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COURT OF APPEALS
DIVISION III
SEATTLE, WASHINGTON

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

No. 29454-4 III

PRIME REAL ESTATE CLOSING & ESCROW, LLC,

Appellant

vs.

EMPIRE MORTGAGE GROUP, INC.,

Respondent

and

HEBERLING, CRAIG, ET AL.

Defendants.

**RESPONDENT EMPIRE MORTGAGE GROUP, INC.'S
RESPONSE BRIEF**

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COURT OF APPEALS
CLERK OF COURT
JENNIFER L. HARRIS

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I. INTRODUCTION

When a real estate closing agent pays off the wrong loan even though the agent has clear evidence they are paying off the wrong loan, frustration and regret understandably follow. However, the closing agent cannot absolve itself of its error by indiscriminately thrusting responsibility onto another party. Liability follows fault; it does not arise spontaneously or by mere invocation.

In this case, Appellant closed a real property refinance transaction by erroneously paying off a loan on a different piece of property. When subsequent non-judicial foreclosures brought this error to light, the Appellant paid over \$108,000 to discharge its sole liability.

The Appellant thereafter brought an action against Respondent Empire Mortgage Group, Inc. alleging claims of negligent misrepresentation, indemnity and contribution. The trial court granted summary judgment to Respondent Empire, dismissing all Appellant's claims. Claiming legal error, the Appellant seeks redress before this Court. However, the application of Washington law to the undisputed facts of the case reveals that summary judgment was indeed proper. This Court should AFFIRM the trial court.

II. STATEMENT OF FACTS

Prime Real Estate Closing and Escrow ("Prime") is in the business of closing real estate transactions, including the refinancing of real property. (Clerk's Papers "CP" 19.) Empire Mortgage Group, Inc. ("Empire") is a mortgage broker that assists borrowers in obtaining mortgage financing. (CP 19.) Craig Heberling ("Heberling"), a defendant below, is a real estate purchaser and investor. (CP 272.)

In the spring of 2007, Heberling owned two (2) parcels of real estate in Spokane, Washington: one located on Normandie Street and the other on Decatur Street. (CP 19; CP 272-273.) Both of these properties had mortgage encumbrances in favor of Wells Fargo Bank: Decatur – Loan 62; Normandie – Loan 44. (CP 272-273.) Heberling sought to refinance the Decatur property and arranged the refinancing through Empire. (CP 273.) Heberling retained Prime to act as his escrow/closing agent for the refinancing. (CP 273.)

On or about April 10, 2007, Prime received initial documents from Empire concerning the refinancing of the Decatur property. (CP 309; CP 298-305.) One document Prime received on April 10, 2007 was a Form 1003, which is a mortgage loan application. (CP 309, 310; 298-305.) The April 10, 2007 loan application showed an asterisk next to the Wells Fargo

Loan 62. (CP 303.)¹ According to Prime, this asterisk indicated what loan was to be paid off at closing. (CP 310.) The first page of the April 10, 2007 loan application listed the subject property as the Decatur property. (CP 299.)

Prior to closing, Prime received a second loan application from Empire by facsimile on or about May 16, 2007. (CP 290-297.) This application also listed the subject property as the Decatur property. (CP 291) However, an asterisk was erroneously placed by the Wells Fargo Loan 44, which actually corresponded to the Normandie property. (CP 295; CP 289.) Before closing, Prime also had within its possession documents evidencing the Decatur real property description, including a copy of the preliminary commitment for title insurance on the Decatur property. (CP 29.)

On the day of closing, the Prime agent who ordered the funding of the refinance was confused regarding the correct loan number for the Decatur property. (CP 314.) One of Prime's agents was also having difficulty getting a correct payoff from Wells Fargo on Loan 62 (the Decatur property) as of May 21, 2007. (CP 315.)

¹ Although the reference is to an asterisk, the copy in the Clerk's Papers makes the asterisk appear as though it is simply a small dot, akin to a bullet point.

Prime also requested a Wells Fargo payoff for Loan 44 on or about May 21, 2007 and received a Wells Fargo payoff quote showing Loan 44 as relating to 5922 N. Normandie Street. (CP 311; CP 289.) Despite these inconsistencies and confusion, Prime closed the real estate transaction with Heberling signing on May 21, 2007. (CP 281.) Prime paid off Wells Fargo Loan 44 (the Normandie property) without cross-checking the Wells Fargo payoff quote with the real property address. (CP 311.)

