relied on *Eastwood* to hold that the plaintiff's claims for tortious interference with a business relationship and negligent

misrepresentation were not barred under the clarified rule. Rather, the court noted that the *Eastwood* court specifically recognized that damages for both types of claims may be recoverable “even if they arise from contractual relationship.” *Id.* at 15 (citing *Eastwood* at 388).

*Eastwood* represents an analytical shift in the way Washington courts should analyze tort claims between contracting parties, and forecloses any argument that the independent duty doctrine bars tort claims arising from duties independent of any contractual obligations.

**B. The Port Had Legal Duties To Avoid Causing Harm To Key That Were Independent Of The Terms Of Any Agreement Between The Parties.**

As the Supreme Court recognized in *Eastwood* and *Affiliated*, Washington law has historically allowed injured plaintiffs to recover in tort economic losses caused by violations of particular legal duties recognized at common law, regardless whether the parties also have contractual relationships. *See Eastwood*, 170 Wn.2d at 388-89; *Affiliated FM Ins.*, 170 Wn.2d at 448 (quoting *Eastwood*, 170 Wn.2d at 388).

Before obtaining recovery, a plaintiff must satisfy specific elements tailored to reflect the particular policy and evidentiary concerns that are relevant to each such tort cause of action. As detailed in Key’s opening brief, the Washington Supreme Court has *already* determined that the three tort claims at issue in this appeal provide remedies for a

defendant's breach of legal duties that are independent of any duty that arises from the terms of a contract. First, Washington law allows plaintiffs to recover damages caused by a defendant's **intentional and wrongful interference** with business expectancies. *Eastwood*, 170 Wn.2d at 388 (citing *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992)). Second, **fraud** claims are not based on commercial injuries, but rather upon societal duties warranting recovery in tort upon breach of those duties. *Steineke v. Russi*, 145 Wn. App. 544, 558, 190 P.3d 60 (2008); *see also Eastwood*, 170 Wn.2d at 388 (citing *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969)). Finally, Washington law also provides a remedy for economic losses caused by certain **negligent misrepresentations**. *Eastwood*, 170 Wn.2d at 388 (citing *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 825, 959 P.2d 651 (1998)). *See also* Key's Opening Appeal Brief at 32-47.

Nevertheless, the Port repeatedly cites to the Supreme Court's observation that courts must determine whether the common law imposes legal duties on a "case by case basis," suggesting that the court should start from scratch in every lawsuit. Opp. Br. at 10, 16, 24 (citing *Eastwood*, 170 Wn.2d at 389). But the Court has already recognized that each of the three tort causes of action at issue impose independent legal duties as a matter of Washington common law. *Eastwood*, 170 Wn.2d at

388. See also *Strategic Intent, LLC v. Strangford Lough Brewing Co.*, 2011 WL 1810474, at \*12 (E.D. Wash. May 11, 2011) (recognizing that under *Eastwood's* case-by-case analysis, Washington law has already recognized independent tort duties not to commit fraud or negligent misrepresentation).

Key does not ask this Court to create a new tort cause of action that would provide additional common law remedies for purely economic harms. *Contra Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417-18, 422, 745 P.2d 1284 (1987) (rejecting proposed tort of negligent construction). Because Key has asserted only the three enumerated tort claims, this appeal also does not present the question whether the Port also breached a duty owed as a matter of general negligence in the particular circumstances of this case. *Compare Affiliated*, 170 Wn.2d at 460-61 (recognizing general negligence claim against engineer who allegedly caused fire), *with Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994) (rejecting general negligence claim seeking delay damages). Nor is it necessary for the Court to resolve competing demands of tort and contract law. *See id.* at 827-28 (barring negligent misrepresentation claim that would have conflicted with specific contractual term limiting

liability).<sup>2</sup> Instead, the Court may apply well-established tort principles to the record in this case.

