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NO. 83690-6

SUPREME COURT OF THE STATE OF WASHINGTON

ELCON CONSTRUCTION, INC., a Washington corporation,

Appellant,

v.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF RESPONDENT

Eastern Washington University (EWU), defendant in the trial court and respondent in Division III of the Court of Appeals, is the respondent to Elcon Construction, Inc.'s petition for review.

II. COURT OF APPEALS DECISION

On August 25, 2009, Division III of the Court of Appeals decided Cause No. 272010-III in an unpublished decision.

This case is controlled by this Court's decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), is in accord with recent published decisions from Division I in *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008), *review granted in part*, 166 Wn.2d 1015, 210 P.3d 1019 (2009), and Division II in *Cox v. O'Brien*, 150 Wn. App. 24, 206 P.3d 682 (2000), and raises no issues that have not previously been clearly addressed by an appellate court.

Because the court of appeals found there was no fraud in this case, and, consequently, that the existence of a fraud exception to the economic loss rule was not implicated, EWU did not request that Division III publish its decision.

III. ISSUES PRESENTED FOR REVIEW

1. Did the court of appeals correctly affirm the trial court's determination that Elcon's relationship with EWU was contractual and correctly dismiss Elcon's fraudulent inducement claim under

the economic loss rule as articulated by this Court in *Alejandro v. Bull, supra*?

2. Where Elcon completely failed to introduce admissible evidence establishing tortious interference with its contractual relationships, did the court of appeals correctly affirm the trial court's dismissal of that claim as a matter of law?
3. Did the court of appeals act in accordance with well-established case law when it affirmed dismissal of Elcon's untimely claim for statutory interest?

IV. SUPPLEMENTAL STATEMENT OF FACTS

A. Counterstatement Of Facts

Since 1984, EWU has had three separate water right certificates permitting it to pump up to 900 gallons per minute (GPM) from its two campus water wells. CP at 1093-94 ¶1. Prior to April 17, 2003, the certificates were specific to each well, allowing EWU to pump 750 GPM from Well 2 and 150 GPM from Well 1. CP at 1093-94 ¶3.¹

Beginning in 1987, EWU sought to obtain permission from the Department of Ecology (DOE) to consolidate its water right certificates in order to allow it to withdraw its entire 900 GPM allocation from either or both of the two wells in any combination. CP at 1094 ¶4. Consolidation of EWU's water right certificates was desirable because it ensured that EWU would have an adequate water supply even if one of the two campus

¹ The Declaration of Shawn King was submitted in support of EWU's 2006 motion for summary judgment. CP at 302-358. The same document was included in support of the 2008 motion. CP at 1093-1101. It is included for the Court's convenience as Appendix A. See also, CP at 1448-70 (Mr. King's Supplemental Declaration).

wells required maintenance or repair. CP at 1094 ¶4. At the time EWU applied to consolidate its water right certificates neither of its wells had the capacity to withdraw 900 GPM. CP at 1094 ¶5.

On February 13, 2003, DOE approved EWU's application to consolidate its water rights. CP at 1094 ¶5. The consolidated permit allowed EWU to draw 900 GPM from its two existing water wells in any combination, but it did not authorize EWU to draw more than 900 GPM or to drill additional water wells elsewhere on or off campus. CP at 1094 ¶5.

DOE rules allowed EWU to "refurbish" its existing wells to increase the individual yield of each well. CP at 1094 ¶6. Under DOE rules, refurbishment could include drilling a replacement well as long as the new extraction point was in immediate proximity to the existing hole. CP at 1094 ¶6.

In May 2003, EWU advertised for and accepted bids to refurbish two water wells, Well 1 and Well 2, located on EWU's Cheney campus. CP at 306, 1097. The work included drilling new "points of withdrawal" (i.e., water wells) in the immediate vicinity of the two existing EWU wells in order to ensure that either well could pump the 900 GPM authorized by the consolidated permits. CP at 306, 1094, 1097. EWU used the engineering firm of Thomas Dean and Hoskins (TD&H) to design the refurbishment project. CP at 1094 ¶7.

EWU did not prepare a hydrogeology report or otherwise attempt to determine the subsurface conditions in the area of the proposed refurbishment project. CP at 1094 ¶8. By contract, the duty to investigate subsurface conditions was the responsibility of the bidding contractor. CP at 1094 ¶8. A complete discussion of this aspect of Elcon's contract with EWU is included in Appendix A ¶s 7-12, 17-31 (CP at 1094-99).

Elcon submitted the low bid of \$1,516,635.00, and was awarded the contract.² CP at 1094 ¶ 7, CP at 1097 ¶¶ 17-18, CP at 1099 ¶ 26, CP at 1107.

The court of appeals accurately summarized the subsequent contractual dispute between Elcon and EWU:

Also in 2003, Elcon successfully bid for "Wells 1 & 2 Refurbishment" by drilling two 750 feet wells. Elcon certified it had, "investigated and satisfied itself as to the general and local conditions which can affect the Work or its cost, including ... (d) the conformation and conditions of the ground; and (e) the character of equipment and facilities needed preliminary to and during the performance of the Work." CP at 313. EWU agreed to pay Elcon \$1,516,635 for the well work.