As a result of Prime's error, the Wells Fargo loan encumbrance on the Decatur property (Loan 62) was not paid off. (CP 72-73, ¶ 2.4.) A mortgage encumbrance in favor of GN mortgage, the refinancing lender, was recorded on the Decatur property, resulting in two mortgage encumbrances on the Decatur property and no mortgage encumbrance on the Normandie property. (CP 72-73, ¶ 2.4.) Thus, the Decatur property had two loan encumbrances after closing on May 21, 2007: Loan 62 (1st position in favor of Wells Fargo) and the refinance loan (2nd position in favor of GN Mortgage).

Thereafter, GN Mortgage initiated unrelated non-judicial foreclosure proceedings against Heberling and his Decatur property in May 2007. (CP 9.) Wells Fargo also instituted unrelated non-judicial

foreclosure proceedings against Heberling and Loan 62 (the Decatur property). (CP 9.) Realizing an error occurred, GN Mortgage subsequently tendered a claim under its title insurance policy issued by Pacific Northwest Title Insurance Company ("PNWT") based on its deed of trust on the Decatur property being in second position subordinate to Wells Fargo. (CP 9.) In turn, PNWT asserted a claim against Prime. (CP 9.) Prime admitted its fault and paid PNWT in excess of \$108,000 as a result of its error. (CP 31-33; CP 9.) PNWT has never asserted a claim against Empire.

Prime then sued Empire, alleging three claims: (1) negligent misrepresentation; (2) indemnity; and (3) contribution. As the foundation for their suit, Prime alleged that prior to closing, agents from Empire verbally indicated to agents of Prime that Loan 44 was the correct loan number to pay off with the Decatur refinancing. (CP 13; CP 74.) Empire denied this allegation. (CP 74; CP 120, 143-144.) Prime also alleged that Empire negligently communicated incorrect payoff information through the May 16, 2007 loan application. (CP 13-14.) However, Prime admitted that it is the escrow company's obligation to match up a correct loan number with a correct street address as a part of a real estate closing. (CP 313.)

The trial court subsequently granted Empire's motion for summary judgment, dismissing all Prime's causes of action. (CP 342-344.) The trial court also denied Prime's motion for reconsideration. (CP 696-697.) Prime now appeals both the trial court's summary judgment dismissal of its claims against Empire as well as the trial court's denial of its motion for reconsideration.

III. SUMMARY OF ARGUMENT

Mere reliance upon communications from one party to another will not support a cause of action for negligent misrepresentation. Rather, a plaintiff asserting negligent misrepresentation must establish that its reliance upon the communications of the defendant was *justifiable*. Moreover, evidence of justifiable reliance must survive the clear, cogent, and convincing evidentiary standard. To avoid this high burden, Prime simply repeats that it relied on the information allegedly given by Empire, ignoring one of the required elements of this cause of action. Summary judgment dismissal of Prime's negligent misrepresentation claim was warranted.

The purported inapplicability of the economic loss rule to its negligent misrepresentation claim is another point on which Prime asserts

error. While recent case law may reveal Empire's invocation of the economic loss rule as untenable, the lack of justifiable reliance in the record provides a viable ground on which to affirm the trial court's summary judgment dismissal of Prime's negligent misrepresentation claim. Moreover, Prime cites no authority for an independent duty Empire owed either Prime or PNWT, other than Prime's alleged negligent misrepresentation claim. Thus, the economic loss rule, as recently articulated by Washington appellate courts, may sustain the dismissal of Prime's negligent misrepresentation claim.

Prime's claims of common law indemnity and contribution, confusingly pleaded and argued by Prime, likewise fail. Washington case law indicates that a claim for common law indemnity only exists between non-joint tortfeasors. However, Prime has admitted fault in this case and Empire is not liable to PNWT. Common law indemnity is therefore unavailable to Prime. Prime's contribution claim is also without merit. First, because Prime is not a fault-free plaintiff, it cannot seek contribution from Empire. Second, PNWT has never asserted a claim against Empire, and Prime's settlement with PNWT extinguished its own liability only, as Empire is not liable to PNWT "upon the same claim." Summary judgment

dismissal of Prime's common law indemnity and contribution claims was warranted.