Contrary to the Port's contention, Key's tort claims also do not seek the benefit of the bargain or expectation damages that would only be available as a contract remedy for a breach of the alleged terms of the parties' confidentiality agreement or Letter of Intent. Opp. Br. at 49. Indeed, in the case of negligent misrepresentation, an award of "damages for the benefit of the plaintiff's contract with the defendant is specifically *not* allowed under the Restatement." *Janda v. Brier Realty*, 97 Wn. App. 45, 50, 984 P.2d 412 (1999) (citing RESTATEMENT (SECOND) OF TORTS § 552B) (1977)) (emphasis added); *see also Berschauer/Phillips*, 124 Wn.2d at 827-28 (rejecting plaintiff's alternative negligent misrepresentation claim seeking only damages representing benefit of bargain). Instead of seeking damages measured by the benefit of bargain of the Port's unconsummated purchase of its property, Key's negligent misrepresentation and tortious interference claims seek damages for Key's "pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation." *Janda*, 97 Wn. App. at 50 (quoting

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<sup>2</sup> The March 2009 Letter of Intent does not in any way address the Port's prior misconduct. The document does not have an integration clause, nor does it have a valid exculpatory provision that might potentially limit the Port's liability. *See, e.g., Eastwood*, 170 Wn.2d at 394 n.3 (exculpatory clauses are strictly construed and must be conspicuous).

RESTATEMENT, *supra*, § 552B). These tort damages include Key's failure to obtain the benefit of the opportunities it had to sell or re-lease the Property to parties *other than the Port* that it lost as result of the Port's wrongful conduct, which extended for a period of *months* both before *and* after the parties signed the Letter of Intent in March 2009. Because the Port's tort duties at issue in this appeal arose independently of the terms of the alleged contract between Key and the Port, the trial court erred in dismissing Key's tort claims under the former economic loss rule.

**C. The Court Should Reverse The Trial Court's Order Granting Summary Judgment On Key's Tort Claims.**

**1. Genuine Issues Of Material Fact Preclude Summary Judgment On Key's Intentional Interference Claim.**

Washington law imposes an independent legal duty to refrain from causing economic harm by wrongfully interfering with another parties' business opportunities. *Eastwood*, 170 Wn.2d at 388. The elements of this cause of action are (1) a valid contractual relationship or business expectancy, (2) defendant's knowledge of that relationship, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) interference by the defendants based on an improper purpose or improper means, and (5) resultant damages. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992).

“A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (citing RESTATEMENT (SECOND) OF TORTS § 766B, cmt. c). Key has identified at least three prospective contractual relationships, all of which were thwarted by the Port’s wrongful conduct: selling the property to Harvey Widman, or entering into leases with mkConstructs or MetalTech. CP 1439; CP 157-158 ¶¶ 6, 7 (Widman opportunity); CP 158-59 ¶¶ 11-14 (lease opportunities).

The Port contests only one element of Key’s tortious interference claim: whether its conduct was “wrongful.” Opp. Br. at 36. The Port contends as a matter of law that it “had a privilege to attempt to ‘induce’ Key not to enter into contracts with other lessors or purchasers” through the use of false or misleading statements. *Id.* Whether a party used improper means to interfere with another party’s contract or business expectation is a question of fact. RESTATEMENT (SECOND) OF TORTS § 767 cmt I. The question is submitted to the jury “to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in question.” *Newton Ins. Agency & Brokerage*, 114 Wn. App. at 159. As set forth in the Restatement,

The fact finder may consider several factors to determine whether interference is importer including: “(a) the nature of the actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor’s conduct to the interference and (g) the relations between the parties.”

RESTATEMENT (SECOND) OF TORTS § 767.