As construction progressed, Elcon had increased difficulty in drilling near Well 1. Elcon did not have the equipment to drill significantly deeper than 750 feet. Elcon refused to continue drilling unless EWU assumed the risk of damage to its equipment. In April 2004, EWU terminated its contract with Elcon for convenience and requested a final

² By subsequent change order, the contract price was adjusted to include the cost of drilling through a sand interbed Elcon discovered. CP at 1448-70. At arbitration the contract amount was calculated at \$1,555,668.90. CP at 1132.

pay request. Elcon submitted its pay request, which EWU disputed. Based on later discovered damage information to Well 1 derived from a high-resolution video, EWU changed its termination claim from convenience to for cause. EWU notified Elcon by letter of its change from convenience to for cause. It provided Elcon's bonding company a copy of this change letter.

Slip Opinion at 2-3 (Pet. for Rev., Appendix A). See also CP at 1097-99 ¶s 17-31.

The "Golder Report" was commissioned three years before DOE authorized consolidation of EWU's water rights for the two existing campus wells (and thirteen years after EWU requested consolidation).³ CP at 1096 ¶13-16. It was a long term planning document commissioned to identify options for obtaining more water than EWU's existing rights to 900 GPM would satisfy. CP at 1096 ¶14. Because, at the time the Golder Report was written, EWU did not have the consolidation permit from DOE that would allow it to refurbish its two existing wells, the report does not discuss refurbishment of Wells 1 or 2 as an option for increasing EWU's water capacity beyond 900 GPM. CP at 1096 ¶13-16.

The Golder Report did not show the subsurface conditions in the area where drilling for the refurbishment project was undertaken. CP at 316-56; 1096 ¶13-16. The only subsurface information the Golder Report

³ The draft report was issued May 11, 2000. CP at 316-56. The report recommended that EWU build a new well in the Grand Rhonde aquifer below the Wanapum aquifer "from about 700 to 1,500 feet below ground surface." CP at 338.

contains related to off campus sites and was a compilation of well log data from other off campus wells (including those for the city of Cheney) that was readily available to the public. CP at 316-56; 1096 ¶13-16.

Elcon errs in suggesting that the court of appeals opinion ignored the underlying record, “erroneously misstated” facts from the record and is unsupported and “erroneous.” Pet. for Rev. at 2, 3, and 6. The court of appeals opinion reflects a careful reading of the Golder Report (CP at 315-56) and accurately describes the irrelevance of the 2000 Golder Report to the 2003 Elcon contract: “EWU did not believe the Golder Report's Grande Rhonde alternative was relevant since it wanted to refurbish its existing wells and consolidate its water rights.” Slip Opinion at 2 (Pet. for Rev., Appendix A).

B. Procedural History

Elcon Construction, Inc. filed a summons and complaint against Eastern Washington University on November 3, 2004, and amended both documents on January 10, 2005. CP at 1-16, 17-33. Elcon filed the litigation prior to the AAA arbitration required under § 8.02 of the General conditions of the contract between EWU and Elcon. CP at 1-16, 92-94. The amended complaint alleged thirteen causes of action including claims for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, equitable estoppel, promissory estoppel, breach of

warranties, doctrine of superior knowledge, negligent misrepresentation, fraud, defamation/libel, tortious interference with contractual relations, false light, and violations of 42 U.S.C. § 1983 based upon the Fourteenth Amendment. CP at 25-33.

On December 16, 2005, AAA arbitrator James S. Craven entered a final award on Elcon's contract claims. CP at 1132-33. The arbitrator subsequently found he did not have jurisdiction to amend the final award to include pre-judgment interest (based on a common law claim) or attorneys' fees and costs.⁴ CP at 1134.

On August 28, 2006, the Spokane County Superior Court awarded partial summary judgment to EWU on Elcon's tort claims, dismissing all but Elcon's claims for fraud and false light and finding the superior court's jurisdiction was limited to awarding post-judgment interest to Elcon. CP at 1039-45.

EWU sought discretionary review of the trial court's denial of its motion for summary judgment on Elcon's remaining claims, arguing that they should be dismissed under the economic loss rule. CP at 1056-58. Division III of the court of appeals denied discretionary review to EWU on January 5, 2007. CP at 1056-58.

⁴ Neither the arbitrator's nor the trial court's denial of attorneys' fees was appealed.

On April 4, 2008, EWU again moved for summary judgment on the basis of a significant change in the applicable law. This Court's decision in *Alejandre v. Bull, supra*, reversed Division III's intermediate decision on the economic loss rule and supported a ruling for EWU in this case. CP at 1088-1275.

On May 30, 2008, the trial court granted EWU's properly renewed motion for summary judgment. CP at 1382-87.

Elcon appealed both partial awards of summary judgment (8/3/2006 and 5/30/2008) on June 25, 2008. CP at 1388-403.

On August 25, 2009, Division III of the Court of Appeals decided Cause No. 272010-III in favor of EWU in an unpublished decision. EWU did not seek publication since this Court's decision in *Alejandre* has fully articulated the applicable law.

