

83690-6

FILED

APR 21 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 272010

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

ELCON CONSTRUCTION, INC.

Appellant

v.

EASTERN WASHINGTON UNIVERSITY

Respondent

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 04-2-05145-7
THE HONORABLE GREGORY D. SYPOLT

**APPELLANT ELCON CONSTRUCTION, INC.'S REPLY
BRIEF**

KEVIN W. ROBERTS, WSBA #29473
ROBERT A. DUNN, WSBA #12089
JOHN C. BLACK, WSBA #15229
DUNN & BLACK, P.S.
111 North Post Street, Ste. 300
Spokane, Washington 99201
(509) 455-8711
Attorneys for Elcon Construction, Inc.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. RE-STATEMENT OF THE CASE.....	2
A. RESPONSE TO EWU’S “COUNTER-STATEMENT OF FACTS”	2
B. PROCEDURAL HISTORY.	7
III. ARGUMENT	9
A. STANDARD OF REVIEW.....	9
B. ELCON’S FRAUD CLAIM WAS IMPROPERLY DISMISSED.	9
1. The Economic Loss Rule Does Not Apply.....	9
a. Washington Should Follow The Broad Fraud In The Inducement Exception.	11
b. The Narrow Exception Does Not Bar Elcon’s Claims.....	13
c. Alejandre and Basin Paving Do Not Apply.	14
2. Issues Of Fact Exist With Regard To The Reliance Element.	15
C. ADMISSIBLE EVIDENCE CONFIRMED ELCON SUFFERED DAMAGES AS A RESULT OF EWU’S TORTIOUS INTERFERENCE.	18
1. Elcon’s Ability To Obtain Bonding Was Impacted.	18
2. EWU Was Not “Exercising A Legal Right”.....	20
D. GENUINE ISSUES OF MATERIAL FACT EXISTED WITH REGARD TO EWU’S PUBLICATION IN A FALSE LIGHT.	20

E. BY STATUTE, ELCON IS ENTITLED TO INTEREST. 21

1. Public Works Contractors Must Be Paid Interest On Untimely Payments. 22

2. The Trial Court Had Jurisdiction To Award Statutory Interest. 23

V. RESPONSE TO EWU’S MOTION FOR ATTORNEY FEES AND COSTS..... 24

VI. CONCLUSION 24

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Alejandro v. Bull</u> , 159 Wn. 2d 674 (2007)	14
<u>Allen v. Stephan Co.</u> , 784 So. 2d 456, 457 (Fla. 4 th DCA 2000).....	13
<u>Allied Fire & Safety Equipment Co., Inc. v. Dick Enterprises, Inc.</u> , 972 F.Supp 922 (E.D.Pa. 1977)	19
<u>Basin Paving Co. v. Mike M. Johnson</u> , 107 Wn. App. 61 (2001)	14
<u>Below v. Norton</u> , 751 NW 2d 351, 366-67 (2008)	12
<u>Bland v. Mentor</u> , 63 Wn.2d 150, 155 (1963).....	15
<u>Coson v. Roehl</u> , 63 Wn.2d 384, 388 (1963)	11
<u>D&M Jupiter, Inc. v. Friedopfer</u> , 853 So.2d 485, 487 (Fl. 4 th DCA 2003)	13
<u>Helen Curtis Industries, Inc. v. U.S.</u> , 312 F.2d 774 (1963)	16
<u>Jacksonville Port Authority v. Parkhill-Goodloe Co., Inc.</u> , 362 So.2d 1009 (1978).....	17
<u>Laas v. Montana State Hwy. Comm.</u> , 483 P.2d 699 (Mont. 1971).....	19
<u>LeiberGesell v. Evans</u> , 93 Wn.2d 881 (1980).....	11
<u>Nationwide Mutual Fire Ins. Co. v. Watson</u> , 120 Wn.2d 178, 186 (1992)	9
<u>Pleas v. Seattle</u> , 112 Wn.2d 794, 803-04 (1989)	18
<u>Sergent Mech. Syst. v. U.S.</u> , 34 Fed. Cl. 505 (1995).....	16
<u>Stienke v. Russi</u> , 145 Wn. App. 544 (2008)	11
<u>Taylor v. Maness</u> , 941 So.2d 559 (Fla. 3d DCA 2006)	13
<u>Threatt v. Forsyth County</u> , 552 S.E.2d 123, 126 (2001).....	23
<u>Vesta Const. & Design, L.L.C. v. Lotspeich & Assoc., Inc.</u> , 974 So.2d 1176, 1181 (Fl. Dist. Ct. App. 5 2008)	13

<u>Walla Walla Port Dist. v. Palmberg, 280 F.2d 237 (9th Cir. 1960)</u>	6
<u>Walla Walla Port District v. Palmberg, 280 F.2d 237 (9th Cir 1960)</u>	16
<u>Western States v. Sania, 798 P.2d 1062 (1990)</u>	16

Statutes

RCW 39.04, et seq.	15
RCW 39.76.010(1).....	22
RCW 39.76.010.....	23
RCW 39.76.020(4).....	22
RCW 7.04.170.....	24
RCW 7.04A.240(1)(c).....	23

Other Authorities

1 <u>Bruner and O'Connor on Construction Law, §3:25 (2008)</u>	6
Ralph C. Anzivino, <u>The Fraud in the Inducement Exception to the Economic Loss Doctrine</u> , 90 Marq. L.Rev. 921, 922 (2007)	12
WASH. ST. CONST. Art. 12 §5	21

I. INTRODUCTION

Eastern Washington University (“EWU”) still does not understand Elcon’s case. However, the irrefutable fact is that EWU put out for bid the drilling and construction of two new wells. EWU takes the absurd position that the project was not to construct “new wells”. Instead, it tries to split hairs by claiming the work was “refurbishment” of existing wells. There was no “refurbishment” work performed on existing wells. EWU designed the new wells to be constructed 750’ deep despite the fact it had the Study (which cost more than \$30,000) that concluded any new campus well would need to be drilled to 1,500 feet. While EWU only needed one 1,500’ well to meet its requirements, EWU chose to seek bids on 2 wells at 750’ deep each. EWU never could explain why it would design wells only to 750’ deep when it was told there would be no water at that elevation. Interestingly enough, EWU added contract language to the Public Works Bid documents that required the contractors to continue digging beyond 750’ deep based on a set unit price. EWU was fully aware that a 1,500’ deep well would require different drilling equipment which was unavailable in the Northwest.

