

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

MATTHEW D. AUSTIN, *Appellant*,
v.

LANCE Ettl and MANDY Ettl, and the marital community
composed thereof,
Respondents.

11 SEP 15 PM 4:34
STATE OF WASHINGTON
BY DEPUTY

COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

DAVID J. BRITTON, WSBA# 31748
Attorney for Appellant Matthew D. Austin

BRITTON & RUSS, PLLC
2209 North 30th Street, Suite 4,
Tacoma, WA 98403
Tel: (253) 383-7113
Fax: (253) 627-5822
brittonlaw@comcast.net

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<u>ASSIGNMENT OF ERROR NO. 1:</u>	p. 13

The trial court incorrectly applied a summary judgment standard, evaluating the presence or absence of issues of fact, rather than the correct standard for evaluating a CR 12(b)(6) motion: the motion should not have been granted unless the moving party could show, beyond a reasonable doubt, that Mr. Austin could not prove any set of facts consistent with his pleadings that would justify relief.

ISSUES RELATED TO ASSIGNMENT OF ERROR NO. 1:

- a. A Motion to Dismiss for Failure to State a Claim should not have been granted unless the Ettl's could prove, beyond a reasonable doubt, that Austin could prove *no* set of facts, consistent with his pleadings, that would justify relief.
- b. The trial court did not make any finding that the Ettl's had met the standard for dismissal beyond a reasonable doubt.
- c. Austin had in fact set forth allegations in his Complaint that would, once proven, have justified relief.

ASSIGNMENT OF ERROR NO. 2:

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The trial court incorrectly relied on *Alejandre v. Bull* in applying the now-outdated “economic loss rule” to Mr. Austin’s negligent misrepresentation claim.

ISSUES RELATED TO ASSIGNMENT OF ERROR NO. 2:

- a. The “economic loss rule” of *Alejandre* has been modified, if not abrogated outright, by the “independent duty doctrine” as set forth by the Washington Supreme Court in *Eastwood v. Horse Harbor Foundation*.
- b. Under *Eastwood*, some tort claims, including negligent misrepresentation, are actionable in tort even where the duty arose from a contract between the parties, as long as that duty also exists independently of the contract.
- c. The physical defect of the home in *Alejandre*, which should have been uncovered in a home inspection in the normal course of business, can be differentiated from and LID formation process, where only Ettl has received the notices from the City, and has withheld them from Austin, who had no way of knowing.

ASSIGNMENT OF ERROR NO. 3:

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The trial court failed to apply Restatement Torts § 551, as adopted by the Washington Supreme Court in *Colonial Imports v. Carlton Northwest* and *Van Dinter v. Orr*, which holds that the Defendant’s failure to correct a partial or ambiguous disclosure of facts constitutes negligent misrepresentation.

ISSUES RELATED TO ASSIGNMENT OF ERROR NO. 3:

- a. Restatement Torts § 551, as adopted by the Washington Supreme Court in *Colonial Imports v. Carlton Northwest* and *Van Dinter v. Orr*, holds that the Defendant’s failure to correct a partial or

ambiguous disclosure of facts constitutes negligent misrepresentation.

- b. The trial court was apprised of this rule, but failed to apply it.

ASSIGNMENT OF ERROR NO. 4:

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The trial court failed to address Mr. Austin's unjust enrichment claim and the allegations in support thereof, and therefore erroneously dismissed a claim that had in fact been adequately stated in Austin's pleadings.

ISSUES RELATING TO ASSIGNMENT OF ERROR NO. 4:

- a. The trial court ignored Plaintiff's unjust enrichment claim, granting Defendant's motion to dismiss under CR 12(b)(6) without addressing it in any way.
- b. Mr. Austin pleaded facts sufficient, once proven, to support a claim of unjust enrichment.