The Port erroneously contends “Key failed to present evidence of ‘wrongful means’ utilized by the Port.” Opp. Br. at 38. To the contrary, Key has presented substantial evidence that at a minimum establishes there are disputed material factual issues precluding summary judgment. For example, Chong So, the Trinity employee who represented Key in connection with the Port, testified that

In the midst of the negotiations between the Port and Key, on or about November 27, 2007, Key received a letter of intent from Harvey Widman and Assigns to purchase the Property for \$32.8 million. I authorized the brokers to disclose to the Port that Key had received an offer for \$32.8 million for the Property and to tell the Port that Key’s asking price to the Port for the Property was \$35 million. In response, beginning in December 2007, the Port, acting through Mr. Emerson, Mr. Stewart and Mr. Hedge, ***repeatedly and insistently represented to me that Superlon’s property had to be taken for the***

***Port's terminal redevelopment project*** and as a result Superlon had to be relocated out of the Port of Tacoma; Superlon had to be moved because of the Port project; to relocate Superlon, the Port intended to purchase Key's property for \$35 million; ***the Superlon property was necessary for the Port redevelopment project and there was no possible way the Port could proceed without taking down the Superlon property; taking of the Superlon property was a certainty***; Key's Property was the only available property that would accommodate Superlon's physical needs and the Port's timing requirements; the Port had no options, given the timeline the Port was working with, to put Superlon anywhere else but Trinity; the need to take the Superlon property and to acquire Key's property was "urgent" given the timing of the Port's terminal redevelopment project; the \$35 million purchase price was "not a problem" because of the Port's critical need and "urgency" to take the Superlon property and to relocate Superlon....

CP 157-58 ¶ 6(So Dec.) (emphasis added). The Port's own representative, Jay Stewart, testified that it was his understanding that it was necessary for the Port to take the Superlon property in order to accommodate the Port's development project, CP 1336-37, and that he consistently represented to Key that the Superlon property would have to be taken. CP 1352.

Meanwhile, however, the Port had determined internally that its strategy would be to avoid condemning the Superlon property, CP 1479; 1480-81, 1516, but it intentionally withheld that information from Key and Trinity. *See, e.g.*, CP 157-58 ¶ 6; CP 1171, 1127, 1133, 1136. And when

Plaintiffs' representatives told the Port about each of the business opportunities to re-lease the Property to other parties, the Port pressured them to keep the Property available. *See, e.g.*, CP 159 ¶ 14.

The Port had no privilege to interfere with Key's business expectations by means of fraudulent misrepresentations and omissions. Because the Port failed to establish the absence of disputed factual issues, the Court should reverse the order granting summary judgment on Key's tortious interference claim. *See, e.g., Pleas v. Seattle*, 112 Wn.2d 794, 795, 805, 774 P.2d 1158 (1989) (court of appeals erred in reversing trial court's grant of summary judgment for plaintiff on its intentional interference claim where, among other things, plaintiff presented sufficient evidence to support claim and defendant "failed to produce persuasive evidence" its conduct was privileged or justified); *Shah v. Allstate Ins. Co.*, 130 Wn. App. 74, 82-83, 121 P.3d 1204 (2005) (reversing summary judgment dismissing negligence claim, and noting that all inferences must be drawn in favor of the nonmoving party).

**2. Genuine Issues Of Material Fact Preclude Summary Judgment On Key's Intentional Misrepresentation Claim.**

The Port had an independent legal duty not to commit fraud. *Eastwood*, 170 Wn.2d at 388 (citing *Beckendorf*, 76 Wn.2d at 462). A party can establish fraudulent concealment or misrepresentation by

proving its nine elements *or* by showing the defendant breached an affirmative duty to disclose a material fact. *Crisman v. Crisman*, 85 Wn. App. 15, 21, 931 P.2d 163 (1997).<sup>3</sup>

The presence or absence of fraud is a question of fact for the jury. *N. Pac. Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn. App. 228, 232, 628 P.2d 482 (1981). Nevertheless, the Port argues that it is entitled to summary judgment – solely on the grounds that Key had no “right to rely on the truth of the representations” because Key’s representatives had experience with real estate transactions. Opp. Br. at 40 (citing *W. Coast, Inc. v. Snohomish Cnty.*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002)). According to the Port, that experience made them “peculiarly fitted and qualified” to determine whether the Port was lying, barring Key’s misrepresentation claim as a matter of law. Opp. Br. at 40 (citing *Beckendorf*, 76 Wn.2d at 464). The Port’s contentions present disputed factual issues that a jury must be decide.