Under pressure to have the project bid or lose funding, EWU concealed the Study from Elcon and other potential bidders. In fact, EWU expressly misrepresented the information available to Elcon prior to bid in answer to a direct question by Elcon. It did this to induce local contractors to enter into a contract for the drilling of two new wells EWU knew would ultimately have to be 1,500' deep. Thus, EWU's attempt to twist the facts only highlights EWU's fraudulent conduct intended to induce the bidders into a contract and confirms the Trial court erred by granting EWU's Renewed Motion.

EWU's Response also ignores the relevant procedural history. EWU concedes the parties did not submit the issue of statutory interest for determination as part of the arbitration. Thus, Elcon's tort claims and statutory rights remained to be decided by the Court and the Court erred by refusing to address these issues.

II. RE-STATEMENT OF THE CASE

A. Response to EWU's "Counter-statement of facts".

EWU's verbal gymnastics aside, EWU advertised and accepted bids for the drilling and construction of two new wells on EWU's campus. CP 1166 – "...to drill two water supply wells...".

The facts surrounding how EWU induced Elcon and others to bid on that project are the basis for the fraud alleged in this case. EWU's Response illustrates a fundamental misunderstanding by its lawyers. EWU's existing wells were on campus in the Wanapum aquifer. CP 565.¹ In 1996, EWU filed an application to consolidate its water rights. CP 587. In 1999 and 2000, EWU hired Varela & Associates to perform the Study. CP 534 – 607. EWU does not dispute this Study was intentionally concealed from Elcon and the other potential bidders. EWU also does not dispute that it misrepresented the information it had relating to wells being drilled on campus. CP 864-865.

Instead, EWU claims the Study was not produced "*because this report had not taken into account the alternative of consolidating EWU's existing water rights and refurbishing existing Wells 1 and 2...*" (Response, p. 12). While irrelevant for purposes of a Summary Judgment motion, it is also inaccurate. At EWU's request, the Study included an in-depth analysis of how to develop additional groundwater capacity either from EWU's existing wells

¹ The Wanapum aquifer sits above the Grande Ronde aquifer. CP 564.

or a new well on campus and addressed the consolidation of the well rights. See e.g. CP 587 - *“Meet with DOE as soon as possible to discuss water rights issues, including the status of the university’s 1996 application for change.”* (emphasis added); CP 610. The Study concluded a well drilled 1,500’ deep would be required to obtain adequate water from the Grande Ronde aquifer if drilled anywhere on campus. CP 564-588; CP 316-356; CP 640-41. A fact recognized by EWU. See Response, p. 3 - *“Digging a new well into the Grande Ronde aquifer...would have required digging to a depth of 1500 feet.”*

EWU received consolidation of its water rights from DOE as recommended by the Study. CP 303. EWU was under pressure to bid since it had funding that it would lose if the project did not go forward. CP 695; 716. Despite having the Study that identified any Grand Ronde well would need to be drilled to a depth of 1500’, EWU decided to establish a well depth of 750’ as both the *“pre-design”* and the *“design”* depth. Id.; CP 651-655; 666-667. During discovery, EWU could not answer why this depth was used, nor does EWU’s counsel now offer any explanation. It is undisputed EWU

intentionally concealed the Study from its engineer, TD&H, from Elcon, and other potential bidders. CP 730-735.

The reason EWU withheld the Study is apparent. EWU knew that as depth increases, the type of drilling equipment required changes. EWU knew drilling at 1,500' requires special drilling equipment not commonly found in this region. See e.g. CP 713-714 – “[T]hey had to bring a well driller in from Texas because they went so deep, and nobody had equipment to go that deep.” With budget and timing concerns in mind, EWU also knew very few drillers in the area could even bid the work for a 750' deep well. CP 662. Based on this information, it is undisputed that EWU concealed the Study to induce bidders to bid.

Since the new well was going to be drilled into the Grande Ronde, the Study and its conclusion that any such well needed to be drilled to 1,500', was critical to a contractor assessing whether to bid and agree to enter into the type of unit price contract proposed by EWU. CP 624-636. Prior to bid, Elcon performed an “*independent investigation of the site or subsurface conditions*” as set forth in the instructions to bidders. CP 313. Elcon visited the site and requested

all of the information EWU had relating to the Project, any other wells in the area, or the geology of wells in the area. CP 864-865. EWU misrepresented *the only information* it had. Notably, what it provided did not relate to the Grande Ronde aquifer. Id. Later, EWU again affirmatively misrepresented that no such studies exist! CP 673.

EWU's response wrongfully suggests it could conceal the Study based on the bid instructions. Response, p. 11.

That it has satisfied itself as to...surface and subsurface materials...to be encountered insofar as this information is reasonably ascertainable from the site, including all exploratory work done by Owner...

