No. 1039859

SUPREME COURT
OF THE STATE OF WASHINGTON

MADERO CONSTRUCTION, LLC,
a Washington limited liability company,

Respondent,

v.

FULLWILER CONSTRUCTION, INC.,
A Washington corporation; 2217 NW 62nd ST, a Washington limited liability company; MERCHANTS BONDING COMPANY (MUTUAL), a surety; FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF PORT ANGELES, a Washington Bank Corporation; THE OHIO CASUALTY INSURANCE COMPANY, a surety,

Appellants.

ANSWER TO PETITION FOR REVIEW MADERO CONSTRUCTION, LLC

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A. INTRODUCTION

Following a bench trial, the court found Fullwiler Construction breached its employment/construction contract with Madero Construction, LLC by failing to pay Madero for work performed on a new condominium project.

The trial court denied Fullwiler Construction's counter claim for breach of contract.

The trial court also denied Fullwiler Construction's counter claim for negligent misrepresentation regarding liability insurance obtained by Madero Construction for the project. Madero had obtained liability insurance, but the coverage contained an exclusion for new construction.

The trial court found, as a question of fact, under the totality of circumstances, Fullwiler did not reasonably rely on the negligent misrepresentation made by Madero Construction LLC. Consequently, Fullwiler failed to prove element 5 of the six elements necessary to support a claim for negligent misrepresentation.

The trial court awarded damages in the amount of $132,791.61 plus interest, fees and costs.

On appeal, Fullwiler Construction argues the trial court misapplied the law applicable to negligent misrepresentation claims and that the trial court improperly awarded damages in the amount of $132,791.61 plus interest, fees and costs.

Division I of the Court of Appeals found no error, affirmed the trial court, and awarded Madero reasonable attorney fees and costs on appeal.

As will be shown below, the decision of the Court of Appeals is not in conflict with decisions of this Court or other decisions of the Courts of Appeal. The law as applied by Division I comports with the standards that guide negligent misrepresentation and breach of contract claims. This case meets none of the criteria required to justify review by this Court under RAP 13.4(b) (1-4).[1]

B. COUNTER-STATEMENT OF THE CASE

[1] See Appendix.

In addition to the facts set forth by Division I in its decision, the following references to the record help explain why that decision was correct and review by this Court is not warranted.

1. Evidence Supporting the Finding of No Reasonable Reliance on Negligent Misrepresentation.

At all material times, Ms. Mallorie Hefley was the office manager for Fullwiler construction and oversaw all operations of the office, including contracts going out. (RP 76). She had been working with subcontractor employment starter contract packets since 2016. (RP 77).

It was Ms. Hefley's understanding that Madero Construction had started as a business the day the contract between Madero and Fullwiler was signed. (RP 97).

Ms. Hefley knew Fullwiler had never worked with Madero before (RP 97), and Mr. Fullwiler testified he had never done work with Madero before. (RP 709).

Mr. Fullwiler had been a developer and general contractor since 2005. (RP 220; 710).

While Mr. Ulloa, owner of Madero Construction, had been a framer for approximately 9 years, he only started the Madero business in the spring of 2021. (RP 243-244).

Madero began work on the project on July 6, 2021. (RP 248). The contractor starter packet was sent to Madero on July 7, 2021 and signed by Madero that day, after Madero had already begun work on the project. (RP 333; Ex. 30).

Normally, Fullwiler had the paperwork returned two weeks before work would begin under a contract. Ms. Hefley testified that allowed Fullwiler time to review all documents to "make sure we've got everything and that everything meets what we're requesting and requiring". That was not done in this case. (RP 95).

Ms. Hefley testified that although the contract documents stated certificates of insurance were to be filed prior to beginning work, Madero began work before the contract was

signed. She testified it was an oversight and it was not corrected. (RP 92; Ex. 29).

Ms. Hefley testified that Fullwiler did not follow their normal procedures regarding paperwork with Madero because Fullwiler "needed the work to continue on site as soon as possible to keep schedules—". That was authorized by Jerry Fullwiler. (RP 95).

Knowing the contract was not signed before work began, Fullwiler then asked that the documents, including insurance coverage, be returned within seven days of Madero's receipt of the paperwork. (Ex. 30; RP 93). Ms. Hefley admitted that was not done. (RP 93).

Madero did not provide a certificate of insurance in the time requested. (RP 94).

Mr. Fullwiler testified it was an oversight that Madero had not signed the contract when Madero began working on the job. (RP 511).

Mr. Fullwiler testified he was not aware there was no certificate of insurance from Madero and that it was an oversight by Fullwiler Construction. (RP 711).

Mr. Fullwiler never discussed insurance with Madero. (RP 513).

Mr. Fullwiler testified that dealing with insurance issues was the office's job. (RP 714).

The document provided by Madero regarding liability insurance did not list a policy number or insurance company, just an agency. (RP 99; Conclusion 32, CP 350).

Ms. Hefley testified she made no inquiries of the insurance company or agency involved with Madero insurance coverage. (RP 98).

2. Computation of damages.

Ms. Karla Luna Garcia is married to Mr. Ulloa, owner of Madero Construction. She helped with everything in running Madero. (RP 127).

Ms. Luna testified Madero had not been paid after they sent invoice #896008 to Fullwiler. (RP 137, 145, 146, 149, 150, 177; Conclusion 41, CP 353).

Mr. Ulloa, owner of Madero Construction testified he needed to be paid after presenting invoice # 896008 to Fullwiler. (RP 245, 319; Conclusion 41, CP 353).

Ms. Luna testified that because Mr. Fullwiler was so angry and threatening, it was decided Madero would continue working until the next inspection phase was completed and that would prove the work was done correctly. (RP 147-48).

Mr. Ulloa also testified Mr. Fullwiler's actions toward him made him fearful and Madero would continue to work until the next site inspection on September 2, 2021 even though Madero had not been paid. (RP 319-20, 404).