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<sup>3</sup> Contrary to the Port’s contention, Opp. Br. at 43, Restatement Sections 551 and 552 are relevant to determining whether a defendant has a legal duty to disclose particular information. *See, e.g., Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn. App. 377, 386, 45 P.3d 580 (2002) (citing § 551 as invoking the duty to disclose in a business transaction under four circumstances, including where a seller has knowledge of a material fact unknown to the buyer); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 698, 994 P.2d 911 (2000) (an affirmative duty to disclose can arise where a seller has knowledge of a material fact not easily discoverable by the buyer).

The Port also erroneously relies on *Beckendorf* for the proposition that Key representatives were uniquely qualified to know that their counterparts from the Port were lying. In *Beckendorf*, the court considered whether parents who deeded their ranch to their son rightly relied on his promise to operate the ranch and pay the expenses out of his half of the farm's gross income, even though the farm operated at a loss. 76 Wn.2d at 458-59. The court held that the parents knew better than anyone else whether their son's promises were irrational because they knew the farm operated at a loss, and their son would have no income. *Id.* at 463-64. Therefore, they could not have relied on his promise that he would pay the expenses from his share of the farm income. *Id.* at 464.

Unlike the parents in *Beckendorf*, Key's representatives, including those who had expertise in real estate, had no evidence or other indication that the Port was telling them one thing while intending to do another. In fact, immediately upon learning of such evidence when the newspaper article was published, Key confronted the Port about the information. CP 161 ¶¶ 21-22. The Port has not established that it would be entitled to summary judgment as a matter of law.

The Port also cites *Oates v. Taylor*, 31 Wn.2d 898, 904, 199 P.2d 924 (1949), for the proposition that a party cannot be "taken advantage of" when his prior business experience should have led him to acquire further

information before he acted. However, the Court in *Oates* noted that the duty to speak *does* arise when the material facts being concealed are peculiarly within the knowledge of one person and not obtainable by the other. *Id.* Here, only the Port knew or could have known that it did not intend to go forward with acquiring the Superlon site, as it had represented to Key. And indeed, Key sought and obtained assurances on multiple occasions that the Port intended to proceed with the Superlon condemnation and with the purchase of Key's property. CP 157-58 ¶ 6.

The Port also argues that Key could not rely on the Port's statements regarding its intentions to buy Key's property because any final sale would depend on Port Commission approval and other contingencies. Opp. Br. at 42. But as discussed above at III.C.1, pages 18-19, Key has presented substantial evidence that the Port made false representations regarding the scope of its expansion project and the role of the Superlon site. *See, e.g.*, CP 157-58 ¶ 6; CP 1171, 1127, 1133, 1136. That evidence creates material issues of disputed fact that preclude summary judgment – even without reaching the additional evidence of the Port's false statements regarding the proposed purchase of the Key property itself. Nevertheless, that evidence regarding the Port's intentions regarding the proposed sales transaction with Key also supports Key's fraud claim. Although Washington courts “subscribe[] to the general rule that, while a

mere unfulfilled promise cannot constitute fraud, a promise made with no intention of keeping it is a ‘misrepresentation of an existing fact’– the speaker’s state of mind – and may be the basis of an action in fraud if the other elements are present.” *Beckendorf*, 76 Wn.2d at 462-63. *See also Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 395-96, 457 P.2d 535 (1969). This Court should reverse the lower court’s order granting the Port’s motion for summary judgment on Key’s fraud claim.