CP 1113(emphasis added). Thus, by asking for EWU's information, Elcon complied with the instructions. EWU was legally obligated to supply this information which clearly contained important information about drilling a well on campus. See Walla Walla Port Dist. v. Palmberg, 280 F.2d 237 (9th Cir. 1960); and 1 Bruner and O'Connor on Construction Law, §3:25 (2008).² Notably, EWU does not dispute it intentionally concealed the Study from Elcon or that it intentionally misrepresented information it had. The fact is that

² Copy attached as **Exhibit A**.

EWU concealed the Study, the fact a campus Grande Ronde well would have to be drilled to 1,500', and misrepresented the information available, all in order to induce bids.

Unable to dispute the intentional concealment that induced Elcon to enter into the contract, EWU attempts to mislead the Court by raising irrelevant accusations that have already been decided. CP 385. EWU's attempts to attack the difficult work Elcon performed have already been found baseless. Id. Moreover, the underground conditions Elcon encountered during drilling also are not at issue here. The fact Elcon was induced into an adhesion contract and suffered significant damage that it was otherwise prevented from recovering under the terms of EWU's adhesion contract at issue. EWU's meritless accusations have nothing to do with EWU's fraudulent inducement and do not absolve EWU from liability.

B. PROCEDURAL HISTORY.

EWU fails to dispute the procedural history that confirms the Trial court's refusal to consider award statutory interest was in err. EWU does not dispute that the parties only submitted a narrow factual issue to arbitration and the Court retained jurisdiction over

the remaining issues, including Elcon's statutory rights, for later adjudication. EWU has not identified anything in the record establishing the Trial court relinquished jurisdiction. CP 222.

In Arbitration, Elcon's position was that EWU breached its contract by refusing to make payments owed under the contract as a result of EWU's termination for convenience. CP 927-932. On the other hand, EWU claimed that it had "converted" the termination to a default, did not owe any contract payments, and that Elcon owed it money. Under the contract, this factual dispute was to be decided by arbitration. The Arbitration Award established Elcon was owed a contractual payment based upon Elcon's June 4, 2004 pay request. CP 249-50. Because the parties did not submit the statutory issues to arbitration, the Award did not address interest or attorney fees. Id.

EWU originally filed a Motion for Summary Judgment on the tort claims. CP 359-376. The Court correctly denied EWU's Motion, finding the Economic Loss Rule ("ELR") did not apply and that genuine issues of material fact existed as to elements of fraud. CP 1017-20. When EWU re-filed its motion, a Judge new to the case erroneously changed the prior rulings and found that the ELR

barred claims for fraudulent concealment and fraudulent inducement. CP 1379-1384. He also ignored the questions of fact and reversed Judge Reilly's determination that genuine issues of material fact existed with regard to the elements of fraud. Id.

III. ARGUMENT

A. STANDARD OF REVIEW.

EWU ignores the appropriate standard of review. The issue on appeal is not judgment as a matter of law after trial. Instead, Elcon was deprived of a trial because EWU's Renewed Motion for Summary Judgment was granted. Therefore, on Appeal the facts submitted and all reasonable inferences from those facts are considered in the light most favorable to Elcon. Nationwide Mutual Fire Ins. Co. v. Watson, 120 Wn.2d 178, 186 (1992).

B. ELCON'S FRAUD CLAIM WAS IMPROPERLY DISMISSED.

1. The Economic Loss Rule Does Not Apply.

Fraud in the inducement occurs "*when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved.*" Black's Law Dictionary 686 (8th ed. 2004). This is a classic case of fraud in the inducement.

As EWU admits, the Study concluded that any well drilled into the Grande Ronde aquifer needed to be 1,500' deep. CP 578. When the DOE consolidated EWU's water rights, EWU was under a time crunch because it would lose funding if it could not get the project bid and under contract. CP 716-717. EWU knew that regional drillers did not have the equipment necessary to drill 1,500' deep. CP 713-714. EWU also knew only a handful of drillers in the area could even drill 750' deep. CP 662.

Under funding pressure, EWU decided to intentionally conceal the Study from the new design engineer, from potential bidders and from Elcon. CP 701, 704, 706-708 and 710. Incredibly, EWU dictated a design depth of 2 wells at 750'. It then misrepresented to bidders the available project information and the true scope of the project. While EWU offers no explanation for its conduct, a jury could without doubt conclude EWU did this to fraudulently induce area drillers to bid the project. EWU engaged in these misrepresentations and concealment knowing that the equipment required to drill to the required 1,500' was very different than that required to drill a well to 750'. CP 713-714. Not only did

EWU intentionally conceal the Study, it also misrepresented to Elcon that it did not have information concerning a campus Grande Ronde well. CP 864-865; CP 673. As a result, Elcon was fraudulently induced to enter into a unit price contract that severely limited its right to recover costs if there were a claim. CP 97-102.

a. Washington Should Follow The Broad Fraud In The Inducement Exception.

Washington courts have not directly addressed the issue of whether the ELR applies to fraud in the inducement. However, in Stienke v. Russi, 145 Wn. App. 544 (2008) Division 2 refused to apply the ELR to fraud allegations. It did so by interpreting Alejandre, “[t]he Alejandre court reaffirmed that the economic loss rule does not apply to claims of fraud...”. Id. at 560. Washington has a well established policy condemning fraudulent behavior. See Coson v. Roehl, 63 Wn.2d 384, 388 (1963)(“A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper...”), Leibergesell v. Evans, 93 Wn.2d 881 (1980). The ELR should not be used to allow EWU to avoid liability for fraudulently inducing Elcon to bid.

The majority view is that the ELR does not apply to fraud in the inducement. Ralph C. Anzivino, The Fraud in the Inducement Exception to the Economic Loss Doctrine, 90 Marq. L.Rev. 921, 922 (2007).

Most states have adopted the broad fraud in the inducement exception to the economic loss doctrine. The broad exception provides that the fraud is an intentional tort, as such, the intentional misrepresentation is actionable as a tort, notwithstanding that the contract losses are solely economic.