E. CONCLUSION

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A. STATEMENT OF THE CASE

Plaintiff/Appellant Matthew D. Austin appeals the trial court's dismissal of his negligent misrepresentation and unjust enrichment claims against Defendants/Respondents Lance and Mandy Ettl pursuant to CR 12(b)(6), for failure to state a claim upon which relief may be granted. Because the trial court's dismissal of Mr. Austin's complaint was based on CR 12(b)(6), the following Statement of the Case is based in large part on the allegations of Mr. Austin's complaint.

a. Allegations of Plaintiff's Complaint

On July 19, 2007, Plaintiff/Appellant Matthew D. Austin and Defendant/Respondent Lance Ettl executed a Real Estate Purchase and Sale Agreement ("REPSA"), whereby Ettl sold Austin the parcel of real property commonly known as 6901 S. Madison Street, Tacoma, Pierce

County, WA (hereinafter “the Property”). The parties set a closing date of August 24, 2007. (Complaint, Para. 2.1, CP at 12).

Although mutual acceptance for purchase of the property occurred on July 30, 2007, Ettl waited until the August 24 closing had actually commenced before faxing Austin a completed Seller Disclosure Statement (Form 17). For the first time, *in the middle of a closing*, Ettl disclosed the existence of a Local Improvement District (“LID”) for street lighting and storm drainage that would affect the property. But even then, at almost literally the last possible minute, Ettl withheld the dollar amount of the assessment against the property. Only the existence of an LID was disclosed – not the amount of liability. (Complaint, Para. 2.2, CP at 12).

In fact, Ettl had been informed by the City of Tacoma as early as May 22, 2007, *three months prior to closing*, not only that an LID affecting the Property had been proposed, but also that the proposed share of the cost to be assessed against the Property would be \$37,767.40 for LID No. 8648, and \$3,459.00 for LID No. 6979. (Complaint, Para. 2.3, CP at 12- 13). Furthermore, Ettl submitted written comments in opposition to the LID proposal to the City of Tacoma on June 11, 2007. (Complaint, Para. 2.4, CP at 13). On November 13, 2007, City of Tacoma LID Ordinances No. 27656 and 27654 were adopted, and Austin, now the property owner of record, was assessed his share of the LID at \$3,459.00

for Ordinance No. 27654, payable over a ten-year period, with interest, and \$37,767.40 for Ordinance No. 27656, payable over a ten-year period, with interest. (Complaint, Para. 2.5, CP at 13).

At no time prior to the closing was a Seller Disclosure Statement delivered to Mr. Austin as the Buyer; nor was he ever informed by the Ettl's that the proposed LID affecting the property at issue could cost the Plaintiff a significant amount of money should he go through with the purchase of the home. (Complaint, Para. 2.6, CP at 13).

Mr. Austin filed a Complaint against the Ettl's in Pierce County Superior Court on March 12, 2010, alleging negligent misrepresentation and unjust enrichment. The negligent misrepresentation claim was based on Ettl's failure to disclose to Austin the estimated cost of the proposed LID, which had been provided to him and a portion of which would be assessed to Austin as the new property owner. In his Complaint, Austin alleges that Ettl "negligently misrepresented an existing material fact that he knew may justifiably induce [Austin] to refrain from purchasing the property. Moreover, [Ettl] had a duty to exercise reasonable care to disclose to [Austin], before the purchase consummated, the proposed LID against the property, information which was not readily obtainable by [Austin], and to further disclose the cost of the LID, which he knew would

be necessary to prevent his partial or ambiguous disclosure of the LID from misleading [Austin].” (Complaint, Para. 3.2, CP at 13-14).

Austin’s Complaint goes on to allege that the Ettls’ negligent misrepresentation in failing to disclose the LID, under circumstances where Ettl had a duty to speak, proximately caused Austin damages in the form of a crippling LID assessment, and the loss of any opportunity to account for the cost of that assessment in negotiating the sale price of the Property. (Complaint, Para. 3.3, CP at 14; Para. 4.2, CP at 14).

Mr. Austin’s Complaint also alleges that the Ettls were unjustly enriched when they retained sale proceeds from the Property at a bargained-for purchase price which did *not* account for the cost to Austin of the proposed LID that the Ettls failed to disclose to Austin. This resulted in a benefit to the Ettls, which could be calculated as the difference between the purchase price the Ettls actually got, and the price they would have gotten had they disclosed what the LID would cost Mr. Austin as the next owner of the Property. It is at least reasonable to assume that the difference would be the amount of the LID assessments: \$41,226.40 plus interest. (Complaint, Para. 4.2, CP at 14).