V. ARGUMENT AGAINST REVIEW

A. Standard of Review

The considerations governing acceptance of discretionary review by this Court are identified in RAP 13.4(b). Elcon erroneously seeks review of the court of appeals decision on the grounds that it "conflicts with decisions and policies expressed in prior Supreme Court decisions and also involves issues of substantial public policy." Pet. for Rev. at 10; RAP 13.4(b)(1) and (b)(4).

B. The Court of Appeals Acted In Accord With This Court's Decisions When It Found That Elcon's Claims Are Barred By The Economic Loss Rule

Elcon's fraud claim is based on its allegation that it was deceived by EWU's failure to provide the Golder Report to bidders and that the failure constitutes fraud actionable apart from contract claims. Pet. for Rev. at 11. There is no basis in law for this argument, nor does it have a rational basis. EWU was anxious to increase its campus water supply and to have Elcon successfully refurbish its two existing wells. Elcon's suggestion that EWU fraudulently induced Elcon to bid on the refurbishment contract or fraudulently concealed information from Elcon ultimately makes no sense. All parties agree that EWU needed increased water and entered into the contract with Elcon for the sole purpose of increasing its water. It defies logic to conclude that EWU would hire and pay Elcon more than \$1.5M to provide drilling work that would not achieve this unquestioned goal.

The court of appeals correctly found that there was no factual basis for Elcon's fraud claim because the Golder Report had no relevance to Elcon's contract with EWU to refurbish Wells 1 and 2. The case is, consequently, controlled by the economic loss rule as it has been defined by this Court and consistently applied by the courts of appeal. Under the

facts of this case, a fraud exception to the economic loss rule is not implicated.

In 2007, this Court considered and rejected a nearly identical claim without reaching the issue of whether such a claim would be precluded by the economic loss rule. *Alejandre*, 159 Wn.2d at 690-91. The court in *Alejandre* determined that plaintiff had no right to rely on the alleged misrepresentation because the plaintiff had failed in the duty to exercise diligence in investigation and inspection before relying on representations by the defendant. *Id.* Here, as in *Alejandre*, the undisputed facts are that Elcon, despite contractual and common law duties requiring it to thoroughly and independently investigate subsurface conditions before bidding, *exercised no diligence at all* and undertook virtually no investigation other than inquiring of defendant. CP at 1193-95. CP at 1211-13.

In *Alejandre* the plaintiff purchased a home with a defective septic system. Testimony indicated the drain field was clogged and could not be repaired and that this was made known to the seller before she sold the property to the plaintiffs. *Alejandre*, 159 Wn.2d at 680. The seller failed to disclose the problem to the buyers, instead telling them that any problems with the system had been repaired. When the buyers discovered the problem and that the seller had been told about the problem, they sued

for fraud and negligent misrepresentation. After plaintiff's rested, the trial court granted the seller's motion for judgment as a matter of law on the grounds that the claims were barred by the economic loss rule and that plaintiff's evidence was not sufficient to support her claims.

On appeal, Division III reversed the trial court's order, holding that the plaintiffs had submitted sufficient evidence and that "the economic loss rule does not apply because the parties' contract did not allocate risk for fraudulent or negligent misrepresentation claims." *Alejandro*, 123 Wn. App at 626. This is the same argument Elcon makes in its petition. Pet. for Rev. at 11-13.

This Court disagreed with Division III's analysis of the economic loss rule:

The Court of Appeals held, however, that if the parties fail to specifically allocate a risk of loss in their contract, the economic loss rule does not apply as to that risk. *Alejandro*, 123 Wn. App. at 626. . . This holding is inconsistent with the weight of authority and with *Berschauer/Phillips*.

In *Berschauer/Phillips*, we stated that our holding limiting the recovery of economic loss due to construction delays ensures "that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts." *Berschauer/Phillips*, 124 Wn.2d at 826....We did not say, however, that the parties will be held to their bargained-for remedies only if they explicitly addressed any or all potential economic losses and allocated the risks associated with them.

Alejandre, 159 Wn.2d at 686-87.

In May 2008, the trial court in this case correctly found that Elcon's fraud claim must fail even though Elcon attempted to avoid *Alejandre* by claiming fraud in the inducement. Elcon's claim must fail, in part, because Elcon admits that the damages it seeks for fraud are exactly the same as Elcon claimed as compensatory under the contract. *See*, CP at 1136-41, 1143-51, and 1223-26. As this Court stated in *Alejandre* in footnote 6 at page 690:

The Alejandres urge the court to hold that the economic loss rule does not apply to claims of fraud in the inducement, and they argue their fraud claims are claims of fraud in the inducement. We are aware that some courts recognize a broad exception to the economic loss rule that applies to intentional fraud. (Citations omitted.) **Other courts recognize a limited exception to the economic loss rule for fraudulent misrepresentation claims that are independent of the underlying contract (sometimes referred to as fraud in the inducement) but only where the misrepresentations are extraneous to the contract itself and do not concern the quality or characteristics of the subject matter of the contract or relate to the offending party's expected performance of the contract.** *See, e.g., Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 209 Mich.App. 365, 532 N.W.2d 541 (1995) (leading case); (other citations omitted). We need not address the question whether any or all fraudulent representation claims should be foreclosed by the economic loss rule because we resolve the Alejandres' fraudulent representation claims on other grounds (emphasis added).