Id. Seven states have adopted a broad fraud in the inducement exception including California, Colorado, Hawaii, and Texas. Id. at fn. 66. In addition, 13 other states will likely adopt the broad exception. These include Nevada and Utah. Id. at fn. 67.

In contrast, only three states have adopted the narrow exception and it has been identified as “*difficult to apply*”. Id. at 933; 936. Three members of the Wisconsin Supreme Court recently questioned Wisconsin’s decision to follow the narrow exception. See Below v. Norton, 751 NW 2d 351, 366-67 (2008)(dissent). Thus, the majority rule should be applied and it held that the ELR does not bar Fraud in the inducement claims.

b. The Narrow Exception Does Not Bar Elcon's Claims.

Even under the minority view, fraud in the inducement is not barred by the ELR “*if it is extraneous to the subject matter of the contract*”. Id. The exception has been explained:

[W]hen the fraud occurs in ...connection with misrepresentations, statements or omissions which cause the complaining party to enter into a transaction, then such fraud is in the inducement and survives as an independent tort.

D&M Jupiter, Inc. v. Friedopfer, 853 So.2d 485, 487 (Fl. 4th DCA 2003). See also Vesta Const. & Design, L.L.C. v. Lotspeich & Assoc., Inc., 974 So.2d 1176, 1181 (Fl. Dist. Ct. App. 5 2008) and Allen v. Stephan Co., 784 So.2d 456, 457 (Fla. 4th DCA 2000)(“*If the fraud occurs...which cause[s] the complaining party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort.*”). In this case, the Trial court recognized that Elcon's fraud in the inducement claims were independent from the contract claims. See CP 824 – “*The tort claims...would be independent of the contract claims*”.

In Taylor v. Maness, 941 So.2d 559 (Fla. 3d DCA 2006), the court explained how to apply the narrow exception. “[A] fraud in

the inducement claim is not barred by the economic loss rule so long as the claim is based on conduct that is separate and distinct from the breach of contract.” Id. at 564. Thus, even under the narrow exception, Elcon’s claim is not barred by the ELR. EWU fraudulently induced Elcon by intentionally concealing the Study showing the actual drilling would be 1,500’ deep and intentionally misrepresenting the available information. In contrast, the breach of contract occurred when EWU wrongfully “converted” the termination and withheld contract payments owed. The fraud is based upon conduct distinct from the breach of contract. Therefore, under the narrow exception Elcon’s claims are not barred.

c. Alejandro and Basin Paving Do Not Apply.

EWU relies heavily on Alejandro v. Bull, 159 Wn. 2d 674 (2007) and Basin Paving Co. v. Mike M. Johnson, 107 Wn. App. 61 (2001). However, these cases do not apply here. Neither was based upon conduct like EWU’s and neither held that the ELR bars a claim of Fraud in the inducement. In Basin Paving, the Owner did not intentionally conceal relevant studies and misrepresent the information in its possession in order to induce a contract. Basin

Paving, 107 Wn. App. at 66-68. Alejandre also did not involve this type of intentional concealment. Furthermore, in Alejandre the parties had the ability to negotiate risk. Here, Elcon was bidding a public works project and could not negotiate the terms of the contract. There was nothing Elcon could do to protect itself from the risk that EWU would fraudulently induce it into the adhesion contract. See RCW 39.04, et seq. Consequently, the Trial court committed reversible error dismissing Elcon's claim based on the ELR.

2. Issues Of Fact Exist With Regard To The Reliance Element.

The presence or absence of fraud in a given situation is a question of fact. Bland v. Mentor, 63 Wn.2d 150, 155 (1963). Judge Reilly correctly ruled genuine issues of material exist with regard to each and every element of Elcon's fraud allegations. CP 1017-1020. Yet, EWU misled Judge Sypolt into ruling that as a matter of law EWU's reliance was not justifiable. EWU's claims Elcon did not have the right to rely on its misrepresentations based on the bid instructions. However, EWU's argument and Judge Sypolt's ruling ignores applicable law and the facts of this case.

This case is not the sale of a house where a buyer agrees to perform their own inspection of a sewer system. This was a public works project where EWU put an adhesion contract out to bid. By law, EWU had a duty to disclose any information in its possession concerning the work. Elcon had the right to rely on EWU's representations concerning facts material to the Project. Infra. Notably, EWU's Response does not address Washington law that provided Elcon the right to rely upon EWU's representations that it disclosed all relevant information. Walla Walla Port District v. Palmberg, 280 F.2d 237 (9th Cir 1960). The Walla Walla Port Court confirmed the duty exists regardless of disclaimers about the type of material to be found. Id., see also Western States v. Sania, 798 P.2d 1062 (1990). Furthermore, EWU had an implied duty to disclose any information material to the contractor's performance. See Sergent Mech. Syst. v. U.S., 34 Fed. Cl. 505 (1995) and Helen Curtis Industries, Inc. v. U.S., 312 F.2d 774 (1963). This includes information acquired under prior contracts or developed during preparation for project design. See Jacksonville Port Authority v.

Parkhill-Goodloe Co., Inc., 362 So.2d 1009 (1978). Thus, as a matter of law and fact Elcon's reliance was justifiable.

EWU's position also ignores that this dispute is not about "*subsurface conditions*" and the difficulties Elcon faced dealing with materials EWU knew would be found. CP 78. It is about EWU's superior knowledge that a well on campus would have to be drilled 1,500' deep. Supra. Yet, when Elcon directly requested information to decide whether to bid the project, EWU intentionally concealed the information and misrepresented that the only information it had.