**3. Genuine Issues Of Material Fact Preclude Summary Judgment On Key’s Negligent Misrepresentation Claim.**

Washington also recognizes an independent tort claim for purely economic losses resulting from negligent misrepresentations and omissions. *Eastwood*, 170 Wn.2d at 388 (citing *ESCA Corp.*, 135 Wn.2d at 825). A defendant who supplies false information in the course of his business for the guidance of others in their business transactions is subject to liability to those parties for their losses sustained in justifiable reliance on the false information. *W. Coast*, 112 Wn. App. at 209-10. Whether a party justifiably relied upon a negligent misrepresentation is generally an *issue of fact* for the jury. *ESCA Corp.*, 135 Wn.2d at 828. The Port does not even address the evidence regarding its affirmative false statements to Key. *See, e.g.*, CP 157-58 ¶ 6 (So declaration stating that as of December 2007, the Port represented that Key’s property was the only available

property for Superlon's relocation, and that it intended to purchase the property for \$35 million). Instead, the Port limits its discussion to its potential liability for *withholding* information, contending that summary judgment is warranted because "no Washington court has ever established duty upon a buyer to reveal its intentions throughout negotiation." Opp. Br. at 45. According to the Port, parties negotiating contracts related to real estate are excused from any independent legal duty to disclose information at all related to the transaction. Opp. Br. at 45 (citing *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 853 P.2d 913 (1993)). But in *Colonial*, the court noted that Washington courts will find a duty to disclose *not only* where there is a special relationship between the parties, but also where – as here – one party has knowledge of a material fact not easily discoverable by the other party. *Id.* at 732 (quoting *Favors v. Matzke*, 53 Wn. App. 789, 796, 770 P.2d 686 (1989)).

Finally, the Port asks this Court to adopt Oregon's version of the economic loss rule. Opp. Br. at 48 (citing *Onita Pac. Corp. v. Trs. Of Bronson*, 315 Ore. 149, 843 P.2d 890, 899 (1992) ("In an arm's length negotiation, negligent misrepresentation is not actionable")). The Port's proposed approach directly conflicts with the Washington Supreme Court's direction regarding Washington's independent legal duty doctrine. Contrary to the Port's contention, Washington law recognizes a legal duty

to avoid negligent misrepresentation that is independent of the terms of any contract. *Eastwood*, 170 Wn.2d at 388.

#### IV. CONCLUSION

As the Supreme Court observed in *Eastwood*, the interpretation of the economic loss rule by many lower courts, including the trial court in this case, may have been “understandable” but was “not correct.” 170 Wn.2d at 387. The Supreme Court has now given guidance that under Washington common law, the Port had independent legal duties to refrain from interfering with Key’s business expectations and from intentional or negligent misrepresentations – regardless whether the Port and Key also had contractual duties arising from the terms of the confidentiality agreement or the Letter of Intent. Those duties arise, not by virtue of any contract terms, but from long-established principles of tort law.

The trial court dismissed Key’s tort claims based solely on its understanding that the former economic loss rule barred all tort claims between parties to a contract. That ruling cannot survive the Supreme Court’s subsequent clarification of the independent legal duty doctrine in *Eastwood* and *Affiliated*. Because genuine issues of material fact preclude summary judgment on each of these tort claims, this Court should reverse the trial court’s May 28, 2010 order granting the Port’s motion for summary judgment on Key’s tort causes of action.

RESPECTFULLY SUBMITTED this 29th day of August, 2011.

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**CERTIFICATE OF SERVICE**

I, Peggy Mitchell, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct. I am over the age of 18 years and not a party to the within cause. I am employed by the law firm of Davis Wright Tremaine LLP And my business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045.

On August 29, 2011, I caused to be served via First Class U.S. mail and electronic mail, the attached **REPLY BRIEF OF CROSS APPELLANT KEY DEVELOPMENT INVESTMENT, LLC** on the Port of Tacoma's attorneys at the following address:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 29<sup>th</sup> day of August, 2011, at Seattle, Washington.

  
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Peggy Mitchell

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