While it is notable that this Court passed on the opportunity to create a fraud exception to the economic loss rule in *Alejandre*⁵, it is equally significant to the instant case that this Court cited *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 532 N.W.2d 541 (1995) as the leading case among those creating such an exception. The *Huron* court decided to recognize fraud in the inducement as a narrow exception to the economic loss rule but in so doing indicated that *the conduct complained of and the damages sought to be recovered had to be completely distinct from the contract* before the exception would apply. *Huron*, 532 N.W.2d at 545.

In this case, the trial court correctly held that the conduct complained of is not extraneous to the contract but a significant part of the fabric of the contract. The contract documents include, among other things, instructions to bidders and general conditions which allocate responsibility for determining foreseeable subsurface conditions. CP at 1103-24. The contract clearly and unequivocally made inspection of and familiarity with subsurface conditions a contractual duty of Elcon's, not EWU. CP at 1103-24, particularly 1113 and 1114.

Elcon's fraud allegations against EWU here are "undergirded by factual allegations identical to those supporting their breach of contract

⁵ See *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008), review granted *in part*, 166 Wash.2d 1015, 210 P.3d 1019 (2009).

counts” and the damages claimed here are the same as those claimed in the contract action.⁶ See, CP at 1136-41, 1143-51, and 1223-26. Because of the identity of factual claims and damage issues raised in the contract and fraud claims, no recognized fraud exception should apply, and the economic loss rule bars additional recovery by Elcon.

In addition, allowing Elcon to proceed here under a fraud exception to the economic loss rule would run afoul of the *Alejandre* decision’s strong policy statement in favor of enforcement of contracts by ignoring the contractual provisions requiring that Elcon become familiar with subsurface conditions and allocating responsibility for knowledge of subsurface conditions to Elcon:

As one court stated: ‘Courts should assume that parties factor risk allocation into their agreements and that the absence of comprehensive warranties is reflected in the price paid. Permitting parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.’ (*citations omitted*).

In fact, if a court permits a tort claim on the ground that the parties have not expressly allocated a particular risk, it interferes with the parties ‘freedom to contract’...to permit a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of the parties to

⁶ While Elcon did not get every dollar it sought in the contract claim which was disputed by EWU as “inflated,” it nevertheless claimed the same damages. There is no authority for the proposition that failure to prove every dollar of damage claimed to the satisfaction of the arbitrator sets the damages claimed but not awarded apart as damages resulting from fraud in the inducement.

allocate the risks of their own transactions' ” (citations omitted). “ [t]he effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for-limited liability’ (citations omitted).

Alejandre, 159 Wn.2d at 688. See also, *Basin Paving Company v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 66-68, 27 P.3d 609 (2001), where a contractor’s claim for extra work under the contract based on subsurface conditions that differed from owner’s pre-contract test borings was denied because contractor had responsibility under the contract for determining foreseeable subsurface conditions.

Since the responsibility for ascertaining subsurface conditions was allocated by contract to Elcon, the economic loss rule, as discussed in this Court’s decision in *Alejandre*, applies and bars Elcon’s claim.

C. No Admissible Evidence Supports Elcon’s Claim That EWU Tortiously Interfered With the Corporation’s Contractual Relationships

In its petition, Elcon argues that the court of appeals failed to review the trial court’s award of summary judgment on its claim that EWU interfered with its business relationship because there was a contract between the parties. Pet. for Rev. at 17. Elcon insists that the import of the court of appeals decision is that “as long as a contract exists, a party...can commit an economic tort with impunity.” Pet. for Rev. at 17.

Elcon's argument ignores the fact that no admissible evidence supports the corporation's claim for tortious interference.

On August 28, 2006 (after a letter ruling on July 19, 2006), the trial court dismissed Elcon's tortious interference with a contractual relationship claim on the grounds that the only evidence supporting the claim that Elcon had been intentionally damaged by EWU was inadmissible hearsay. CP at 856, 1018. There is no reason to revisit the trial court's conclusion. Elcon has failed to produce material facts sufficient to support a prima facie case of tortious interference⁷ with a contractual relationship or business expectancy. No issue of public policy is raised by this decision in Elcon's case.

D. The Court of Appeals Acted In Accord With Well-Established Case Law When It Denied Elcon's Claim For Statutory Interest

1. Relevant Facts

The contract which Elcon entered into with EWU provided:

All claims arising out of the Work shall be resolved by arbitration. The judgment upon the arbitration award may be entered, or review of the award may occur, in the superior court having jurisdiction thereof. No independent

⁷ Tortious interference with a contractual relationship or business expectancy requires Elcon to establish five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) evidence that EWU had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that EWU interfered for an improper purpose or used improper means; and (5) that Elcon experienced resultant damage. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

legal action relating to or arising from the Work shall be maintained.

CP at 93 (§ 8.02 C of Elcon / EWU Contract (emphasis added)).

Furthermore,

Claims between Owner and Contractor, Contractor and its Subcontractors, Contractor and A/E, and Owner and A/E shall, upon demand by Owner, be submitted in the same arbitration or mediation.

CP at 93 (§ 8.02 D of Elcon / EWU Contract).