Moreover, because the Defendant knew that the proposed LID was on track for approval, and would result in incurred costs against the Property, and knew that the Plaintiff could not readily obtain data on the

LID before closing, it was inequitable for the Defendant to retain the benefit of the sale of the Property and thus, gain a windfall at the expense of the Plaintiff. (*Id.*)

b. Defendant's Motion to Dismiss Pursuant to CR 12(b)(6)

Defendants Lance and Mandy Ettl filed a Motion to Dismiss Pursuant to CR 12(b)(6) and for Failure to Comply With the Case Schedule on May 4, 2011 (*see* CP at 19-21).¹ The Ettls argue that “[Austin’s] claims for negligent misrepresentation and unjust enrichment have no legal or factual basis,” (Defendants’ Motion to Dismiss, CP at 20:22-23); that “Negligent misrepresentation is not a viable legal remedy under the economic loss rule,” citing as authority *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) (Motion to Dismiss, CP at 20:25-26); and that “[Austin] does not allege facts which would support a claim for unjust enrichment,” citing as authority *Cox v. O’Brien*, 150 Wn. App. 24, 36, 206 P.3d 682 (2009) (Motion to Dismiss, CP at 20:26-21:2). This brief contains no further discussion of the *Alejandre* or *Cox* holdings.

Mr. Austin filed an opposition brief on May 18, 2011 (CP at 22-28). The standard for dismissal under CR 12(b)(6) for failure to state a claim, the “economic loss rule” enunciated by the Washington Supreme

¹ Because the court explicitly declined to grant dismissal based on failure to comply with the case schedule, (Verbatim Transcript of Proceedings (“RP”), Attachment 1 at 3:16-22), further discussion of Ettl’s motion to dismiss for failure to comply with the case schedule is unwarranted.

Court, and the Supreme Court's subsequent clarification in Eastwood v. Horse Harbor Foundation, 170 Wn.2d 380, 241 P.3d 1256 (2010), the elements of a claim for unjust enrichment, and how Austin's factual allegations satisfied each of those elements, were all discussed at some length in Plaintiff's Opposition to Defendants' Motion to Dismiss. (CP at 25-27). The Ettls filed a Reply to Opposition to Motion to Dismiss on May 19, 2011, making mostly factual arguments in response to Austin's legal arguments and the allegations of Austin's Complaint. (CP at 41-44).

On May 20, 2011, after hearing arguments from counsel for both parties on the Ettls' Motion to Dismiss, the Pierce County Superior Court, Hon. Susan K. Serko, Judge, granted the Ettls' Motion to Dismiss, with prejudice, for Failure to State a Claim, pursuant to CR 12(b)(6). (CP at 47-48). The Ettls' arguments that Plaintiff's Complaint should be dismissed for failure to comply with the case schedule were rejected by the court, which focused exclusively on their arguments for dismissal based on CR 12(b)(6). (RP at 3:16-22) (see attached).

Counsel for the Ettls then argued briefly that, "[l]ooking at the claims and the plaintiff's complaint in the best light," Austin could have rescinded the transaction after he received the Form 17 on the day of closing. (RP at 3:23-4:13). Counsel for Mr. Austin pointed out that Austin's actual allegation was not that no disclosure was made at all, but

rather than (“timing” issues aside) the disclosure that was finally made was incomplete in a very material way, in that there was no disclosure of the amount of the LID assessment, and this constitutes a “partial or ambiguous statement of facts” that can form the basis for a negligent misrepresentation claim. (RP at 5:5-13). Counsel for Mr. Austin then stated the standard for evaluating the Ettls’ CR 12(b)(6) motion: “[a] motion to dismiss under CR 12(b)(6) should not be granted unless we can prove no set of facts consistent with the pleadings that would justify relief.” (RP at 5:14-16).²

The trial court granted the Ettls’ Motion to Dismiss with prejudice. Based on the oral ruling of the court, the bases for the ruling were as follows:

1. That “*the issue of fact* is when did they become aware of the LID, the potential for an LID assessment. And *there’s no question of fact* that it came before closing.” (RP at 6:1-3) (emphasis added);
2. That the court could not “see any set of facts that would allow the plaintiff to prevail in this case based on the revelation that this LID was potentially there, and the closing could have been stopped.” (RP at 7:3-7);
3. “That the more analogous case is clearly *Alejandro*” [rather than *Eastwood v. Horse Harbor Foundation*]. (RP at 7:1-2).