Mr. Ulloa testified Madero stopped operating as a company in September 2021 because Fullwiler did not pay him. (RP 245, 404).

Ms. Luna and Mr. Ulloa prepared a Notice of Default (Ex. 60) identifying the amount of money that was owed to Madero at the time the notice was sent and to tell Fullwiler that unless paid, Madero could not work for Fullwiler any longer. (RP 148, 150).

Mr. Fullwiler was aware of the amount claimed by Madero and did not dispute the amount in his response, but instead, focused on the offset he believed he was owed. (Ex. 62).

Ms. Hefley testified Fullwiler received the notice and never paid either of the amounts referenced in the Notice of Default. (RP 110-11; Ex. 60).

Madero continued to work after the Notice of Default was sent until the next scheduled building inspection called the shear inspection was performed. The building passed that inspection on September 2, 2021. At that point, work on the buildings was almost completed, yet Madero still had not been paid. (RP 150-151; Ex. 61).

Ultimately Fullwiler informed Madero that it would not pay Madero until Fullwiler determined how much to deduct for "mistakes" made by Madero. (RP 163-64; Ex. 66).

Ms. Hefley testified regarding Exhibit 151 and that it was prepared as a collaboration. The exhibit showed unpaid wages for three invoices. #896008 in the amount of $50,172.57; #896009 in the amount of $64,738.80; and #896010 in the amount of $17,880.24. (RP 75, 84; Conclusion 39, CP 352).

Ms. Hefley testified the material in Exhibit 151 was accurate except for a date that should have been 8/16, rather than 8/19 as it appeared on the exhibit. With that correction, the exhibit was a fair depiction. (RP 84-85; Conclusion 40, CP 353).

During cross-examination of Ms. Luna, counsel for Fullwiler stated Exhibit 151 had been identified as being accurate. Ms. Luna did not disagree. (RP 178).

Both Mr. Ulloa and Ms. Luna were available to be cross-examined regarding Exhibit 151.

C. ARGUMENT

1. The Law Regarding Negligent Misrepresentation was Properly Applied.

To sustain a claim for negligent misrepresentation, a claimant must prove by clear cogent and convincing evidence each of the following six elements:

> (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

Ross v. Kirner, 162 Wash. 2d 493, 499, 172 P.3d 701, 704 (2007); *see also* CP 348.

In addition, a claimant must not have been negligent in relying on the representation. *Id.* at 500. It is a question of fact whether a claimant's reliance on the representations was reasonable under the circumstances. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 552, 55 P.3d 619 (2002).

After a bench trial, the court found Fullwiler's reliance on the false information was not reasonable under the circumstances. (CP 348, 349). The trial court's findings of fact, and the trial record, support the trial court's conclusions.

> Where the standard of proof is clear, cogent, and convincing evidence, the Court cannot find that Fullwiler Construction was free of negligence under these circumstances and that it reasonably relied on Madero's misrepresentation.

(CP 351).

On review, the Court of Appeals found this to be a proper application of the negligent misrepresentation standards. (Opinion at *4 and *5). The Court of Appeals went on to explain that reasonable reliance remained a standard for negligent misrepresentation claims and that comparative fault principles only came into play *after* reasonable reliance was established. *Id.* That is also not a misstatement of negligent misrepresentation claims.

That the Court of Appeals' decision is correct is shown by its own analysis and a review of cases leading up to the

application of comparative fault to negligent misrepresentation claims.

The current status of negligent misrepresentation law, was developed by three cases: ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 959 P.2d 651 (1998); Lawyers Title Ins. Corp. v. Baik, 147, 536, 55 P.3d 619 (2002; and Ross v. Kirner, 162 Wn.2d 493, 172 P.3d 701 (2007).

In ESCA the issue was whether the comparative fault statute, RCW 4.22.005,[2] applied to negligent misrepresentation claims, and whether a jury instruction based on the *Restatement (Second) of Torts § 552A (1977)* was proper. *Id.* at 826-27.

ESCA held the comparative fault statute applies to negligent misrepresentation claims. *Id.* at 830. The requirement that a plaintiff must reasonably rely on a misrepresentation remained part of the necessary proof of claim.

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[2] Text of RCW 4.22.005 set forth in full in Appendix.

Rather than allow an instruction based on the *Restatement,* the trial court had entered an instruction that stated in part:

> (5) That Seafirst's reliance on the false information supplied by KPMG was justified (that is, that reliance was reasonable under the surrounding circumstances);

Id. at 828.

In upholding the instruction requiring reasonable reliance on false information, this Court stated:

> We hold the trial court properly instructed the jury, and did not err in denying KPMG's proposed instruction. In this case, the instructions given by the trial judge required Seafirst to prove that its "reliance on the false information supplied by KPMG was justified *(that is, that reliance was reasonable under the surrounding circumstances*) ... by clear, cogent, and convincing evidence." *Negligence is the failure to act reasonably under the circumstances. Whether a party justifiably relied upon a misrepresentation is an issue of fact.*

Id. at 828. (Internal citations omitted, emphasis added).

The ESCA jury found Seafirst was 60 percent negligent in relying on the misinformation. KPMG argued that must mean the reliance was not justified.

The Court disagreed because the jury had made a finding Seafirst's behavior was "reasonable under the circumstances". In explanation this Court stated:

> KPMG confuses the issues of justifiable reliance (the right to recover) with the damage (the proper amount of recovery)

Id. at 829.

ESCA established three elements that apply to negligent misrepresentation claims.

1) Comparative fault will be applied to damage determinations.

2) There are two separate stages to establish a claim for negligent misrepresentation. The first is justifiable or reasonable reliance which establishes whether there is a *right* to recover. With regard to the *right* to recover, "negligence is the failure to act reasonably under the circumstances". Therefore, if a plaintiff does not prove reasonable reliance on the representation under the circumstances of the case, that is negligence by definition. The claim fails.