On April 15, 2004, EWU terminated its contract with Elcon for convenience pursuant to part 9.02 of the General Conditions of the parties' contract. CP at 852-53. On October 22, 2004, after EWU had the opportunity to view an independent high resolution video of the entire length of Well 1, EWU sought to treat its termination of the contract as a termination for cause under Part 9.01(D) of the contract's General Conditions because of the "substantial amount of damage" visible in the video, including damage to "virtually every welded joint." CP at 162-64, 852-53.

In its October 22, 2004, letter, EWU advised Elcon that it was "not entitled to receive further payment on the Project, if any, until the work has been accepted and a full accounting of EWU's damages has been determined." CP at 853.

After a long delay in which Elcon filed suit against EWU, but failed to either mediate its claim with EWU or to contact the American Arbitration Association as the contract required in order to initiate arbitration (CP at 93, ¶ 8.02 B), the parties participated in a four day arbitration (November 14, 15, 16, and 23, 2005). CP at 1132-33. At arbitration, Elcon requested payment of between \$1,547,048.68 and \$1,845,715.63. CP at 1140. EWU requested that payment to Elcon be limited to \$550,000, with setoffs for nonconforming work.⁸ CP at 1163, 1153-64. The arbitrator awarded \$891,202.70 to Elcon (noting that EWU had already paid Elcon \$946,293.36). CP at 1132.

The arbitrator decided all of the issues raised by the parties. The award concluded by stating: "This FINAL AWARD is full resolution of all claims and counterclaims, and issues submitted to this arbitration. CP at 1133-34. All claims not expressly granted herein are hereby denied." CP at 1132-33. Elcon did not request pre-judgment interest or attorney's fees or post-judgment interest at arbitration. CP at 1136-41, 1143-50. It made no request for statutory interest and made no mention of the prompt pay act. CP at 1136-41, 1143-50.

On December 22, 2005, six days after the arbitrator had entered the final arbitration award, Elcon filed a motion for award of attorneys' fees,

⁸ "In this case, EWU is left with a bore hole that is worse than worthless." CP at 1164.

costs and pre-award common law interest. CP at 387, 428. Elcon made no request for statutory interest at this time. CP at 387, 428. On January 30, 2006, the arbitrator determined that he lacked “post-Final Award jurisdiction to address these issues pursuant to RCW 7.04 et sequitur, and AAA rules.” CP at 387, 1134.

In the trial court’s August 28, 2006, order (based upon its July 19, 2006, letter ruling), it awarded post-judgment interest to Elcon, but found that it did not have jurisdiction to award pre-judgment interest. CP at 1047, 1051-52.

The proper conclusion to be drawn from these facts is not that the trial court erred but either that Elcon erred when it failed to request pre-award interest at the time of the arbitration, or that Elcon correctly knew at the time of the arbitration that no pre-judgment interest could be award on an amount that was disputed in good faith by EWU. RCW 39.76.020(4).

2. Argument

a. Elcon Failed To Demonstrate Errors Justifying A Modification Of The Arbitration Award

The trial court ruled correctly in August 2006 when it found that it did not have jurisdiction to alter the arbitrator’s final award.

A superior court's limited review of an arbitration award does not allow for adding pre-judgment interest. *Westmark Properties, Inc v.*

McGuire, 53 Wn. App. 400, 766 P.2d 1146 (1989); *see also Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 279-80, 876 P.2d 896 (1994) (superior court did not have the power to award attorney's fees that were not provided in an arbitration award).

This Court has specified that "unless the award on its face shows [the arbitrator's] adoption of an erroneous rule, or mistake in applying the law, the award will not be vacated or modified," *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995).

In *Westmark, id.*, the court of appeals examined the propriety of a superior court's award of pre-judgment interest during a confirmation hearing when the arbitrator had failed to make such an award. The appellate court held that pre-judgment interest could not be awarded when the arbitrator failed to so provide. *Westmark*, 53 Wn. App. at 404.

b. The Trial Court Did Not Have Jurisdiction To Amend The Arbitrator's Award

Elcon does not allege errors that would satisfy the statutory grounds for modifying the arbitration award. By asking this Court to force the trial court to add interest to the award, Elcon asks this court to enter into the "forbidden territory" of the arbitrator's jurisdiction.

The rule precluding a superior court from adding interest to an arbitration award was confirmed in the case of *Wash. Dept. of Corrections*

v. Fluor Daniel, Inc., 130 Wn. App. 629, 126 P.3d 52 (2005). The law in this area is well-settled and does not require review by this Court.

c. Elcon Is Also Not Entitled To Interest Based On Washington's Common Law

Elcon's original request for interest in this case was based on common law rather than statute. CP at 428, 1134. That request would have been appropriately denied by the arbitrator even if it had been timely.

"Under the common law, a claim is liquidated only if its amount is readily determinable and it is possible to determine the exact amount without reliance on opinion or discretion. *Hansen v. Rothaus*, 107 Wn.2d 468, 472. 730 P.2d 662 (1986). "Where a defendant has challenged the reasonableness of the amount awarded for extra work arising outside of the contract, the award is unliquidated, "because reliance upon opinion and discretion [is] necessary in determining the reasonableness of the amounts expended.'" *Kiewit-Grice v. State*, 77 Wn. App. 867, 873, 895 P.2d 6 (1995). "A claim is unliquidated if the principal must be arrived at by a determination of reasonableness." *Id.* at 873. "[A] defendant should not be required to pay pre-judgment interest in cases where he is unable to ascertain the amount owed." *Id.* at 873.