² The correct standard for evaluating a CR 12(b)(6) motion to dismiss was also raised and discussed by Austin in his opposition brief: *see* CP at 25:14-18).

B. STANDARD OF REVIEW

This appeal is taken from the trial court's dismissal of Mr. Austin's Complaint for failure to state a claim. An appellate court reviews a trial court's decision on a CR 12(b)(6) motion to dismiss de novo. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007); *US Oil Trading v. OFM*, 159 Wn. App. 357, 361, 249 P.3d 630 (2011).

C. PRESERVATION OF ERROR

Generally, in order to preserve error for review, counsel must call the alleged error to the court's attention at a time when the error can be corrected. *State v. Norman*, 143 Wn. App. 45, 64, 176 P.3d 582 (2008). In the present case, each of the issues raised in the following Assignments of Error were also timely raised by counsel for Plaintiff in his Opposition to Motion to Dismiss (CP at 22-37), prior to the motion hearing, and again at oral argument on the motion. Error has therefore been preserved for review.

D. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1:

The trial court incorrectly applied a summary judgment standard, evaluating the presence or absence of issues of fact, rather than the correct standard for evaluating a CR 12(b)(6) motion: the motion should not have been granted unless the moving party could show, beyond a reasonable doubt, that Mr. Austin could not prove any set of facts consistent with his pleadings that would justify relief.

ISSUES RELATED TO ASSIGNMENT OF ERROR NO. 1:

- a. A Motion to Dismiss for Failure to State a Claim should not have been granted unless the Ettls could prove, beyond a reasonable doubt, that Austin could prove no set of facts, consistent with his pleadings, that would justify relief.

“Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery.” *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007), citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *US Oil Trading v. OFM*, 159 Wn. App. 357, 361, 249 P.3d 630 (2011) (“beyond a reasonable doubt”). This is obviously a very high bar to dismissal. Defendants did not meet it, and the trial court therefore erred in dismissing Plaintiff’s complaint.

- b. The trial court did not make any finding that the Ettls had met the standard for dismissal beyond a reasonable doubt.

Although in its oral ruling on the Ettls' motion to dismiss the court did ~~state~~ that it could not "see any set of facts that would allow the plaintiff to prevail in this case based on the revelation that this LID was potentially there, and the closing could have been stopped," (RP at 7:3-7), there is absolutely no indication that the correct, "beyond a reasonable doubt" standard was applied. Elsewhere in its oral ruling the trial court alludes to "question[s] of fact," and discusses at some length factual "issues" raised by Defense counsel. (RP at 6:1-3; 7:1-12). It is evident that the court is applying the wrong standard, and that it made no findings that would support a dismissal under the *correct*, "reasonable doubt" standard.

As discussed below, Mr. Austin set forth the elements of his negligent misrepresentation and unjust enrichment claims in his Complaint, and alleged facts which, when proven, will support each element of his two claims.

- c. Austin had in fact set forth allegations in his Complaint that would, once proven, have justified relief under both claims.

Plaintiff's Complaint states causes of action for negligent misrepresentation, and unjust enrichment. To establish a claim for negligent misrepresentation generally, a plaintiff must show that the defendant negligently supplied false information, that the defendant knew or should have known would guide the plaintiff in making a business decision, that the plaintiff justifiably relied on the false information, and that plaintiff's reliance proximately caused the damages claimed. *Van Dinter v. Orr*, 157 Wn.2d 329, 333, 138 P.3d 608 (2006). More specifically, negligent misrepresentation can arise from the breach of a duty to disclose. *Van Dinter*, 157 Wn.2d at 334; *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 731, 853 P.2d 913 (1993).