Furthermore, Elcon complied with the instructions to bidders by requesting the information from EWU. CP 864-65. EWU has not presented any evidence that this information, the \$30,000 conclusion that a campus well in the Grande Ronde would have to be drilled to 1,500', was discoverable from any other source. When it comes to specific information of this nature, other Courts have rejected arguments like EWU's. See Appendix A. Consequently, as a matter of law and fact, Judge Reilly denied EWU's Motion.

C. **ADMISSIBLE EVIDENCE CONFIRMED ELCON SUFFERED DAMAGES AS A RESULT OF EWU'S TORTIOUS INTERFERENCE.**

The Trial court found that genuine issues of fact existed for four of the five elements of Elcon's tortious interference with a business relationship claim. CP 1018. This included the issue of whether the interference was improper. EWU did not appeal that ruling. Consequently, the only issue on Appeal is whether a genuine issue of material fact exists with regard to damages.

1. Elcon's Ability To Obtain Bonding Was Impacted.

Damages exist in a tortious interference claim if the business relationship has been injured. Pleas v. Seattle, 112 Wn.2d 794, 803-04 (1989). In this case, Elcon presented evidence that EWU's conduct directly impacted its relationship.

Although you submitted your request with adequate time for the bonding company to review, the approval was delayed due to the number of underwriters involved because of the unknown exposure that exists at EWU on the Wells project. ... the bond is approved on the condition that you limit your future bids to quick turn-around jobs such as this (90 days) until the pending issues at EWU become more clear.

CP 1253 (emphasis added). In addition to Weller's testimony, this evidence makes it clear that Elcon's ability to bid anything other

than “quick turn-around jobs” was directly impacted because of EWU providing the letter indicating some “unknown exposure. Id. Obviously, the exposure was “unknown” because EWU wrongfully provided the surety the letter without ever making any actual claim against the bond. This conduct resulted in the loss of bonding described in this critical piece of evidence.

This type of lost bonding capacity and its impact has been recognized as a damage. See e.g., Allied Fire & Safety Equipment Co., Inc. v. Dick Enterprises, Inc., 972 F.Supp 922 (E.D.Pa. 1977)(lost bonding capacity determined to be a jury question); Laas v. Montana State Hwy. Comm., 483 P.2d 699 (Mont. 1971). Although it knew it was not making a claim, EWU chose to inject itself into Elcon’s bonding relationship and impaired Elcon’s bonding capacity. CP 1247; CP 1353.

As a result, based on the reasonable inferences to which Elcon is entitled, genuine issues of material fact exist with regard to the damages.

2. EWU Was Not “Exercising A Legal Right”.

As a public works contract, Elcon was obligated to obtain a performance and payment bond. Under the terms of the bond, EWU had the right to make a claim against the bond. However, if EWU did so wrongfully, it would obviously open itself up to substantial exposure. A review of the record confirms EWU did not make a claim against the bond. Consequently, when it improperly provided the surety a copy of its letter to Elcon it did so wrongfully and caused Elcon damage. EWU was not exercising any legal right it had. The Trial court correctly found that genuine issues of material exist with regard to that element.

D. GENUINE ISSUES OF MATERIAL FACT EXISTED WITH REGARD TO EWU’S PUBLICATION IN A FALSE LIGHT.

EWU also ignores that the Court found genuine issues of material fact existed with regard to the elements of Elcon’s Fraud and False Light allegations. CP 1018. On October 22, 2004, EWU published information in a false light concerning Elcon by sending a copy of the “conversion” letter to First National Insurance Company and Marsh. CP 853; 862. In addition, EWU told other contractors

that it was going to “take” Elcon’s bond. CP 867³. Thus, EWU caused the information to be published to third parties.

EWU claims that a Corporation may not pursue a claim for publication in a false light is not supported by Washington law. In Washington, Corporations are given the constitutional right to sue on the same causes of action as a natural person. WASH. ST. CONST. Art. 12 §5 – “...*in like case as natural persons*”. Finally, the Court’s application of the ELR is err since EWU was not exercising rights under the contract and its conduct was separate from the contract.

E. BY STATUTE, ELCON IS ENTITLED TO INTEREST.

In an attempt to divert the Court’s attention, EWU regurgitates the arguments it made to justify withholding the money it owed to Elcon. However, as explained above, all of EWU’s allegations were found to be unsupportable. CP 1132. Curiously, EWU misrepresents to the Court that Elcon “*failed to either mediate its claim or to contact the American Arbitration Association*”. While EWU’s statement is irrelevant, it is also completely false. Elcon participated in an unsuccessful mediation of the dispute and

³ This statement in the declaration is not hearsay. The statement is not being offered to provide the truth of the matter asserted. Instead, it is being offered to establish publication by EWU.

also filed a demand for arbitration with the AAA. CP 1408. In any event, EWU's attempts to confuse the issue do not change the fact that the parties only submitted to arbitration the factual dispute over the "conversion" of the termination and the amount owed for the termination for convenience. Once that issue was resolved and it was determined EWU had wrongfully withheld funds owed, the issue of statutory interest was triggered. The parties never agreed to submit that issue to the arbitrator. Indeed, that issue did not ripen until it was confirmed EWU did not provide the payment owed.

1. Public Works Contractors Must Be Paid Interest On Untimely Payments.

By statute, once it is confirmed that a payment has been improperly withheld, a public contractor is entitled to interest. RCW 39.76.010(1). The legislature made the payment of interest mandatory – "*shall pay interest*". Id. EWU claims that RCW 39.76.020(4) allows it to avoid its obligation to pay interest on the amounts it wrongfully withheld. However, that provision only applies if before the date timely payment is due notice of the dispute is provided by 1) certified mail; 2) personally delivered or 3) sent in accordance with the procedures of the contract. In this case, EWU

has not identified that it complied with that requirement. Therefore, the Court should have awarded the mandatory Statutory interest.