IV. ARGUMENT

A. Standard of Review

Appellate review of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). On summary judgment, the moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-226. While questions of fact typically are left to the trial process, they may be treated as a matter of law if “reasonable minds could reach but one conclusion” from the facts. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). A party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

B. Prime Failed To Meet Its Burden Of Establishing A Genuine Issue Of Material Fact Precluding Summary Judgment On Its Negligent Misrepresentation Claim and Failed To Establish Each Element Of Its Claim.

In its summary judgment order, the trial court dismissed Prime's negligent misrepresentation claim on the ground that it was barred by the economic loss rule. Recent decisional law may affect the propriety of such a ruling. However, this Court may affirm the trial court's grant of summary judgment if it is supported by any ground in the record, regardless of whether the trial court relied upon that ground. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2008). Prime failed to establish each element of its negligent misrepresentation claim. Thus, dismissal was proper, notwithstanding the trial court's reliance on the economic loss rule.

A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false

information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Bloor v. Fritz*, 143 Wn. App. 718, 734, 180 P.3d 805 (2008). A plaintiff's claim fails if proof of any element is lacking. *Westby v. Gorsuch*, 112 Wn. App. 558, 576, 50 P.3d 284 (2002). Each element must be proven by clear, cogent, and convincing evidence. *Borish v. Russell*, 155 Wn. App. 892, 906 n.7, 230 P.3d 646 (2010). When an appellate court reviews cases in which the standard of proof is clear, cogent, and convincing evidence, it "must view the evidence presented through the prism of the substantive evidentiary burden." *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). See also *Tiger Oil Corp. v. Yakima County*, ___ Wn. App. ___, 242 P.3d 936, 940 (2010) (clear, cogent, and convincing evidence is the quantum of evidence sufficient to convince the fact finder that the fact in issue is "highly probable.").

Justifiable reliance is the element at issue here. Ordinarily, justifiable reliance is a question of fact. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 181, 876 P.2d 435 (1994). However, when reasonable minds could reach but one conclusion, it may be determined as a matter of

law. *Id.* Justifiable reliance means reliance that is reasonable under the surrounding circumstances. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 551, 55 P.3d 619 (2002).

Here, there is no genuine issue of material fact regarding the lack of justifiable reliance. Prime's reliance on information communicated by Empire was not reasonable under the circumstances. Below, Prime asserted that Empire communicated three pieces of information to it prior to the closing on Heberling's Decatur property: (1) the April 10, 2007 loan application (CP 298-305); (2) the May 16, 2007 loan application (CP 290-297); and (3) alleged telephone conversations with agents of Empire (CP 13; CP 74; CP 120, 143-144.) When viewed through the prism of the clear, cogent, and convincing evidence standard, Prime *un*-justifiably relied on the information for several reasons.

First, the first page of both the April 10, 2007 and the May 16, 2007 loan applications both listed the Decatur property as the subject property. (CP 291, 299.) The April application revealed an asterisk by the correct loan number – Loan 62 (the Decatur property). (CP 303.) In the May application, however, the asterisk was located next to Loan 44 (the Normandie Property). (CP 295.) Prime had both of applications in its file at closing. (CP 309,310.) The unpaid balances on both Loan 62 and Loan

44 were identical on the April application (CP 303) but were different on the May application (CP 295). These inconsistencies should have been a red flag for Prime – the closing/escrow agent.

Second, Prime admitted that it is the escrow company's obligation to match up a correct loan number with a correct street address as a part of a real estate closing. (CP 313.) This is consistent with the testimony of Ned Barnes, Empire's liability expert. (CP 34-36.) Mr. Barnes, an attorney with over forty years of real estate experience, testified that the ultimate responsibility for paying off the correct mortgage lies with the closing/escrow agent – Prime. (CP 35.) Indeed, paying off the correct mortgage is one of the steps for which a closing/escrow agent collects a closing fee. (CP 35.) Prime admitted its obligation to correctly determine the loan and property address prior to closing. (CP 313.) Prime also admits it did not do so in this case – they "just missed it." (CP 311.)