If a right to recover is established, the second stage of the tort deals with proximate cause and damages. That is where comparative fault principles apply, but only after the right to recover has been established.

3) Justifiable reliance is a question of fact.

In Lawyers Title Ins. Corp v. Baik, 147 Wn.2d 536, 55 P.3d 619 (2002), the Court specifically rejected *Restatement § 552A* and its applicability to negligent misrepresentation claims. Baik at 551.

The Baik court, however, *retained all other aspects of proving a negligent misrepresentation claim set forth in ESCA.*

Baik recognized the confusion that could ensue if it simply held comparative fault applied to negligent misrepresentation claims generally, thus leading people to believe comparative negligence might also apply to establishing justifiable reliance.

The Court did not intend that result. The holding specifically reiterates the need to prove the *right* to recover

remains the same as set forth in ESCA. The right to recover must be established before moving to damage calculations.

The opinion noted that applying contributory negligence to the question of the *right* to recover (justifiable reliance) would be unnecessarily confusing. Therefore, the Court made clear the need to follow a two-step process.

> In light of our holding that comparative negligence applies to negligent misrepresentation claims, *we believe that application of a contributory negligence bar to the "justifiable reliance" element would be confusing and contradictory. As we held in ESCA, "justifiable reliance" is properly defined for the jury as " 'reliance [that] was reasonable under the surrounding circumstances.' " Id. at 828, 959 P.2d 651 (quoting CP at 1359 (Jury Instruction 17))*. We see no clear-cut way to distinguish between a plaintiff's reasonableness in relying on a misrepresentation and a plaintiff's culpability in causing his or her own damages.

Baik at 551. (Emphasis added, footnote deleted).

Under Baik, a plaintiff may not need to be "fault free" in relying on a representation, however that reliance cannot cross the line such that a finder of fact deems it was not reasonable under all the circumstance of the case. Thus, if a plaintiff

proves reasonable reliance, i.e. non-negligence by definition, and thereby earns the right to recover, they can move on to the next phases of the tort, proximate cause and damages. At that point, even if a plaintiff's actions are negligent in some manner, comparative fault principles will be applied to damage calculations and some recovery can be allowed.

> We believe that, where a plaintiff *reasonably reposes some trust in a misrepresentation and shows that that reliance proximately caused some damages*, the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of "harsh result" that the comparative fault statute sought to forestall in tort claims. *Id.* at 830, 959 P.2d 651. Thus, we hereby reject the applicability of section 552A to negligent misrepresentation claims *and reaffirm our determinations in ESCA that reliance is justifiable if it is reasonable under the circumstances* and that negligent misrepresentation defendants are not entitled to a jury instruction based on section 552A. *Id.* at 828, 959 P.2d 651.

Baik, at 551. (Emphasis added).

The "harsh result" to be forestalled applies *only after a plaintiff shows reliance on the misrepresentation was reasonable, i.e., not negligent.* At that point recovery will not

be completely barred but will be decided under comparative fault standards.[3]

The final case in the trilogy, and one cited by the trial court, is Ross v. Kirner, 162 Wn.2d 493 (2007). There, a decision was disapproved because it was based on outdated case law. Ross at 499.

This Court went on to note the elements of a negligent misrepresentation claim, citing its decision in Baik remained extant. Ross at 499.

It then reiterated its position that to prove the right to recover "the plaintiff *must not have been negligent in relying on the representation.*" Ross at 500, citing to ESCA, *supra.* (Emphasis added. *See also* CP 349, 351).

Fullwiler's argument the statement is simply "dicta" is not persuasive. It is a reiteration by this Court that element 5 of

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[3] The Court of Appeals' decision follows this approach. *4 and *5 of that opinion.

a negligent misrepresentation claim still needs to be proven even under comparative fault principles.

The section of ESCA referenced by Ross states:

> *A plaintiff must prove he or she justifiably relied upon the information negligently supplied by the defendant.*

ESCA Corp. v. KPMG Peat Marwick, 135 Wash. 2d 820, 826, 959 P.2d 651, 654 (1998). (Emphasis added).

The impact of the Court's cite to ESCA in Ross is that even though the *Restatement's* bar to recovery based on comparative negligence no longer prevents damage calculations and recovery after the right to recovery is established, negligence of a plaintiff remains an aspect of a negligent misrepresentation claim *when a plaintiff does not reasonably rely on a misrepresentation.*

Fullwiler's argument that a plaintiff need not be "negligence free" is incorrect insofar as reasonable reliance on a negligent misrepresentation is concerned. What the trial court found as a matter of fact and was supported by the Court of Appeals in this case was, Fullwiler did not, under the totality of

the circumstances, reasonably rely on the negligent misrepresentation. Any plaintiff that fails to prove reasonable reliance could claim they were required to "do something more", when in fact, they are only required to prove their reliance was reasonable.

Fullwiler's analysis is not correct, because if it were, there would no longer be a 5th element of proof for a negligent misrepresentation claim. That is not what this Court held in Baik. The 5th element remains a necessary component of a negligent misrepresentation claim.

In the instant case, the trial court properly conducted the two-part analysis established by Baik.

First, the trial court recognized the need to find reasonable reliance on the representation as set forth by the Supreme Court in Ross, *supra*. (Conclusion 30, CP 349-350).

It then found that after examining all the evidence presented at trial, and under the circumstances of the case, Fullwiler did not reasonably rely on the representation made by

Madero concerning liability insurance. (Conclusion 35, CP 351).

Because the facts failed to show Fullwiler proved the element of reasonable reliance, the misrepresentation claim failed. (Conclusion 36, CP 351).