2. The Trial Court Had Jurisdiction To Award Statutory Interest.

EWU did not dispute that the Court did not divest itself of all jurisdiction. Indeed, it concedes the parties did not submit Elcon's tort claims and statutory rights to the Arbitrator. Consequently, once the Arbitrator decided the underlying factual dispute and confirmed that the termination pay request was wrongfully withheld, it was for the Trial court to award statutory interest on that amount. RCW 39.76.010. See also Threatt v. Forsyth County, 552 S.E.2d 123, 126 (2001) (Statutory Interest following Arbitration is appropriate when statute makes it mandatory).

In addition to the above, Washington law also provides the Trial court authority to modify or correct an award where "*the award is imperfect in a matter of form, not affecting the merits of the decision on the claims submitted.*" RCW 7.04A.240(1)(c). Here, the Arbitrator decided the amount owed for the termination for convenience pay request but did not address statutory interest triggered by the award. As a result, the Court had authority to

“modify” the Award by awarding the mandatory statutory prejudgment interest. RCW 7.04.170. Since the principal amount owed constituted the controversy, the award of statutory interest would not affect the merits of the controversy. Accordingly, the Trial court had jurisdiction to modify the Award.

V. RESPONSE TO EWU’S MOTION FOR ATTORNEY FEES AND COSTS

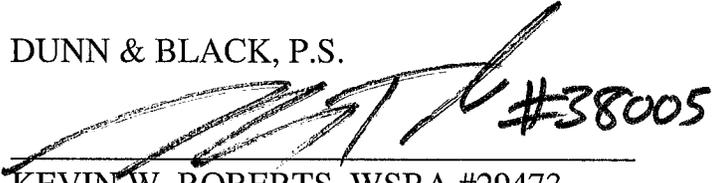
EWU again misrepresents facts. This lawsuit was not filed “*more than a year before Elcon requested the AAA arbitration...*”. The AAA arbitration was requested on October 19, 2004, prior to this suit being filed. CP 1408. EWU also offers no basis upon which it would be entitled to recover attorney fees.

VI. CONCLUSION

Based upon the foregoing, Appellant Elcon respectfully requests this Court to reverse the Trial court’s decision.

DATED this 20th day of April, 2009.

DUNN & BLACK, P.S.

 #38005

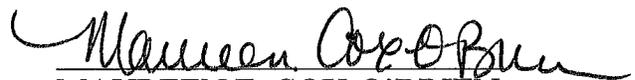
KEVIN W. ROBERTS, WSBA #29473
ROBERT A. DUNN, WSBA #12089
JOHN C. BLACK, WSBA #15229
Attorneys for Appellant Elcon Construction

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of April, 2009,
I caused to be served a true and correct copy of the foregoing
document to the following:

<input type="checkbox"/>	HAND DELIVERY	Jerry Cartwright
<input checked="" type="checkbox"/>	U.S. MAIL	Carl Warring
<input type="checkbox"/>	OVERNIGHT MAIL	Attorney General Office
<input type="checkbox"/>	FAX TRANSMISSION	Torts Division
<input type="checkbox"/>	EMAIL	1116 W. Riverside Avenue
		Spokane, WA 99201-1106

<input type="checkbox"/>	HAND DELIVERY	Catherine Hendricks
<input checked="" type="checkbox"/>	U.S. MAIL	Office of the Attorney General
<input type="checkbox"/>	OVERNIGHT MAIL	Torts Appellate Program
<input type="checkbox"/>	FAX TRANSMISSION	800 5 th Ave., Suite 2100
<input type="checkbox"/>	EMAIL	Seattle, WA 98104-3188


MAUREEN E. COX-O'BRIEN

Bruner and O'Connor on Construction Law

Database updated May 2008

Philip L. Bruner and Patrick J. O'Connor, Jr.

Chapter
3. CONTRACT INTERPRETATIONReferences**§ 3:25. Risk allocation principles as applied to contract interpretation: Consequences of knowing other party's meaning—Doctrine of "superior knowledge"**

A contracting party that has superior knowledge about conditions that may impact the other party's use of a product or performance of a contract will have a "duty to inform" that overrides any duty to inquire on the part of a contractor.^[1] The "duty to inform" is implied where one party has superior knowledge about performance risks unavailable to the other party.^[2] The leading case establishing this duty is the United States Court of Claims' decision in *Helene Curtis Industries, Inc. v. United States*,^[3] wherein the government failed to disclose to the contractor the need to grind a new disinfectant prior to blending it with other ingredients. The government had performed research and development on the disinfectant and, as a result, was aware that the grinding process would be required in order to meet the specification. The results of its research and development were not available in the industry and the government contractor had no way of knowing about this condition unless informed of it by the government. In this case, the court held that the government was required to inform prospective bidders of this information as the "balance of knowledge" favored the government and to remain silent would be to "betray a contractor into a ruinous course of action."^[4]

In certain circumstances, the superior knowledge doctrine may act as an exception to the patent ambiguity doctrine, which itself is an exception to the "construed against the drafter" rule. The relationship of the first two doctrines was examined in the decision of *Appeal of Power City Electric, Inc.*,^[5] where a contract to construct a power transmission line had a pay item for an estimated 40,000 feet of access roads. The contractor knew that this figure was materially understated as a result of its site examination. The contractor was nevertheless entitled to be paid for work in clearing the excess footage. The board declined to apply the patent ambiguity rule because the government knew the exact number of feet, as it had made a list of access roads for which it would pay, but had not disclosed this information to the contractor. In so ruling, the Board noted:

We turn to the government's most serious contention, i.e., that the pre-bid site investigation should have alerted appellant to the fact that, under its interpretation of the invitation, there was a substantial under-estimate of the quantities of road improvement and of the need to inquire of Bonneville as to what was intended in this regard. Representatives of the bidders who testified ... readily admitted that the considered Bonneville's estimate of the quantity of road improvement would be exceeded. However, they defended their failure to bring this matter to the attention of Bonneville on the ground that, under the terms of the invitation, their concern was to develop a reasonably accurate unit price for road improvement and on the further ground that it was not unusual for there to be substantial variances between estimated and actual quantities. Assuming the validity of this latter assertion, the question presented is whether a bidder, on notice of potential substantial overrun in estimated quantities, is on notice of an error in specifications, and is required to bring this situation to the attention of the gov-

ernment. It appears to be well-settled law that, in the absence of language requiring a bidder to make its own determination of quantities, a contractor is generally entitled to rely on the reasonable accuracy of government estimates. This being true, no reason is apparent why a prospective bidder on notice of a substantial overrun should not be expected to seek clarification or risk having the interpretation of the contract result against him. Application of this rule here would require denial of the claim for, although we have found appellant's interpretation of the invitation reasonable, a site invitation in conjunction with the estimated amount of road improvement makes it equally reasonable to conclude that appellant was on notice of a possible error in the specifications and it is evident that appellant's assumption that access roads shown on the drawings either were or would be brought to the standards of the specifications was favorable to the contractor. Nevertheless, under the circumstances present here, we decline to apply the rule for the reason that at the time the invitation was issued, the government had in its possession material information, i.e., the list of access road improvement for pay, which it failed to disclose. When the government enters into a contract, as part of its implied duty to help rather than hinder performance, it is obligated to provide the contractor with special knowledge in its possession which might aid the contractor in performing. The courts and the boards have taken an increasingly stringent attitude toward withholding information, the disclosure of which would be likely to have a material effect on the contractor's estimate of cost. We, therefore, hold that any possible duty of appellant to make inquiry has been nullified by Bonneville's failure to disclose the access road improvement list which, according to the government's own admission, contain the only improvements necessary for its needs and was based on standards not specified in the contract. On balance, the appellant's fault was less serious than the government's fault.[6]

Notwithstanding the above rationale for invoking the superior knowledge doctrine in the face of a known ambiguity, most expressions of the rule require the absence of an inquiry duty. It is commonly held that to invoke the doctrine a contractor must produce specific evidence of the following:

1. That it undertook to perform without vital information of a fact that affects performance, costs or direction;
2. That the government was aware the contractor had no knowledge and had no reason to obtain such information;
3. That any contract specifications supplied misled the contractor, or did not put it on notice to inquire; and
4. That the government failed to provide the relevant information.[7]

Applying the superior knowledge test, the Court of Claims has held that the government has a duty to disclose its intent to construct other projects in a given area which may impact the labor market.[8] The government has been held to have a duty to disclose renovation plans to a bidder as those plans impacted upon elevator maintenance costs.[9] The government has also been found responsible for unanticipated labor costs due to its failure to inform bidders that crates contained unassembled office furniture.[10]

The government, however, is under no duty to volunteer information in its files if the contractor can reasonably be expected to seek and obtain the facts elsewhere.[11] Moreover, the government may avoid liability for failing to disclose vital information if it can establish that the contractor should have known the information.[12] Furthermore, the fact that the government's knowledge in an area is more extensive than the contractor's is not material, so long as the information is reasonably available elsewhere.[13] Nevertheless, if the information is specific and the contractor likely would not be able to obtain the information, the government will be assumed to have reason to know of the contractor's ignorance.[14]

[FN1] See §§ 14:41, 9:92. See also Restatement Second, Contracts § 161; Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 A.L.R. 3d 182. See also *Welch v. State of California*, 139 Cal. App. 3d 546, 188 Cal. Rptr. 726 (3d Dist. 1983) (owner's nondisclosure of crucial information overrode contractor's failure to make adequate pre-bid inquiry and investigation of site conditions). See also *Guarantee State Bank v. Farm Service Agency of U.S. Dept. of Agriculture*, 68 Fed. Appx. 134 (10th Cir. 2003) (citing treatise).

[FN2] See *Am. Rock Mechanics, Inc. v. Thermex Energy Corp.*, 80 Ohio App. 3d 53, 608 N.E.2d 830 (8th

Dist. Cuyahoga County 1992 (holding explosives supplier liable for delaying and disrupting a contractor's performance by failing to inform the contractor that its T-600 explosive required significant "warm-up" time prior to use in blasting subsurface rock). See also State ex rel. Stephan v. GAF Corp., 242 Kan. 152, 747 P.2d 1326 (1987) (holding roofing manufacturer liable for failure to warn owner that its roof system was not as durable as represented in its product literature). See also Eshelman & Sanford, the Superior Knowledge Doctrine: An Update, 22 Pub. Cont. L. J. 494 (1993). The duty to inform is a corollary to the parties' implied duties of mutual cooperation and good faith. See § 9:99.

[FN3] Helene Curtis Industries, Inc. v. U. S., 160 Ct. Cl. 437, 312 F.2d 774 (1963).

[FN4] Helene Curtis Industries, Inc. v. U. S., 160 Ct. Cl. 437, 312 F.2d 774, 778 (1963). See also Eshelman & Sanford, The Superior Knowledge Doctrine: An Update, 22 Pub. Cont. L.J. 477 (1993).

[FN5] Appeal of Power City Elec., Inc., 74-1 B.C.A. (CCH) ¶10376, 1973 WL 1323 (I.B.C.A. 1973).

[FN6] Appeal of Power City Elec., Inc., 74-1 B.C.A. (CCH) ¶10376, 1973 WL 1323 (I.B.C.A. 1973).