A cause of action for breach of a common-law duty to disclose consists of: (1) a duty to disclose, (which may be based either on a fiduciary relationship, or on the existence of "*matters known to [the Defendant] that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading*"); and (2) a failure by Defendant to disclose a fact (3) that he knows may justifiably induce the other to act or refrain from acting. *Colonial Imports*, 121 Wn.2d at 731 (emphasis added) (following *Restatement (2d) Torts* § 551 (1977)); accord, *Van Dinter*, 157 Wn.2d at 334. This cause of action is

precisely what Plaintiff has pleaded in Paragraph 3.2 of his Complaint: that Defendant was under a reasonable duty to disclose, that he failed to do so despite actual knowledge of facts which he knew would have caused Plaintiff not to purchase the property had he known of them. (CP at 13). Moreover, the *partial* disclosure of the existence of an LID, *at the last possible moment*, where even at that late moment the value of the assessment was concealed, (See Complaint, Para. 2.2, 2.4, 2.6) is precisely the kind of “partial or ambiguous statement” that gives rise to a duty to disclose. At the very least, Ettl’s knowledge, and Austin’s justifiable reliance, can be inferred from Austin’s allegations as a whole, and this is sufficient to satisfy the standard for CR12(b)(6) motions: if there is even a *reasonable doubt* that “the claimant can prove no set of facts, consistent with the complaint, which would justify recovery,” *San Juan County*, 160 Wn.2d at 164, the motion to dismiss must be denied. The trial court erred in not doing so.³

ASSIGNMENT OF ERROR NO. 2:

The trial court incorrectly relied on *Alejandre v. Bull* in applying the now-outdated “economic loss rule” to Mr. Austin’s negligent misrepresentation claim.

³ The sufficiency of Mr. Austin’s claim for unjust enrichment is addressed under Assignment of Error No. 4.

ISSUES RELATED TO ASSIGNMENT OF ERROR NO. 2:

- a. The “economic loss rule” of *Alejandre* has been modified, if not abrogated outright, by the “independent duty doctrine” as set forth by the Washington Supreme Court in *Eastwood v. Horse Harbor Foundation*.

In their Motion to Dismiss for Failure to state a Claim, the Ettls strongly imply that *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) somehow abrogated negligent misrepresentation as a theory of liability. (Motion to Dismiss, CP at 20:25-26). First of all, *Alejandre* did no such thing: the holding merely limited a plaintiff alleging a breach of duty arising solely from a contract, to whatever remedies the contract may have provided. *Alejandre*, 159 Wn.2d at 681. Moreover, the “economic loss rule” stated by the Supreme Court in *Alejandre* has recently been modified to clarify that, where a duty arises in tort, *independently of the provisions of any contract*, a plaintiff may sue in tort for a breach of that independent tort duty. *Eastwood v. Horse Harbor Foundation*, 170 Wn.2d 380, 241 P.3d 1256 (2010) (“[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract”); accord, *Affiliated FM Ins. V. LTK Consulting*, 170 Wn.2d 442, 448, 243 P.3d 521 (2010) (“economic losses are sometimes recoverable in tort, even if they arise from contractual relationships”). Mr. Austin respectfully submits that *Eastwood* has in fact completely abrogated the “economic loss rule,” replacing it with the “independent duty doctrine” as

set forth above. The independent tort duty alleged in Paragraph 3.2 of the Complaint arises, not from any contract, but from *Restatement* § 551 as adopted by the Washington courts in *Colonial Imports*.

- b. Under *Eastwood*, some tort claims, including negligent misrepresentation, are actionable in tort even where the duty arose from a contract between the parties, as long as that duty also exists independently of the contract.

In explaining the independent duty doctrine, the court in *Eastwood* makes it very clear that “economic losses are sometimes recoverable in tort, even if they arise from contractual relationships,” *Eastwood*, 170 Wn.2d at 388, and that *negligent misrepresentation* is a recognized tort in Washington, arising independently from an established common-law duty of care, whether a contractual relationship exists or not. *Id.* The only questions, then, are the usual ones when evaluating a tort claim: did a common-law duty exist, (it did – see discussion above), whether the duty was breached, and whether Mr. Austin suffered harm as a result. Again, all of these things have been alleged by Mr. Austin in his Complaint, and for purposes of overcoming a motion to dismiss under CR 12(b)(6), that is enough. The trial court erred in dismissing Mr. Austin’s claims.

- c. The physical defect of the home in *Alejandro*, which should have been uncovered in a home inspection, can be differentiated from and LID formation process, where only Ettl has received the notices from the City, and has withheld them from Austin, who had no way of knowing.