Fullwiler's argument the ruling of the trial court required it to "do something more" is unpersuasive. What was required was Fullwiler had to meet the reasonable reliance standard for a negligent misrepresentation claim by clear cogent and convincing evidence. As a factual question, after a full trial, the court found Fullwiler failed to meet that burden. The trial court's determination that Fullwiler must not have been negligent in relying on the representation, quoting Ross, *supra* is a proper statement of the current law. (CP 349-350).

That the analysis set forth above is correct is recognized by the Washington Practice Series. WPI 165.01 sets forth the elements to prove a negligent misrepresentation claim.[4]

In that instruction, the fifth element of a claim is a plaintiff's reliance on the false information was reasonable. The notes for use state:

> If a plaintiff's reliance was negligent, comparative fault does not apply.

The instant decision does not misapply the law.

Fullwiler's claim the trial court erred in citing Condor Enterprises, Inc. v. Boise Cascade Corp, 71 Wn.App. 48, 856 P2d 713 (1993), because the case had been eclipsed by the Baik and ESCA decisions, is misplaced. (Petition at p.14, fn4). In the Ross opinion decided after Baik, this Court cited Baik for the proposition a plaintiff's reliance on a misrepresentation must be reasonable, and cited ESCA and Condor for the

[4] A copy of the instruction and pertinent notes on use are set forth in the Appendix.

proposition "Moreover, the plaintiff must not have been negligent in relying on the representation." Ross at 500.

2. The Award of Damages to Madero Was Proper.

The baseline for sufficiency of evidence to prove damages was established in Haner v. Quincy Farm Chemicals, Inc. 97 Wn.2d 753, 649 P.2d 828 (1982):

> The rule in Washington on the question of the sufficiency of the evidence to prove damages is: "(T)he fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss."

Id. at 757, (Internal citation omitted).

In addition:

> The burden of proof is on the party seeking damages. An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, shocks the conscience, or appears to have been arrived at as the result of passion or prejudice.

224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wash. App. 700, 729, 281 P.3d 693, 709 (2012) (Internal citations omitted).

Further:

> The amount of damages is a matter to be fixed within the judgment of the fact finder. A trier of fact has discretion to award damages which are within the range of relevant evidence. An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice.

Mason v. Mortgage America, Inc., 114 Wn. 2d 842, 850, 792 P.2d 142, 146 (1990).

In this case, the trial court heard testimony, reviewed evidence and made credibility and discretionary decisions. Review of trial court decisions in such cases:

> ...is limited to determining whether the court's findings are supported by substantial evidence and, if so, whether the findings support the court's conclusions of law and judgment. Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise. The party challenging a finding of fact bears the burden of showing that it is not supported by the record.

Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wash. App. 422, 425, 10 P.3d 417, 420 (2000) (Internal citations omitted).

Contract damages are ordinarily based on an injured party's expectation interest and are intended to give the party the benefit of the bargain. The damages include all that naturally accrue from the breach. Brotherton v. Kralman Steel Structures, Inc., 165 Wn.App. 727, 734-35, 269 P.3d 307 (2011).

Further, "Damages must be proved with reasonable certainty ***or*** supported by competent evidence in the record." Iverson v. Marine Bancorporation, 86 Wn.2d 562, 565, 546 P.2d 454 (1976). (Emphasis added). *See also*, Hyde v. Wellpinit School Dist. No. 49, 32 Wn.App. 465, 470, 648 P.2d 465 (1982); Lincor Contractors, Ltd. V. Hyskell, 39 Wn.App. 317, 321, 692 P.2d 903 (1984).

Finally, regarding an award of damages, the appellate court will:

> .....review a trial court's award of damages for abuse of discretion. Abuse of discretion occurs when the court's exercise of discretion is " 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' ". We will reverse a damages amount only if it

> is outside the range of relevant evidence, shocks the conscience, or results from passion or prejudice.

Banuelos v. TSA Washington, Inc., 134 Wash. App. 607, 613–14, 141 P.3d 652, (2006) (Internal citations omitted).

With the above standards in mind, it is clear the trial court's award of $132,791.61 was appropriate.

First, the fact of damage was clearly established. Both Mr. Ulloa and Ms. Luna testified Madero was not paid pursuant to the contract. Fullwiler refused to pay the amounts claimed by Madero unless Fullwiler would be compensated for claimed offsets.

Ms. Hefley testified that even after receiving Madero's notice of default, Fullwiler did not pay Madero.

Exhibit 151 was a summary compilation of the claim for damages made by Madero. That exhibit was a collaboration. It's accuracy was admitted by Fullwiler's own witness. During the cross examination of Ms. Luna, Fullwiler's own counsel reiterated the information set forth in the exhibit was accurate.

It was not error for the trial court to consider the exhibit in its determination of damages. Use of such summaries is appropriate even if they are identified as illustrative and having been prepared by a party's bookkeeper. *See*, Keen v. O'Rourke, 48 Wn.2d 1, 5, 290 P.2d 976 (1955).

Fullwiler's cite to Owens v. City of Seattle, 49 Wn.2d 187, 299 P.2d 560 (1956) is not persuasive. There, the issue involved a chart summarizing data with no preliminary testimony as to accuracy and there was nobody present who could have been cross-examined regarding the exhibit. *Id.* at 194.

In the instant case, Ms. Hefley did testify, and Mr. Ulloa and Ms. Luna were at trial and able to be questioned about the all the information involved with Exhibit 151. Cross examination of Ms. Luna began with counsel's comment the exhibit had been identified as accurate but there was no effort to cross examine about the accuracy of the numbers and the total amount of damages represented in the exhibit.

Fullwiler's reliance on Norris v. State, 46 Wn.App. 822, 733 P.3d 231 (1987) for the proposition the trial court improperly considered Exhibit 151 as it did is curious. Norris involved admission of professionally rendered drawings of an on ramp based on information from eyewitnesses. The drawings were then authenticated by the witnesses at trial. In holding the drawings were properly admitted, the Court of Appeals explained:

> Demonstrative evidence is encouraged if accurate and relevant; admission is within the trial court's wide discretion. Illustrative evidence is appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on accuracy of the evidence. The State was afforded the full opportunity to test the accuracy of the drawings and to establish their limits.