Prime submitted the Declaration of Robert W. Golden in opposition to Empire's summary judgment motion. (CP 87-90.) Prime sought to buttress its claims of reliance with Golden's declaration. Although Golden stated that escrow agents customarily rely on asterisks placed on loan applications, he does not address the issue of ultimate responsibility for confirming the proper loan is paid off at closing. (*See*

CP 88.) While Golden makes sweeping statements regarding the customs and standards of the escrow industry, he assumes without reservation that this *necessarily* establishes the standard of care for escrow agents. Custom in an industry is not conclusive, as the custom itself may fall below the standard of care. *See Griebler v. Doughboy Recreational, Inc.*, 466 N.W.2d 897, 902 (Wis. 1991) ("The fact that many people engage in unreasonable behavior does not make the behavior reasonable."). Golden's declaration did not create genuine issues of material fact.

Third, Prime requested a Wells Fargo payoff for Loan 44 on or about May 21, 2007 and received a Wells Fargo payoff quote showing Loan 44 as relating to 5922 N. Normandie Street on or about May 22, 2007. (CP 311; CP 289.) The payoff quote read as follows:

708/0140801044/XP522/2/4/000009226815
May 22, 2007

Attn: Trina
Prime Closing
509 466 9292

(509)466-9200

Mortgagor: Craig R Heberling
Property: 5922 North Normandie St
Spokane WA 99205
708 Loan Number: 0140801044
Loan Type: Conventional

THIS STATEMENT REFLECTS THE PAYOFF DATE YOU PROVIDED. ALL FIGURES MUST BE VERIFIED 24 HOURS PRIOR TO PAYOFF. FOR YOUR CONVENIENCE, PLEASE CALL OUR VOICE RESPONSE SYSTEM AND SELECT THE APPROPRIATE PAYOFF QUOTE OPTIONS. ALL FIGURES SUBJECT TO FINAL VERIFICATION BY THE NOTEHOLDER. ALL REMITTANCES MUST BE MADE BY CASHIER'S CHECK OR CERTIFIED FUNDS.

1. TOTAL PRINCIPAL, INTEREST AND OTHER AMOUNTS DUE UNDER NOTE/SECURITY INSTRUMENT

Note: This Note/Security Instrument is due for payment June 01, 2007
Unpaid Principal Balance \$ 91,763.62
Interest at 7.50000% from 05-01-07 to 05-25-07 452.53
TOTAL AMOUNT DUE UNDER NOTE/SECURITY INSTRUMENT \$ 92,216.15

2. ADDITIONAL CONTRACTUAL AND OTHER FEES AND CHARGES DUE

Recording Fees 32.00
Fax Fee 20.00
TOTAL CONTRACTUAL AND OTHER FEES AND CHARGES DUE \$ 52.00
TOTAL AMOUNT DUE \$ 92,268.15

*Per Terry
This has been
paid in full*

34102

800-888-3212

539-42-6944

*Sylvia Campbell
Fax 466-8943*

PRIME - 024

(CP 289). *On its face*, the loan payoff links Loan 44 with the Normandie property. Without investigating the inconsistency between the payoff quote (showing the Normandie property) and the subject property of the refinance (concerning the Decatur property), Prime issued a check to Wells Fargo on or about May 23, 2007 in the amount of \$92,324.84, indicating that the check was for the Decatur property and referencing Loan 44 (the Normandie property). (CP 405.) The Wells Fargo payoff information linking Loan 44 with the Normandie property directly contradicted Prime's knowledge that the refinance concerned Heberling's Decatur property. The payoff quote, *on its face*, stated Loan 44 encumbered the *Normandie property*; Loan 44 had nothing to do with the Decatur property. Given this clear information, Prime never should have paid Wells Fargo on Loan 44. Responsibility for such erroneous payment rests solely with Prime.

Fourth, Prime's agents expressed confusion with respect to the proper Wells Fargo loan number prior to closing. On the day of closing, the Prime agent who ordered the funding of the refinance was confused regarding the correct loan number for the Decatur property. (CP 314.) That same agent was also having difficulty getting a correct payoff from Wells Fargo on Loan 62 (which was the correct loan number for the

Decatur property) as of May 21, 2007. (CP 315.) Rather than investigating the source of the confusion, Prime's agent simply continued with the closing. (CP 314.) This confusion constitutes additional evidence vitiating Prime's alleged justifiable reliance on information provided by Empire.