The trial court, in its oral ruling, expressed an apparent belief that the *Eastwood* holding both upheld *Alejandro* and applied it to negligent misrepresentation claims in a residential purchase-sale context:

Because of the issue of the economic loss rule, the interaction of tort damages with contract damages, and it was - - *Alejandro* I was familiar with. I wasn't as familiar with the *Eastwood* case. Although I think it was by some personal discussion that I'd heard about it. And there's a very - - in *Eastwood*, there's a very interesting discussion about *Alejandro* and one that is clear and in plain language, so that those of us at the trial level can sometimes sort things out from the Supreme Court.

It seems to me that the more analogous case is clearly *Alejandro* which was in the context of a residential closing and some septic issues were not disclosed.

(RP at 6:16-7:3). The *Eastwood* holding does indeed contain a lengthy discussion of *Alejandro* (an appeal from a grant of summary judgment), but the discussion makes it clear that the holding of *Alejandro* turned on a physical defect in the property that the buyers should have uncovered during a home inspection performed on their behalf:

For example, *Alejandro v. Bull* involved a real estate sales contract, and the Alejandres (buyers) complained that Bull (seller) failed to tell them about a defect in the home's septic tank.

The Alejandres sued for negligent misrepresentation, and so the issue was whether Bull owed them a "duty of care under the *Restatement (Second) of Torts* § 552 (1977)," which is the duty to use ordinary care in obtaining or communicating information during a transaction.

Although we couched our analysis in terms of looking for an "exception" to the economic loss rule, *the core issue was whether Bull, as the home seller, was under a tort duty independent of the contract's terms.* [Emphasis added]. The contract between Bull and the Alejandres contained ample disclosures about the home; the Alejandres agreed that "[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion," (alteration in original) (quoting ex. 4); the Alejandres acknowledged "their duty to `pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation,'" (quoting ex. 5), and the Alejandres had their own inspection done. With significant information communicated about the home in the course of contractual negotiations, Bull had no independent tort duty to obtain or communicate even more information during a transaction. The contract sufficed, and the Alejandres' negligent misrepresentation claim did not survive. We recognized, however, that Bull's independent duty to not commit fraud persisted, and we would have allowed the Alejandres to sue for fraudulent concealment if they had offered enough evidence to support that tort claim. *Id.* at 689-90.

Eastwood, 170 Wn.2d at 389-90 (internal citations omitted). The Alejandres' claim failed because Bull was under no additional duty to disclose "more" information than the Alejandres should have discovered in the course of their home inspection. *Id.*

In the present case, Austin has alleged in his Complaint that Ettl knew of, not only the pendency of an ongoing LID process, but actually knew the dollar amount of the assessment. Ettl chose to wait until the last possible second to disclose *anything*, and then only disclosed a vague statement about an LID for utilities, withholding the information regarding the \$41,226.40 plus interest in costs Austin would be incurring by purchasing the Property. It would be reasonable to infer, and it actually happened, that a vague reference to an “LID” did not catch Mr. Austin’s attention in the middle of a real estate closing. It is also reasonable to infer that a disclosure of \$41,226.40 in additional costs, would have. This is exactly the kind of “partial or ambiguous statement of the facts” that *Van Dinter* and *Restatement* § 551 place Ettl under a tort duty to correct, so that such a partial statement will not be misleading. *Van Dinter*, 121 Wn.2d at 731. The trial court erred in analogizing *Alejandro* to the facts of this case.

ASSIGNMENT OF ERROR NO. 3:

The trial court failed to apply *Restatement (2d) Torts* § 551, as adopted by the Washington Supreme Court in *Colonial Imports v. Carlton Northwest* and *Van Dinter v. Orr*, which holds that the Defendant’s failure to correct a partial or ambiguous disclosure of facts constitutes negligent misrepresentation.

ISSUES RELATED TO ASSIGNMENT OF ERROR NO. 3:

- a. Restatement Torts § 551, as adopted by the Washington Supreme Court in *Colonial Imports v. Carlton Northwest* and *Van Dinter v. Orr*, holds that the Defendant’s failure to correct a partial or ambiguous disclosure of facts constitutes negligent misrepresentation.