Id. at 827 (Internal citations omitted).

The trial court's use of Exhibit 151 fits precisely with the analysis of Norris. Further, as shown above, Fullwiler had full opportunity to test the accuracy of the figures in Exhibit 151 and to establish their limits. They chose not to do so at trial.

Fullwiler's claim the Court of Appeals improperly made findings regarding the existence of substantive documentary evidence is also not well taken. (Petition at p.23-24). The Court of Appeals in this case specifically noted:

> While we agree with Fullwiler's assertion at oral argument that exhibits 14 and 60 are not substantive evidence of liability, they are additional evidence regarding the *amount* of Madero's damages (the issue before us on appeal) and we consider them solely for that purpose.

(Opinion fn.2 at *2, emphasis in original). There was no improper fact finding.

The trial court acted within the scope of its discretion to analyze the damages claim and the court of appeals rightfully found that was not an abuse of discretion. (Opinion at *2 and *3).

To challenge the trial court's decision regarding damages, Fullwiler relies on a denied motion for summary judgment as the point at which the amount of damages was challenged by Fullwiler. When a trial court denies summary

judgment due to factual disputes, which was the case here, and a subsequent trial is held, appeal review is based on the evidence presented at trial, not the summary judgment. Winbun v. Moore, 143 Wn.2d 206, 213, 18 P.3d 576 (2001).

The argument presented by Fullwiler at trial was that damages should be limited to the amount Madero reported to the department of revenue. It did not specifically challenge the amount of damages claimed. It was rightfully rejected. (CP 82-83, 353).

Further, the trial court's conclusion regarding damages does not represent an improper burden shift. The trial court and the court of appeals both set forth the proper standard to determine damages. After a full bench trial, the court, in its discretion, found the damages were proved with competent evidence and a reasonable certainty.

The decision was not based on an improper burden shift, but on a finding of fact by the trial court that Madero met its

burden to prove damage in an amount that did not require guessing or speculation. (CP 353).

As the Court of Appeals noted, the trial court's comment regarding damages referred to

> "Fullwiler's failure to undermine the weight of Madero's evidence supporting the amount of damages once it satisfied its burden of proving the fact of damage."

(Opinion at *3).

In that light, with regard to Exhibits 14 and 60, the court of appeals regarded them for their ability to show the amount of damage to prevent the need for speculation.

The facts of this case do not meet the necessary standards for Supreme Court review.

3. <u>Madero Requests an Award of Attorney Fees.</u>

Madero Construction was the prevailing party at trial. Madero was awarded costs and reasonable attorney fees. On appeal, Madero was the prevailing party. The Court of Appeals awarded Madero costs and reasonable attorney fees for the appeal.

Pursuant to RAP 13.4(d) and RAP 18.1(j), Madero hereby requests an award of reasonable attorney fees and expenses for answering Fullwiler's Petition for Review.

D. CONCLUSION

This case does not meet any of the criteria for discretionary review by this Court. The trial court and the Court of Appeals both correctly identified and applied the standards to prove a negligent misrepresentation claim. Fullwiler failed to meet its burden.

The trial court properly analyzed all evidence regarding damages, the first element of which, the fact of damage, was unrebutted. Fullwiler did not pay Madero per the contract. The trial court reviewed all relevant evidence and concluded the proper amount of damages was $132,791.61. That was not an abuse of discretion.

Madero respectfully requests Fullwiler's Petition for Review be denied.

CERTIFICATE OF COMPLIANCE

I certify pursuant to RAP 18.17(b) the foregoing consists of 4994 words.

DATED this 18th day of April 2025.

RONALD E. FARLEY, PLLC

By: /S/ Ronald E. Farley
Ronald E. Farley, WSBA #8113
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DORE LAW GROUP, PLLC

By: /S/ James J. Dore
James J. Dore, WSBA #22106

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CERTIFICATE OF SERVICE

I certify that on the 18th day of April 2025, I filed the foregoing with the Supreme Court through the Washington State Appellate Court's Portal, and I caused the same to be forwarded to the following:

William E. Pierson, Jr. Attorney for Fullwiler Construction, Inc.	E-filing via Appellate Courts Portal and via E-Mail to: Bill.pierson@weplaw.com

Philip A. Talmadge Attorney for Fullwiler Construction, Inc.	E-filing via Appellate Courts Portal and via E-mail to: phil@tal-fitzlaw.com

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

DATED: April 18, 2025 at Des Moines, Washington.

/S/ Ronald E. Farley
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E. APPENDIX

WPI 165.01 Page 1

WPI 165.01 Negligent Misrepresentation—Affirmative Misstatement— Burden of Proof on the Issues

(Name of plaintiff) has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:

(1) That (name of defendant) supplied information for the guidance of others in their business transactions that was false;

(2) that (name of defendant) knew or should have known that the information was supplied to guide (name of plaintiff) in business transactions;

(3) that (name of defendant) was negligent in obtaining or communicating the false information;

(4) that (name of plaintiff) relied on the false information;

(5) that (name of plaintiff)'s reliance on the false information was reasonable; and

(6) that the false information proximately caused damages to (name of plaintiff).

If you find from your consideration of all the evidence that each of these elements has been proved, your verdict should be for (name of plaintiff) on this claim. On the other hand, if any of these elements has not been proved, your verdict should be for (name of defendant) on this claim,

NOTE ON USE

The instruction sets forth the elements of a claim for negligent misrepresentation. This instruction is to be used for claims that are based on an affirmative statement rather than on a failure to disclose information. For claims based on a failure to disclose information, use WPI 165.02 (Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues) instead of this instruction.