Elcon's claim was clearly not readily determinable without reliance on opinion or discretion. At the arbitration, Elcon submitted

testimony through an expert accountant witness that it was entitled to \$1,547,048.68, while Elcon continued to claim entitlement to \$1,845,715.63. CP at 895-979. EWU presented expert testimony that, at most, Elcon might be entitled to \$525,457.57 less whatever offset was due for defective work. CP at 1153-64. The arbitrator's award was actually for an amount different from that which either party calculated. As in the *Kiewit-Grice* case, there was no way EWU could have determined that the amount eventually awarded was the amount due.

The common law on unliquidated damages is also well-settled and does not require review by this Court.

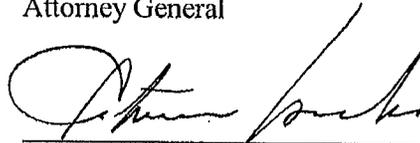
VI. CONCLUSION

This unpublished case is governed by this Court's decision in *Alejandre v. Bull, supra*. It does not conflict with that decision, or with any other recent published Washington decision on the economic loss rule. RAP 13.4(b)(1). Public policy fully supports applying the economic loss rule to the facts of this case. RAP 13.4(b)(4).

EWU respectfully requests that this Court deny Elcon's petition for review.

RESPECTFULLY SUBMITTED this 2nd day of December, 2009.

ROBERT M. MCKENNA
Attorney General



CATHERINE HENDRICKS, WSBA #16311
Senior Counsel
JAROLD P. CARTWRIGHT, WSBA #9595
Senior Counsel
Attorneys for Respondent Eastern Washington
University

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BY RONALD R. CARPENTER

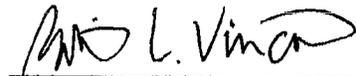
CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of ^{CLERK} the State of Washington, that on the undersigned date the original of the preceding Answer To Petition For Review and Certificate of Service were filed in the Washington State Supreme Court according to the Court's Protocols for Electronic filing, as a PDF e-mail attachment, at the following e-mail address: Washington State Supreme Court (Supreme@courts.wa.gov).

And, that I arranged for a copy of the preceding Answer To Petition For Review and Certificate of Service to be served on counsel for petitioner at the address below, by prepaid First Class U.S. Mail:

Kevin W. Roberts
Dunn & Black, P.S.
111 N. Post Street, Suite 300
Spokane, WA 99201-0907

DATED this 2nd day of December, 2009, at Seattle, WA.


PATTI L. VINCENT

ORIGINAL

APPENDIX A

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HONORABLE NEAL Q. RIELLY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

ELCON CONSTRUCTION, INC., a
Washington corporation,

NO. 04-02-05145-7

Plaintiff,

vs.

DECLARATION OF SHAWN KING
IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

EASTERN WASHINGTON
UNIVERSITY,

Defendant.

SHAWN KING hereby states and declares as follows:

1. I am over the age of eighteen and competent to testify to the facts stated in this declaration. The statements in this declaration are based on my personal knowledge of the matters related below.

2. I am the Associate Vice President for Facilities and Planning for the Defendant Eastern Washington University ("EWU"). I make this declaration in support of EWU's Motion for Summary Judgment.

3. Since 1984, EWU has had three separate water right certificates permitting it to pump up to 900 gallons per minute ("GPM") from its two campus water wells. Prior to

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SUMMARY JUDGMENT

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1 April 17, 2003; the certificates were specific to each well, and allowed EWU to pump 750
2 GPM from well 2 and 150 GPM from well 1.

3 4. EWU has long wanted to consolidate its certificates to be able to withdraw its full
4 allocation of 900 GPM from either one or both wells in order to provide more flexibility and to
5 ensure an adequate water supply remains available in the event one of the wells is down during
6 times of maintenance or repair. As early as September 25, 1987, EWU applied to the
7 Department of Ecology ("DOE") for consolidation.
8

9 5. On February 13, 2003, DOE finally approved EWU's application to consolidate
10 its water rights thereafter allowing it to withdraw a total of 900 GPM from either or both of its
11 two water wells in any combination. The consolidated permit did not authorize EWU to draw
12 more than a total of 900 GPM or authorize EWU to drill additional wells elsewhere on campus.
13 At the same time, neither EWU's existing well 1, nor well 2 has the capacity to withdraw the
14 full 900 GPM that the new consolidated permit now allows. Both wells must be pumping at
15 the same time to reach permitted capacity.
16

17 6. DOE rules allowed EWU to "refurbish" its two existing wells so as to increase
18 their individual yield. Refurbishment can include drilling a replacement well so long as the
19 new extraction point is in the immediate proximity of the existing hole.
20

21 7. After receiving the permit allowing consolidation of its water rights received on
22 February 13, 2003, in order to take advantage of the permit, EWU elected to refurbish well 1
23 and well 2 to try to increase their independent capacity with the intent that either well could
24 pump up to 900 GPM as needed. EWU used the engineering firm of Thomas Dean and
25 Hoskins ("TD&H") to design the refurbishment project.
26

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1 8. EWU did not prepare a hydrogeology report or otherwise seek to determine the
2 subsurface conditions in the area where the drilling for this project would be undertaken. The
3 duty to investigate subsurface conditions was, by contract, the contractor's.