The tort duty to avoid negligent misrepresentation in one’s business transactions by clarifying vague or incomplete disclosures, is thus independent of any “economic loss rule” or contractual relationship, and is well established. As discussed at some length above, negligent misrepresentation can arise from the breach of a duty to disclose. *Van Dinter*, 157 Wn.2d at 334; *Colonial Imports*, 121 Wn.2d at 731. A cause of action for breach of a common-law duty to disclose consists of: (1) a duty to disclose, (which may be based on the existence of “matters known to [the Defendant] that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading”); and (2) a failure by Defendant to disclose a fact (3) that he knows may justifiably induce the other to act or refrain from acting. *Colonial Imports*, 121 Wn.2d at 731 (emphasis added) (following *Restatement (2d) Torts* § 551 (1977)); accord, *Van Dinter*, 157 Wn.2d at 334.

- b. The trial court was apprised of the applicability of Restatement § 551, but failed to apply the rule.

The above legal theory, along with the factual allegations to substantiate it, was pleaded in Mr. Austin's Complaint and were set forth for the trial court in the parties' briefing on Defendant's Motion to Dismiss. It is eminently clear that the trial court knew about Restatement § 551 and its progeny. The trial court failed to apply the rule in this case, or even to explain why it would not have been applicable. This was error.

ASSIGNMENT OF ERROR NO. 4:

The trial court failed to address Mr. Austin's unjust enrichment claim and the allegations in support thereof, and therefore erroneously dismissed a claim that had in fact been adequately stated in Austin's pleadings.

ISSUES RELATING TO ASSIGNMENT OF ERROR NO. 4:

- a. The trial court ignored Plaintiff's unjust enrichment claim, granting Defendant's motion to dismiss under CR 12(b)(6) without addressing it in any way.

In their briefing the Ettls state without further discussion that Plaintiff has failed to allege facts which would support a claim for unjust enrichment. (Motion to Dismiss, CP at 20:26 – 3:2). A claim for unjust enrichment consists of three elements: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the

defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008), quoting *Bailie Commcations, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991).

- b. Mr. Austin pleaded facts sufficient, once proven, to support a claim of unjust enrichment.

Mr. Austin has alleged each of these elements in Paragraph 4.2 of his Complaint: the benefit is the higher purchase price secured by the Ettls by withholding crucial information about the LID from Austin; actual knowledge of both the relevant information and the actual purchase price are alleged in the Complaint or can readily be inferred from the allegations; and the facts that make Defendant's enrichment unjust are set forth in detail. (Complaint, Para. 4.2 at CP 14). Again, this is more than enough to overcome a CR 12(b)(6) motion to dismiss. The trial court therefore erred in dismissing Mr. Austin's Complaint, even if not on both claims, then on this one alone.

E. CONCLUSION

For the reasons set forth above, Appellant Matthew D. Austin prays this Court to REVERSE the trial court's May 20, 2011 Order of

Dismissal for Failure to State a Claim, and REMAND this matter to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of September, 2011.

BRITTON & RUSS, PLLC

by:



DAVID J. BRITTON, WSBA# 31748
Attorney for Appellant Matthew D. Austin

ATTACHMENT 1:

Verbatim Transcript of Proceedings, May 20, 2011 hearing on Defendant's Motion to Dismiss for Failure to State a Claim in Austin v. Ettl, Pierce County Superior Court No. 10-2-07367-7.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MATTHEW D. AUSTIN,)	
)	
Plaintiff,)	
)	
vs.)	Superior Court
)	No. 10-2-07367-7
LANCE Ettl and MANDY Ettl,)	
husband and wife, and their)	
marital community comprised)	
thereof,)	
)	
Defendants.)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

May 20, 2011
Pierce County Superior Court
Tacoma, Washington
Before the
HONORABLE SUSAN K. SERKO

Natasha Natalizio
Certified Court Reporter
1650 South John King Blvd.
Rockwall, Texas 75032

A P P E A R A N C E S

FOR THE PLAINTIFF:

DAVID J. BRITTON
Britton & Russ, PLLC
2209 North 30th Street, Suite 4
Tacoma, WA 98403

FOR THE DEFENDANT:

ROBERT G. CASEY
Eisenhower & Carlson, PLLC
1201 Pacific Avenue
Tacoma, WA 98402

1 failure to disclose a potential LID that was going to be
2 imposed against the property until shortly before the time
3 of closing.