Use WPI 10.01 (Negligence—Adult—Definition), the applicable proximate cause instruction from WPI Chapter 15, and one of the two instructions that set forth the clear, cogent, and convincing standard of proof: WPI 165.05 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence) or 165.06 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence— Combined With Preponderance of Evidence) with this instruction.

This instruction may need to be modified depending on the facts and issues in a **articular**trial. For example, the parties may dispute whether the defendant made the statement in question in the course of business, profession, or employment, or whether the alleged statement was in fact made, or whether it was false, or the like.

COMMENT

Source of instruction. Washington courts have adopted the standards for negligent misrepresentation from section 552 of the Restatement (Second) of Torts. Specialty Asphalt & Const. , LLC v. Lincoln Cnty., 191 Wn.2d 182, 421 P.3d 925 (2018);

ESCA corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998); Dewar v. Smith, 185 Wn. App. 544, 342 P.3d 328 (2015) (trial court erroneously imposed summary judgment when proximate cause element was disputed); Guarino v.

Interactive Objects, Inc., 122 Wn.App. 95, 129—30, 86 P.3d 1175 (2004). Section 552(1) reads as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts 552(1) (1977).

From these standards, Washington courts have developed the following elements for the cause of action:

- (1) the defendant supplied information for the guidance of others in their business transactions that was false,
- (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions,
- (3) the defendant was negligent in obtaining or communicating the false information,
- (4) the plaintiff relied on the false information,
- (5) the plaintiff's reliance was reasonable, and
- (6) the false information proximately caused the plaintiff damages.

Specialty Asphalt, 191 Wn.2d 182; Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007); Austin v. Etti, 171 Wn.App. 82, 286 P.3d 85 (2012); see also Lawyers Title Ins. corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); ESCA corp., 135 Wn.2d at 827-28.

Reliance. Washington cases vary in their description of the requirement as to the plaintiff's reliance. In Ross, the court required that a plaintiff's reliance be "reasonable." Ross, 162 Wn.2d at 499. Other opinions require that the reliance be "justifiable," which is the term used in Restatement (Second)

of Torts section 552. see, e.g., ESCA corp., 135 Wn.2d at 826-31; Van Dinter v. Orr, 157 Wn.2d 329, 332—33, 138 P.3d 608 (2006). Washington cases appear to use the terms "reasonable" and "justifiable" interchangeably. See, e.g., Baik, 147 Wn.2d at 551 (defining "justifiable reliance" in this context as meaning "reliance [that] [is] reasonable under the surrounding circumstances"); ESCA Corp., 135 Wn.2d at 828 (same holding as in Baik). The WPI Committee has used the word "reasonable" to convey these concepts, as it is the easiest for jurors to understand.

WPI Page 3

If the plaintiff's reliance was negligent, comparative fault does not apply. For a discussion on comparative fault, see WPI 165.00 (Negligent Misrepresentation— Introduction).

(Emphasis added).

RCW 4.22.005

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

RAP 13.4(b) (1-4)

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

DIVISION I OPINION ATTACHED BELOW

2025 WL 588159
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

MADERO CONSTRUCTION, LLC, a Washington limited liability company, Respondent,

v.

FULLWILER CONSTRUCTION, INC., a Washington corporation; 2217 NW 62nd St., LLC, a Washington limited liability company; Merchants Bonding Company (Mutual), a surety; First Federal Savings & Loan Association of Port Angeles, a Washington Bank Corporation; The Ohio Casualty Insurance Company, a surety, Appellants.

No. 86281-2-I
|
Filed February 24, 2025

Judgment or order under review, Honorable David Whedbee, Judge.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Feldman, J.

*1 Fullwiler Construction, Inc. (Fullwiler) appeals the trial court's award of damages to Madero Construction, LLC (Madero) on Madero's breach of contract claim and its dismissal of Fullwiler's negligent misrepresentation counterclaim. We affirm.

I

In June 2021, Fullwiler was the general contractor for a townhome construction project in Ballard (the Ballard Project). Its sole shareholder, Jerry Fullwiler (referred to herein by his full name to avoid confusion with Fullwiler), asked Jose Ulloa, the owner of Madero, to perform framing work on the townhomes as a subcontractor. On July 6, Madero began working on the Ballard Project, and Jerry Fullwiler signed a Trade Contractor Agreement (TCA) memorializing the parties' agreement.

The next day, Fullwiler's office manager, Mallorie Hefley, e-mailed Ulloa the TCA and a "starter packet" with two attached addenda regarding insurance coverage (Addenda A and B) and asked him to complete, sign, and return the documents to her. The TCA required Madero to maintain insurance during the contract period for claims arising out of the work and provide Fullwiler with a certificate of insurance. Ulloa filled out and signed the contract documents and returned them to Hefley. Unbeknownst to Fullwiler, Madero's insurance policy had an exclusion for "newly built residential construction," which applied to the Ballard Project. Ulloa did not notify Fullwiler of this exclusion, nor did he supply a certificate of insurance to Fullwiler.

Madero's laborers were initially supervised by Fullwiler's assistant superintendent, Jacob Minzghor. In mid-July, Ulloa advised Minzghor that certain aspects of the approved building plans were internally inconsistent. To resolve this issue, Minzghor instructed Ulloa to construct the roofs in a manner that deviated from the approved building plans. Madero continued constructing the roofs per Minzghor's instructions for several weeks. Then, on August 11, a replacement superintendent noticed the roofs were not being constructed according to the approved building plans. Madero's laborers worked over a period of approximately two weeks, at Fullwiler's direction, to tear down the framing and reconstruct it according to the approved building plans.