4 9. Nor did EWU represent to Elcon or any other potential bidder what subsurface
5 conditions would be encountered. Except for the information in well log 2, EWU did not know
6 what subsurface conditions would be encountered in the immediate proximity of the existing
7 wells or near the area where the drilling for this project would be undertaken. EWU had a well
8 log for original well 2 which it provided to Elcon and other bidders, but did not have a well log
9 for well 1.
10

11 10. EWU informed Elcon that the geological formation sketched on design
12 documents was in general based on that found in the well log for well 2, but that that
13 information was "shown for information only," and expressly stated that "No representation is
14 made as to their accuracy." Attachment A.
15

16 11. In fact Elcon, by submitting its bid, represented to EWU that:

17 "[I]t has taken steps reasonably necessary to ascertain the nature and
18 location of the Work, and that it has investigated and satisfied itself as to
19 the general and local conditions which can affect the Work or its cost,
20 including but not limited to:

- 21 d. the conformation and conditions of the ground; and
22 e. the character of equipment and facilities needed preliminary to
23 and during the performance of the Work. Attachment B.
24
25
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1 12. Moreover, the contract requires the contractor to investigate subsurface
2 conditions. Part 1.03(2) provides:

3 Contractor makes the following representations to Owner:

4
5
6 2. Contractor has carefully reviewed the Contract Documents,
7 visited and examined the Project site, become familiar with the local
8 conditions in which the Work is to be performed, and satisfied itself as
9 to the nature, location, character, quality and quantity of the Work, the
10 labor, materials, equipment, goods, supplies, work, services and other
11 items to be furnished and all other requirements of the Contract
12 Documents, as well as the surface and *subsurface conditions* and other
13 matters that may be encountered at the Project site or affect performance
14 of the Work or the cost or difficulty thereof. . . .

15 (Italics added.) Attachment C.

16 13. The "Golder Report" which Elcon now argues shows subsurface conditions was
17 not prepared for the well 1 and well 2 refurbishment project. Attachment D. In fact, it was
18 commissioned before DOE authorized EWU to consolidate its existing water rights which gave
19 rise to the refurbishment project.

20 14. The "Golder Report" was a long term planning document commissioned to
21 identify options to meet projected future needs for more water than its present 900 GPM rights
22 would satisfy. Although one of the options discussed was seeking to obtain additional water
23 rights and drilling an entirely new well somewhere on campus to supplement the capacity of
24 wells 1 and 2, the report had absolutely nothing to do with the refurbishment project that Elcon
25 bid on.

26 15. When the "Golder Report" was done, it had been more than 12 years since EWU
requested DOE to allow it to consolidate its water rights. DOE had not taken action on the

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1 request and EWU had no reason to expect that it would in the foreseeable future. At that time,
2 EWU did not have the consolidation permit that would have allowed it to consider refurbishing
3 wells 1 and 2. The "Golder Report" does not discuss refurbishment of wells 1 or 2 as one of
4 the options it considered as a possible way to increase capacity beyond 900 GPM.
5

6 16. The "Golder Report" does not purport to show the subsurface conditions that
7 would be encountered in the immediate area where the drilling for this project would be
8 undertaken. The only subsurface information that the report does contain relates to off-campus
9 sites and is simply a compilation of well log data from other wells which information is readily
10 available to the general public.

11 17. In May 2003, EWU advertised for and accepted bids to refurbish two wells,
12 well 1 and well 2 to drill two new "points of withdrawal," place new pumps and install propane
13 generators and related electrical systems.
14

15 18. The work covered in the relevant section of the specifications includes the
16 furnishing of all plant equipment, labor, materials, and services to drill two water supply wells
17 in accordance with RCW Chapter 18.104 and WAC 173. *Depth of each well is estimated to be*
18 *750 feet. Should water of sufficient quantity and quality be encountered at lesser depths,*
19 *drilling may be stopped by the Owner. Likewise, the Owner may direct the depth to be*
20 *increased in order to obtain sufficient water. The objective is to drill two wells, each capable*
21 *of producing 900 gpm at maximum drawdown. Section 13951, ¶1.01, Attachment E. The*
22 *nominal drilling depth of both new points of withdrawal was 750 feet. The 750-foot nominal*
23 *depth was not the maximum depth of the well. The contract documents clearly state that.*
24
25
26

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1 19. Elcon experienced numerous problems drilling the new extraction point for
2 well 1. Prior to the termination for convenience (April 14, 2004), working relationships and
3 communication with Elcon had been deteriorating for the previous few months. Elcon was
4 refusing to continue to drill without a statement from EWU that it would guarantee to pay for
5 any repairs on their equipment caused by continuing to drill and that EWU would assume risks
6 of the drilling operations.
7