Fifth, had Prime looked to the Decatur property deed of trust, it would have been clear that the Wells Fargo loan corresponding to the Decatur property's legal description was Loan 62. (CP 306.) The deed of trust also included a reference to Loan 62 on its face. (CP 306.) Although aware that it could order a copy of the deed of trust, Prime's agent simply chose not to do so. (CP 314-315.)

These reasons support the conclusion that reasonable minds could not differ as to the lack of justifiable reliance by Prime. As stated above, the clear, cogent, and convincing evidence standard applies to the justifiable reliance element of a negligent misrepresentation claim. There existed no genuine issues of material fact. As viewed through that evidentiary prism, summary judgment dismissal of Prime's negligent misrepresentation claim was appropriate, even if the trial court dismissed the claim based on the economic loss rule.

C. The Economic Loss Rule May Still Bar Prime's Negligent Misrepresentation Claim Under the Principles Recently Articulated in *Eastwood v. Horse Harbor Foundation, Inc.*

Empire concedes that obscurity shrouded the precise application of the economic loss rule in the proceedings below. Prime and Empire agree that no contract existed between them. However, this may not necessarily be dispositive of the issue. Two recent opinions of the Washington Supreme Court help to illuminate the scope of the economic loss rule. *See Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, ___ Wn.2d ___, 243 P.3d 521 (2010); *Eastwood v. Horse Harbor Foundation, Inc.*, ___ Wn.2d ___, 241 P.3d 1256 (2010). From the plurality opinion of *Eastwood*, it appears as though "the economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract." Division II of the Court of Appeals has also recently stated that "[i]n order for the economic loss rule to apply and preclude tort damages for negligent misrepresentation, there must be a contract between the parties." *Borish v. Russell*, 155 Wn. App. 892, 901, 230 P.3d 646 (2010). Under *Borish*, it appears as though the economic loss rule does not bar Prime's claim of negligent representation against Empire because there was no contract between Prime and Empire.

However, under the *Eastwood* case, Prime's recovery in tort must be predicated upon a "duty that arises independently of the terms of [a] contract." In its Opening Brief, Prime argues that its negligent misrepresentation claim supplies the requisite independent duty. *See* Appellant's Opening Brief at 33-34. Prime essentially argues that its negligent misrepresentation claim is not barred because Empire owed Prime the independent duty to not commit negligent misrepresentation. This argument is circular and fails for the reasons set forth at section IV. B., *supra*. Beyond its negligent misrepresentation claim, Prime cites no authority for an independent duty Empire owed *either Prime or PNWT*. Thus, Prime's negligent misrepresentation claim may remain barred under *Eastwood's* re-characterization of the economic loss rule as the "independent duty doctrine." *Eastwood*, 241 P.3d at 1268.

D. Prime's Common Law Indemnity Claim Fails Because It Is Inconsistent With the Facts Of the Case.

Prime alleges that its claim for common law indemnity was improperly dismissed by the trial court. As the parties agree that no contract exists between Prime and Empire, express contractual indemnity is not at issue. *Toste v. Durham & Bates Agencies, Inc.*, 116 Wn. App. 516, 522, 67 P.3d 506 (2003). Rather, Prime asserts common law

indemnity. Common law indemnity, equitable indemnity and implied contractual indemnity are the same species of a cause of action. *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997) ("Central Washington"); *Toste*, 116 Wn. App. at 522.

"Indemnity in its most basic sense means reimbursement and may lie when one party discharges a liability which another should rightfully have assumed." *Central Washington*, 133 Wn.2d at 513. "Indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the entire loss." *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 588, 5 P.3d 730 (2000) (quoting *Central Wash. Refrigeration v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997)).

The common law right of indemnity between active and passive tortfeasors is abolished. RCW 4.22.040(3). This statute abolished the indemnity rights between joint tortfeasors, intending that such rights would be replaced with contribution rights. *Sabey*, 101 Wn. App. at 589. RCW 4.22.040 abolished common law indemnity between joint tortfeasors, replacing it with a right of contribution based upon comparative fault. *Toste*, 116 Wn. App. at 519-520. Indemnity between non-joint tortfeasors survived the adoption of RCW 4.22.040. *Toste*, 116

Wn. App. at 520.