While Madero was reconstructing the roofs, Fullwiler refused to pay invoice #896008 (Invoice 8), in the amount of $50,172.57, submitted by Madero on August 16 for work it performed between August 2 and August 13. Madero then sent a "notice of default" to Fullwiler on September 1 that referenced Invoice 8 and "a second invoice, #896009 [Invoice 9], dated August 28, 2021 for $64,738.80." On September 2, Madero ceased working on the Ballard Project. It then generated its final invoice, Invoice #896010 (Invoice 10), totaling $17,880.24, for work it performed after August 28. Madero also recorded a mechanic's lien on September 13, stating the "[p]rincipal amount for which the Lien is claimed is ... $132,791.61," which is the total of the foregoing invoices ($50,172.57 + $64,738.80 + $17,880.24).

*2 In March 2022, Madero filed a complaint against Fullwiler alleging breach of contract and seeking damages totaling $132,791.61.[1] In response, Fullwiler asserted counterclaims alleging Madero breached the parties' contract by performing faulty and defective work and negligently misrepresented the extent of its insurance coverage. Following a bench trial, the court found (a) Madero did not breach the contract by performing faulty or defective work because it was instructed by Fullwiler's agent to deviate from the approved building plans, (b) Fullwiler breached the contract by failing to pay Madero for all the work it performed on the Ballard Project through September 2, 2021, and (c) Fullwiler had failed to establish its negligent misrepresentation claim. Turning to the amount of Madero's damages, the trial court found Madero "did sufficiently demonstrate (albeit by a thin reed) that Madero was deprived of a total of $132,791.61 ($50,172.57 + $64,738.80 + $17,880.24) due to Fullwiler Construction's refusal to pay the invoices." Fullwiler appeals.

1 Madero's complaint also named as defendants the property owner (2217 NW 62nd St., LLC) and two sureties (Merchants Bonding Company (Mutual) and The Ohio Casualty Insurance Company). This opinion refers to these defendants collectively as "Fullwiler" because they filed a joint appellate brief in which they collectively refer to themselves as "Fullwiler Construction," are represented by the same counsel, and have otherwise acted in concert throughout this litigation. A fifth defendant, First Federal Savings & Loan Association of Port Angeles, was voluntarily dismissed.

II

A

Fullwiler argues Madero "never offered evidence or testimony" regarding Invoices 9 and 10 and therefore "failed to prove with substantial evidence $82,619.04 of $132,791.61 of its claimed damages (62 percent), that were wrongfully awarded by the trial court." We disagree.

"The general measure of damages for breach of contract is that the injured party is entitled to (1) recover all damages that accrue naturally from the breach and (2) be put into as good a pecuniary position as [the injured party] would have had if the contract had been performed." *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 729, 281 P.3d 693 (2012). While damages must be proved with reasonable certainty, this certainty requirement " 'is concerned more with the *fact of damage than with the extent or amount of damage.*' " *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (quoting *Gaasland Co., Inc. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 712-13, 257 P.2d 784 (1953)). As to the amount of damage, " 'Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.' " *Clayton v. Wilson*, 168 Wn.2d 57, 72, 227 P.3d 278 (2010) (quoting *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)).

Where a trial court has weighed the evidence and entered findings of fact, as the trial court did in this case, "we review the trial court's factual findings for substantial evidence to support them." *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 497, 254 P.3d 835 (2011). " 'Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.' " *Id.* (quoting *Brin v. Stutzman*, 89 Wn. App. 809, 824, 951 P.2d 291 (1998)). "There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." *Id.* Lastly, we "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses." *Id.*

Substantial evidence supports the trial court's damages award. Contrary to Fullwiler's argument that Madero "never offered evidence or testimony" regarding Invoices 9 and 10, the

record establishes the amount of both invoices. The trial court admitted as exhibit 60—without objection from Fullwiler—the notice of default Madero sent to Fullwiler on September 1, 2021 referencing the $50,172.57 requested in Invoice 8 and "a second invoice," referring to Invoice 9, "dated August 28, 2021 for $64,738.80." The trial court also admitted as exhibit 14—again without objection from Fullwiler—the mechanic's lien Madero recorded on September 13, 2021 stating it "perform[ed] labor, provide[d] professional services, [and] suppl[ied] material or equipment" at the site of the Ballard Project from July 6 to September 2, 2021, and the "[p]rincipal amount for which the Lien is claimed is ... $132,791.61."[2]

2 While we agree with Fullwiler's assertion at oral argument that exhibits 14 and 60 are not substantive evidence of liability, they are additional evidence regarding the *amount* of Madero's damages (the issue before us on appeal) and we consider them solely for that purpose.

*3 The trial court's damages award is also supported by exhibit 151, a spreadsheet entitled "Madero Construction Billing Summary," which the trial court admitted for demonstrative purposes. While demonstrative evidence "is not itself evidence," it is nonetheless "appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on the accuracy of the evidence." *State v. Lord*, 117 Wn.2d 829, 855-56, 822 P.2d 177 (1991), *overruled on other grounds by State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018). Where, as here, an exhibit is admitted for demonstrative purposes, the fact finder is "free to judge the worth and weight of the evidence." *Id.* at 855-56.

Consistent with these legal principles, the trial court properly relied on exhibit 151, along with the evidence it summarizes, in determining Madero's damages for its breach of contract claim. The exhibit is a detailed spreadsheet listing the invoices Madero submitted to Fullwiler for its work on the Ballard Project. The spreadsheet indicates Invoice 9 pertains to work Madero performed from "8/16 – 8/28/21" in the amount of "$64,738.80," Invoice 10 pertains to work Madero performed from "8/31 – 9/2/21" in the amount of "$17,880.24," and the unpaid Invoices 8, 9, and 10 total "$132,791.61." These amounts match those reflected on exhibits 14 and 60—which were admitted as substantive evidence—with respect to Invoice 9 and the total of the three unpaid invoices, respectively. Additionally, Fullwiler prepared and offered exhibit 151 for use during trial, and Hefley (its Chief Operations Officer at the time of trial) testified she was involved in creating the exhibit and had "reviewed it for accuracy."