[FN7] See GAF Corp. v. U.S., 932 F.2d 947; 949, 37 Cont. Cas. Fed. (CCH) ¶76091, 15 U.C.C. Rep. Serv. 2d 785 (Fed. Cir. 1991), reh'g denied, (June 11, 1991) and suggestion for reh'g in banc declined, (July 30, 1991); Lopez v. A.C. & S., Inc., 858 F.2d 712, 717, 35 Cont. Cas. Fed. (CCH) ¶75563, Prod. Liab. Rep. (CCH) ¶12058 (Fed. Cir. 1988); American Ship Bldg. Co. v. U. S., 228 Ct. Cl. 220, 654 F.2d 75, 79, 29 Cont. Cas. Fed. (CCH) ¶81612 (1981). Some decisions add an element or two when setting forth the prerequisites for establishing superior knowledge clause. For example, in Appeal of ECOS Management Criteria, Inc., 86-2 B.C.A. (CCH) ¶18885, 1986 WL 20697 (Veterans Admin. B.C.A. 1986), the Veterans Administration Board set forth five elements necessary to establish a duty to inform on the part of the government. The additional element is that the government possesses information it knows or should know is material to the contractor's performance.

[FN8] See J. A. Jones Const. Co. v. U. S., 182 Ct. Cl. 615, 390 F.2d 886, 893 (1968).

[FN9] See Miller Elevator Co., Inc. v. U.S., 30 Fed. Cl. 662, 39 Cont. Cas. Fed. (CCH) ¶76635 (1994), dismissed, 36 F.3d 1111 (Fed. Cir. 1994).

[FN10] See Kloke Transfer, 91-3 BCA P 24,356, ASBCA No. 39,602 (1991).

[FN11] See H. N. Bailey and Associates v. U. S., 196 Ct. Cl. 166, 449 F.2d 376, 383 (1971); Appeal of Haas & Haynie Corp., 84-2 B.C.A. (CCH) ¶17446, 1984 WL 13942 (Gen. Services Admin. B.C.A. 1984) (holding that government was not liable for non-disclosure as contractor independently obtained information); Appeal of Jet Power Inc., Miami, A.S.B.C.A. No. 21559, 1983 WL 13150 (Armed Serv. B.C.A. 1983) (holding that government was not liable for non-disclosure of information related to overhaul of armored personnel vehicles as contractor obtained the information from other sources).

[FN12] See Appeal of Johnnie Quinn Painting and Decorating, 79-1 B.C.A. (CCH) ¶13797, 1979 WL 2518 (Armed Serv. B.C.A. 1979) (holding that knowledge that the work would be difficult was not exclusively the government's).

[FN13] See Drillers, Inc., 90-3 B.C.A. (CCH) ¶23056, 1990 WL 83322 (Dep't Energy B.C.A. 1990) ("Superior knowledge does not mean that the government knows more about a subject than does a particular contractor. Rather, it means that the government knows some fact that is not known or is otherwise available to the industry concerned."); Appeal of Continental Rubber Works, 80-2 BCA 754, ASBCA No.

22,447 (1980).

[FN14] See Appeal of Lear Siegler, Inc., 81-2 B.C.A. (CCH) ¶15372, 1981 WL 7139 (Armed Serv. B.C.A. 1981), on reconsideration, 82-2 B.C.A. (CCH) ¶15832, 1982 WL 8912 (Armed Serv. B.C.A. 1982) (finding government liable for failing to disclose specific problems experienced by prior producers).

© 2008 Thomson Reuters/West

BOCL § 3:25

END OF DOCUMENT

RCW 39.76.010

Interest on unpaid public contracts — Timely payment.

(1) Except as provided in RCW 39.76.020, every state agency and unit of local government shall pay interest at the rate of one percent per month, but at least one dollar per month, on amounts due on written contracts for public works, personal services, goods and services, equipment, and travel, whenever the state agency or unit of local government fails to make timely payment.

(2) For purposes of this section, payment shall be timely if:

(a) A check or warrant is mailed or is available on the date specified for the amount specified in the applicable contract documents or, if no date is specified, within thirty days of receipt of a properly completed invoice or receipt of goods or services, whichever is later.

(b) For any amount which is required to be withheld under state or federal law, a check or warrant is mailed or is available in the proper amount on the date the amount may be released under the applicable law.

[1981 c 68 § 1.]

Notes:

Application -- 1992 c 223: See RCW 39.04.901.

RCW 39.76.020

Interest on unpaid public contracts — Exceptions.

RCW 39.76.010 does not apply to the following:

- (1) Interagency or intergovernmental transactions;
- (2) Amounts payable to employees or prospective employees of state agencies or local governmental units as reimbursement for expenses;
- (3) Belated claims for any time of delinquency after July 31 following the second year of the fiscal biennium;
- (4) Claims subject to a good faith dispute, when before the date of timely payment, notice of the dispute is:
 - (a) Sent by certified mail;
 - (b) Personally delivered; or
 - (c) Sent in accordance with procedures in the contract;
- (5) Delinquencies due to natural disasters, disruptions in postal or delivery service, work stoppages due to labor disputes, power failures, or any other cause resulting from circumstances clearly beyond the control of the unit of local government or state agency;
- (6) Contracts entered before July 26, 1981; and
- (7) Payment from any retirement system listed in RCW 41.50.030 and chapter 41.24 RCW.

[1981 c 68 § 2.]

RCW 7.04A.240

Modification or correction of award.

(1) Upon motion filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, the court shall modify or correct the award if:

(a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(2) If a motion filed under subsection (1) of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, the court shall confirm the award.

(3) A motion to modify or correct an award under this section may be joined with a motion to vacate the award.

[2005 c 433 § 24.]