While not defined in *Toste* or *Sabey*, the label "joint tortfeasors" is defined as "two or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit." *Black's Law Dictionary* 1497 (7th ed. 1999). From this definition, it follows that a "non-joint tortfeasor" is a party who did not contribute to the claimant's injury and may not be joined as a defendant in the same lawsuit.

In its Opening Brief, and before the trial court, Prime relies exclusively upon *Sabey* to support its claim for common law indemnity. *See* Appellant's Opening Brief at 35-36. (*See* CP 81-83.) However, *Sabey* is distinguishable. *Sabey* involved Howard Johnson doing actuarial work on the pension fund for Frederick & Nelson. *Sabey*, 101 Wn. App. at 579. Howard Johnson made representations to the Pension Benefit Guarantee Corporation ("PBGC") of the federal government regarding the pension fund's assets and liabilities. *Id.* Howard Johnson's representations and actuarial analyses were grossly in error, which caused a deficiency assessment which Sabey had to pay. *Id.* at 581. After paying the PBGC through a settlement, Sabey brought negligent misrepresentation and indemnification claims against Howard Johnson, seeking reimbursement of his settlement with the PBGC. *Id.*

The *Sabey* court noted that Howard Johnson made no claim that Sabey was a tortfeasor. *Id.* at 591. The court stated that Sabey was not a joint tortfeasor with Howard Johnson as to the PBGC. *Id.* Sabey's liability arose because Sabey was the controlling interest in the Frederick & Nelson company and under ERISA, Sabey had liability. *See id.* at 582-84. As a result, Sabey was deemed to be a non-joint tortfeasor and his common law indemnity action against Howard Johnson was not barred by RCW 4.22.040. *Id.* at 591-592. The holding in *Sabey* is consistent with the definition of "joint tortfeasors" above. Sabey did not contribute to PBGC's injury. Sabey's only liability to the PBGC arose through ERISA. Howard Johnson was in essence the only party with actual fault. Thus, the label "joint tortfeasor" did not apply to him and the court permitted him to pursue his common law indemnity claim against Howard Johnson.

Here, Prime admits fault. *See* RCW 4.22.015 (definition of fault includes "acts or omissions...that are in any measure negligent...toward the person or property of the actor or others.") A principal of Prime, attorney James Olson, testified in his deposition that Prime committed an error when it did not double-check the address on the Wells Fargo payoff quote prior to closing. (CP 31-32.) Additionally, Prime's agent admitted that it is the escrow company's obligation to match up a correct loan

number with a correct street address as a part of a real estate closing. (CP 313.) Prime paid PNWT 100% of the claim as a result of its erroneous payoff to Wells Fargo Bank. Prime's admitted culpability prevents it from asserting the equitable remedy of common law indemnity. *Cascade Timber Co. v. Northern Pac. R.R. Co.*, 28 Wash.2d 684, 711, 184 P.2d 90 (1947) ("A person seeking an equitable remedy must come into court with clean hands.").

The holding of *Central Washington*, that "indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the *entire loss*," *Central Washington*, 133 Wn.2d at 513 (emphasis added), governs this case. The facts of the case, however, reveal why Prime's attempts to thrust liability for the *entire loss* onto Empire is misplaced. Prime was the only tortfeasor with respect to PNWT. Prime's assertion of innocence with respect to Empire is the only thread by which it seeks to maintain its common law indemnity claim.

The undisputed facts clearly reveal Prime's fault. First, the first page of both the April 10, 2007 and the May 16, 2007 loan applications both listed the Decatur property as the subject property, but the applications contained an asterisk by different loan numbers. (CP 291,

295, 299, 303.) Second, Prime admitted that it is the escrow company's obligation to match up a correct loan number with a correct street address as a part of a real estate closing. (CP 313.) Third, Prime requested a Wells Fargo payoff for Loan 44 and received a Wells Fargo payoff quote showing Loan 44 as relating to the Normandie property. (CP 311; CP 289.) Without investigating the inconsistency between the payoff quote (Normandie property) and the subject property of the refinance (Decatur property), Prime issued a check to Wells Fargo indicating that the check was for the Decatur property and referencing Loan 44 (Normandie property). (CP 405.)