4 If the closing had not occurred at the time they
5 received the seller's disclosure statement, they admit they
6 received the seller's disclosure statement which included
7 in there a reference to the LID for street, light, sewer,
8 something to that effect.

9 So they had that in hand. They had the right --
10 statutory right to terminate the transaction at that point.
11 It could take three days to make that decision to do so.
12 They did not. They proceeded to close the transaction.
13 There's no basis for this lawsuit.

14 THE COURT: Thank you.

15 MR. BRITTON: Your Honor, David Britton. I'm
16 representing Mr. Austin. Not only do we look at this case
17 differently, but the complaint which is, if you're making
18 a motion to dismiss under CR 12(b)(6), the complaint is the
19 important thing. The complaint looks at it differently.

20 We are alleging in the complaint that the LID was
21 formed and that Mr. Ettl knew --

22 THE COURT: I'm sorry. Was?

23 MR. BRITTON: Formed. That Mr. Ettl knew very
24 well it had been formed. He was on notice from the City of
25 Tacoma as to the amount of the assessment against his

1 property long before the closing date. And that when the
2 closing occurred, while the closing was going on on August
3 24th, I believe the year was 2009, that's when the Form 17
4 was finally faxed in.

5 And the crux of this issue, and this is also alleged
6 in the complaint, is that the Form 17 disclosed an LID, but
7 did not disclose the amount of assessment. And the
8 defendant knew very well already what the amount of the
9 assessment was going to be.

10 So it's sort of a partial or ambiguous statement of
11 facts. I think we were pretty careful about alleging the
12 -- both causes of action for negligent misrepresentation
13 and unjust enrichment and the facts to back those up.

14 A motion to dismiss under 12(b)(6) should not be
15 granted unless we can prove no set of facts consistent with
16 the pleadings that would justify relief. And that's just
17 not the case. If we prove the allegations that are in this
18 complaint, which we can, then relief is justified under
19 both theories of liability.

20 And I understand that we've got a big docket this
21 morning, and I think the Court is probably familiar with
22 the briefing, so I'm not going to go into the details of
23 why that's a cause of action unless the Court wants another
24 explanation.

25 THE COURT: Well, I've read all these

1 materials, so the issue of fact is when did they become
2 aware of the LID, the potential for a LID assessment. And
3 there's no question of fact that it came before closing.

4 Is that true, Mr. Britton?

5 MR. BRITTON: Your Honor, it's not. The
6 allegation is -- they keep saying that, but the allegation
7 is during closing, during the time the deal was closing.
8 Part of the relevant facts were disclosed, not all of them.

9 And the defendant was under a duty to disclose under
10 Restatement Section 551 because of that sort of partial or
11 ambiguous statement of the facts.

12 THE COURT: Well, what I did then was go and
13 read both the Alejandre, and I'm trying to remember the
14 other name of the other case --

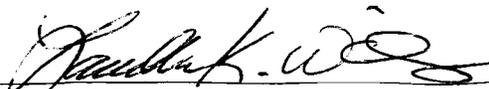
15 MR. CASEY: Eastwood.

16 THE COURT: Eastwood case. Because of the issue
17 of the economic loss rule, the interaction of tort damages,
18 with contract damages, and it was -- Alejandre I was
19 familiar with. I wasn't as familiar with the Eastwood
20 case. Although, I think I was by some personal discussion
21 that I'd heard about it. And there's a very -- in
22 Eastwood, there's a very interesting discussion about
23 Alejandre and one that is very clear in plain language, so
24 that those of us at the trial level can sometimes sort
25 things out from Supreme Court.

1 1200 Wells Fargo Plaza
2 1201 Pacific Ave.
3 Tacoma, Washington 98402
4 (Copy)

5 I hereby declare under penalty of perjury under the Laws of the State of Washington that
6 the foregoing is true and correct.

7 SIGNED at Tacoma, Washington, this 15th day of SEPTEMBER 2011.

8 
9 LOUELLA K. WILSON