8 20. EWU made the decision to terminate for convenience because communication
9 with the contractor had deteriorated to a point that it was not productive for the project. The
10 contract was well behind the original schedule and Elcon had not provided a viable recovery
11 schedule. Drilling that had been done previous to Elcon's stop drilling was slow and at low
12 productivity level. EWU had lost confidence in the contractor's ability to complete the project
13 and to recover the schedule. Damage to the well casing made it difficult to test the wells
14 productivity. Elcon refused to continue to drill without assurance from EWU that EWU would
15 be entirely responsible for the risk on continued drilling and for any damage to Elcon's
16 equipment.
17

18 21. The information that was then available to EWU appeared to show the damage to
19 the casing was confined to milling marks and one visible penetration at an approximate depth
20 of 626 feet. Information available at that time was that this damage could be repaired and the
21 project could be complete using materials that were already installed.
22

23 22. EWU believed that to terminate for convenience and make equitable adjustment
24 for reasonable direct cost incurred prior to the termination would be the best response for both
25 parties.
26

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1 23. Subsequently however, after reviewing the video tape of the well (dated April 6,
2 2004 and received by EWU from DOE on May 27, 2004) called the "Golder Video," EWU
3 became concerned that damage to the well casing was not confined to the milling and
4 penetration at approximately 626 feet. In viewing the "Golder Video," additional damage was
5 visible at each casing weld and the piping adjacent to the welds.
6

7 24. After viewing the "Golder Video," EWU began to gather information from our
8 engineering consultant that would reasonably identify whether or not this damage was caused
9 by contractor's means and methods and non-conforming work; whether or not the casing was
10 repairable, if repaired, would the materials installed meet the requirements of the DOE for
11 appropriate casing; and whether the repair would meet the expectations of EWU for a pumping
12 chamber that would be viable as a long term investment.
13

14 25. On August 5, 2004, EWU met with our engineering consultant to review current
15 information and decide whether damage to the casing was deemed non-conforming work.
16 Based upon the information and the amount of damage that was evident on the "Golder Video"
17 and the concern that repairs would not be able to be done, it was decided that the damage
18 constituted non-conforming work. Once the decision was made, EWU proceeded to convert
19 the termination for convenience to a termination for cause on October 22, 2004.
20

21 26. The total amount Elcon was awarded for the entire project including both wells,
22 the generator and electrical work was \$1,516,635. As of the date EWU terminated the contract
23 EWU had paid Elcon \$946,293.36 for the work performed on the generator setup, electrical
24 work and its partial work drilling well 1. Elcon had not started work on well 2.
25
26

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1 27. In June of 2005, Elcon submitted its "Termination for Convenience Pay Request"
2 claiming an entitlement to an additional \$1,845,715.63. After careful review of Elcon's claim,
3 EWU determined that it was seeking payment in excess of that allowed by the contract. EWU
4 disputed the claim and asserted a counter-claim based on the damage to the casing.
5

6 28. The parties' contract at paragraph 8.02 C provides that all claims arising out of
7 the work of the contract shall be resolved by arbitration and that no independent legal action
8 relating to or arising from the work shall be maintained. Attachment F.

9 29. The parties' contract at part 2 required Elcon to obtain a performance bond.
10 However, at no time did EWU contact Elcon's bonding company to make a claim on its bond.
11 At no time did Elcon contact EWU to ask that its bond be released prior to the resolution of its
12 disputed claim.
13

14 30. In October of 2003, during the drilling operation, some drill foaming agent that
15 Elcon was using migrated into a well EWU was using and contaminated the campus water
16 supply. I am familiar with some of the media reports relating to this incident, as well as the
17 underlying facts and to the best of my knowledge and belief, the media reports were accurate
18 and truthful.

19 31. Elcon's claims, including that EWU withheld the Golder Report, have been
20 arbitrated and the arbitration resulted in an award to Elcon of an additional \$891,202.70. This
21 award necessarily satisfies all claims related to this contract, and Elcon's civil lawsuit seeking
22 more money should be dismissed.
23

24 ///

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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.

DATED this 24th day of February, 2006 at Spokane, Washington.

EASTERN WASHINGTON UNIVERSITY

By: 
SHAWN KING
Its: Associate Vice President for Facilities
and Planning

DECLARATION OF SHAWN KING IN
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To: Vincent, Patti (ATG)
Subject: RE: Elcon v. Eastern Washington University, S. Ct. No. 83690-6 - Attachment Filing

Rec. 12-02-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Vincent, Patti (ATG) [mailto:PattiV@ATG.WA.GOV]

Sent: Wednesday, December 02, 2009 12:16 PM

To: OFFICE RECEPTIONIST, CLERK

Subject: Elcon v. Eastern Washington University, S. Ct. No. 83690-6 - Attachment Filing

Please find the following PDF documents attached for filing in Elcon v. Eastern Washington University, S. Ct. No. 83690-6:

- Answer to Petition for Review, with Attachment A and certificate of service; and
- Motion Requesting Permission to File Overlength Brief, and certificate of service

Senior Counsel Catherine Hendricks, WSBA No. 16311, tel. no. 206-464-7352, is filing this document on behalf of respondent EWU. A hard copy will be delivered to petitioner's counsel by First Class U.S. mail.

<<Mtn to File Overlength Brief 12-2-09.pdf>> <<Ans to PFR w-Appendix A 12-2-09.pdf>>

Patti Vincent

Torts Appellate Program

206-389-2150