Fourth, Prime's agents expressed confusion with respect to the proper Wells Fargo loan number prior to closing. (CP 314, 315.) Fifth, had Prime looked to the Decatur property deed of trust, it would have been clear that the Wells Fargo loan corresponding to the Decatur property's legal description was Loan 62. (CP 306.) However, Prime simply chose not to pull up the deed of trust. (CP 314-315.)

A trial is not necessary to determine the *existence* of Prime's negligence. Prime's argumentative assertions, speculative statements, and conclusory allegations do not raise material fact issues that precluded Empire's summary judgment. *Adams v. City of Spokane*, 136 Wn. App.

363, 365, 149 P.3d 420 (2006). Nor are Prime's statements of ultimate facts, conclusions of fact, or conclusory statements of fact sufficient to overcome Empire's summary judgment motion. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008).

Prime's invocation of indemnity is inconsistent with the facts of this case and serves only to confuse the issues. Empire did not have a contract with PNWT. Prime has never asserted that Empire owed PNWT a duty. Prime's erroneous funding of the Decatur refinance led to PNWT's claim against Prime. Prime admitted its fault and paid PNWT in excess of \$108,000 as a result of its error. (CP 31-33; CP 9.)

From these facts, it follows that Empire did not contribute to *PNWT's injury*. Empire was not a joint tortfeasor vis-à-vis PNWT. Given that Empire did not owe PNWT any duty and that it did not contribute to PNWT's injury, it is absurd that Empire should therefore bear *Prime's entire loss*. *Central Washington*, 133 Wn.2d at 513. Unlike in *Sabey*, where Sabey was deemed a non-joint tortfeasor in relation to the PBGC because Sabey had liability under ERISA, Empire is neither a joint tortfeasor nor a non-joint tortfeasor in relation to PNWT. Prime's remedy against Empire was to bring a separate claim against Empire, such as its claim of negligent misrepresentation. Prime's invocation of common law

indemnity displays a misapprehension of the facts and the law. Prime's common law indemnity claim was properly dismissed.

E. Prime's Claim for Contribution Fails Because It Paid Its Proportionate Share of Fault When It Settled With PNWT for \$108,000 and Because Empire Is Not Liable To PNWT.

RCW 4.22.010 *et seq.* governs a right of contribution between parties. RCW 4.22.040 states in relevant part:

(1) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. [...] The basis for contribution among liable persons is the comparative fault of each such person.

Joint and several liability is a prerequisite to a right to seek contribution.

Kottler v. State, 136 Wn.2d 437, 442, 963 P.2d 834 (1998). RCW

4.22.070 abolishes joint and several liability in Washington in favor of proportionate liability. *Kottler*, 136 Wn.2d at 444. However, joint and several liability is retained only in a few explicitly listed exceptions.

Kottler, 136 Wn.2d at 444; RCW 4.22.070. Under proportionate liability, a negligent party is liable for his own proportionate share of fault and no more. *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 294, 840 P.2d 860 (1992). Therefore, when a proportionately liable party settles, he settles for his share alone, and he may neither seek nor be liable for

contribution. *Kottler*, 136 Wn.2d at 445-446.

The provision of RCW 4.22.070(1)(b) is at issue regarding Prime's contribution claim. RCW 4.22.070(1)(b) reads:

If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

The plain language of the statute indicates that joint and several liability arises only if a plaintiff is fault-free. *Kottler*, 136 Wn.2d at 446. This is a threshold determination.

Prime contends that summary judgment dismissal of its contribution claim was improper because a trier of fact has not determined whether Prime was at fault. *See* Appellant's Opening Brief at 37-38. This is simply a variation of its argument that a trial is necessary to determine the existence of Prime's fault. However, the existence of fault is a rather low standard. *See* RCW 4.22.015 (definition of fault includes "acts or omissions...that are in any measure negligent...toward the person or property of the actor or others.") A review of the undisputed facts in this case establish the existence of Prime's fault, both through documentary evidence (CP 289, 291-306, 405), Prime's own admissions (CP 31-32,

311, 313-315), and the testimony of Empire's liability expert Ned Barnes (CP 34-36.)

Because Prime is not fault-free, joint and several liability does not exist. Therefore, proportionate liability is what remains. *Kottler*, 136 Wn.2d at 444. Under proportionate liability, Prime was liable for its own proportionate share of fault and no more. *Washburn*, 120 Wash.2d at 294. When Prime settled with PNWT, it settled for its share alone, and it may neither seek nor be liable for contribution. *Kottler*, 136 Wn.2d at 445-446. Prime's paid its proportionate share of fault by paying PNWT \$108,000. Empire does not owe PNWT anything. Prime, therefore, cannot seek contribution from Empire. Prime's arguments to the contrary are misplaced.

Alternatively, Prime's contribution claim fails because Empire is not liable to PNWT. RCW 4.22.060(2) states in relevant part that a release "entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides." RCW 4.22.040(2) states in relevant part: "Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the

settlement...."

Contribution is defined as "[a] tortfeasor's right to collect from others responsible *for the same tort* after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *Black's Law Dictionary* 329 (7th ed. 1999) (emphasis added).

Here, Prime settled with PNWT by paying it \$108,000. Prime's liability to PNWT arose from the contractual relationship between them. (See CP at 95, 106-107); *see also* Appellant's Opening Brief at 10. This settled its own liability to PNWT. Because Prime has not alleged Empire owed PNWT any duty and because Empire did not have any contract with PNWT, Empire is not liable to PNWT. Empire was not responsible to PNWT "for the same tort" as was Prime. Prime's payment to PNWT does not automatically engender a claim of contribution against Empire. First, Empire is not liable to PNWT "upon the same claim," so Prime's \$108,000 payment extinguished only its own liability. RCW 4.22.060(2). Second, Prime's settlement with PNWT could not extinguish the [non-existent] liability of Empire because Empire did not owe PNWT any duty. RCW 4.22.040(2). In other words, Prime cannot extinguish its own liability to PNWT and chase Empire for contribution for such payment. Prime's settlement with PNWT has no affect on Empire. Prime's remedy against

Empire was to bring a separate claim against Empire, such as its claim of negligent misrepresentation. Prime incorrectly invoked a claim for contribution.

The trial court's dismissal of Prime's contribution claim because it "is not supported by the facts of this case," (CP 343) was proper.

F. Prime's Motion for Reconsideration was Properly Denied By the Trial Court.

The denial of a motion for reconsideration is within the sound discretion of the trial court and will be overturned only upon an abuse of discretion. *Lilly v. Lynch*, 88 Wn.App. 306, 321, 945 P.2d 727 (1997). After the trial court dismissed Prime's claims against Empire, Prime moved for reconsideration based on an alleged error in law. In its motion for reconsideration, Prime simply reiterated the arguments it previously raised in opposition to Empire's summary judgment, citing the same authorities. (*See* CP 683-689.) Recognizing this, the trial court denied Prime's motion. (CP 696-697). The trial court fully considered the legal arguments of the parties during summary judgment. Conducting a subsequent, identical review of the law would be superfluous. The trial court did not abuse its discretion by denying Prime's motion for reconsideration.

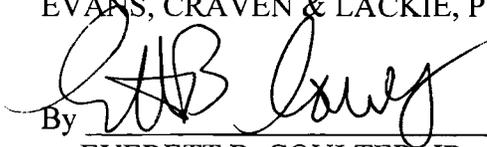
V. CONCLUSION

The trial court properly dismissed Prime's claims of negligent misrepresentation, indemnity, and contribution on summary judgment. No genuine issues of material fact existed. Although the trial court's application of the economic loss rule to bar Prime's negligent misrepresentation claim may have been untenable, Prime cannot establish each element of its negligent misrepresentation claim by clear, cogent, and convincing evidence as a matter of law. This Court may affirm dismissal of the negligent misrepresentation claim on this ground alone.

Prime's claims for indemnity and contribution were also properly dismissed because the facts of this case do not support either theory of recovery. Summary judgment dismissal of all Prime's claims against Empire was proper. Empire respectfully requests this Court AFFIRM the trial court.

Respectfully submitted this 15th day of March, 2011

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