These circumstances are markedly different from those in *Owens v. City of Seattle*, 49 Wn.2d 187, 299 P.2d 560 (1956), which Fullwiler cites in support of its argument. The Supreme Court in *Owens* held that the trial court erred in admitting a chart and map summarizing data collected from the scene of an automobile accident because there was no "preliminary testimony as to the accuracy of the data upon which the exhibits were based, submitted by someone who could have been cross-examined." *Id.* at 194. Here, in contrast, Hefley (Fullwiler's own employee) testified regarding the preparation and accuracy of exhibit 151, and Fullwiler could cross-examine her (among other witnesses) regarding her testimony that the amounts reflected on the exhibit were accurate. Unlike the trial court in *Owens*, the trial court in this case did not err in relying on exhibit 151, along with exhibits 14 and 60 and Hefley's testimony, in awarding $132,791.61 as damages for Madero's breach of contract claim.

Fullwiler argues the trial court's finding that "Fullwiler Construction did not put on evidence that Invoices [9 and 10] were inaccurate" constitutes improper burden-shifting. While Fullwiler correctly observes that the party seeking damages bears the burden of proving them, *224 Westlake*, 169 Wn. App. at 729, the trial court's finding is not to the contrary; rather, the finding was merely an observation that Fullwiler failed to contest the accuracy of exhibit 151. As the next sentence of the finding clarifies, "Hefley conceded the amounts in question[ ] for those two periods were accurate." In this context, the trial court was referring to Fullwiler's failure to undermine the weight of Madero's evidence supporting the amount of its damages once it satisfied its burden of proving the fact of damage.

Lastly, Fullwiler cites two cases rejecting conclusory damages awards, but both cases are distinguishable. In *Mutual of Enumclaw Insurance Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 723-24, 315 P.3d 1143 (2013), a jury awarded $1.5 million for tortious interference with a business relationship where the only evidence quantifying the claimant's injury was an interrogatory response stating it was seeking "$10,000 in reputation damages." And in *Hardcastle v. Greenwood Savings and Loan Ass'n*, 9 Wn. App. 884, 888, 516 P.2d 228 (1973), we held that the trial court erred in entering a finding as to damages where "[a] review of the evidence shows that this finding is supported at most only by

highly speculative testimony." In sharp contrast to the damage claims in these cases, Madero's damages could be calculated with precision, and there is evidence from which the trier of fact could calculate these damages without resorting to speculation. The trial court's damages award is neither legally nor factually flawed.[3]

3 Fullwiler repeats many of the above arguments in a statement of additional authority submitted following oral argument. Madero has filed a motion to strike the statement. As this court has previously explained, "the 'purpose of RAP 10.8 is to provide parties with an opportunity to bring to the court's attention cases decided after the parties submitted their briefs.' " *City of Edmonds v. Edmonds Ebb Tide Ass'n of Apt. Owners*, 27 Wn. App. 2d 936, 945 n.2, 534 P.3d 392 (2023) (quoting *Whitehall v. Emp't Sec. Dep't*, 25 Wn. App. 2d 412, 419 n.3, 523 P.3d 835 (2023)). Despite our admonition in *City of Edmonds*, Fullwiler's statement of additional authority does not cite or discuss any such cases. We therefore grant the motion to strike the statement and decline to consider it.

B

*4 Next, Fullwiler claims the trial court applied "the incorrect law on negligent misrepresentation" and its "finding on justifiable reliance is not supported by sufficient evidence." We disagree.

As noted previously, the trial court rejected Fullwiler's negligent misrepresentation claim based on the evidence presented at trial. In its findings of fact and conclusions of law, the trial court correctly recited the six-element test from *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007), for establishing such a claim:

> (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

The trial court also noted, as *Ross* confirms, *id.*, that these elements must be proven "by clear, cogent, and convincing evidence."

The trial court found (and Madero does not dispute on appeal) that Fullwiler satisfied the first four elements of a negligent misrepresentation claim. But the court found that Fullwiler had not proven the fifth element. The court explained, "Where the standard of proof is clear, cogent, and convincing evidence, the Court cannot find that Fullwiler Construction was free of negligence under these circumstances and that it reasonably relied on Madero's misrepresentations." Based on this finding, the trial court concluded Fullwiler had failed to prove its negligent misrepresentation claim and did not reach the sixth and final element regarding proximate cause and damages.

Fullwiler argues the trial court's legal analysis is contrary to our Supreme Court's opinion in *Lawyers Title Insurance Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002). The court there addressed whether to continue to apply contributory fault principles, rather than comparative fault principles, to negligent misrepresentation claims in accordance with section 552 of the Restatement (Second) of Torts (1977). Regarding that issue, the court held:

> We reject the applicability of section 552A to negligent misrepresentation claims in Washington. In *ESCA* [*Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998)], we held that RCW 4.22.005, the uniform comparative fault statute, applies to negligent misrepresentation claims. 135 Wash.2d at 831, 959 P.2d 651. In weighing that question, we observed that, "[b]y adopting comparative negligence, the harsh result of denying recovery was eliminated because the plaintiff's culpability was considered in determining total damages." *Id.* at 830, 959 P.2d 651. In light of our holding that comparative negligence applies to negligent misrepresentation claims, we believe that application of a contributory negligence bar to the "justifiable reliance" element would be confusing and contradictory. As we held in *ESCA*, "justifiable reliance" is properly defined for the jury as " 'reliance [that] was reasonable under the surrounding circumstances.' " *Id.* at 828, 959 P.2d 651 (quoting CP at 1359 (Jury Instruction 17)). We see no clear-cut way to distinguish between a plaintiff's reasonableness in relying on a misrepresentation and a plaintiff's culpability in causing his or her own damages. We believe that, where a plaintiff reasonably reposes some trust in a misrepresentation and shows that that reliance proximately caused some damages, the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of "harsh result" that the comparative

fault statute sought to forestall in tort claims. *Id.* at 830, 959 P.2d 651. Thus, we hereby reject the applicability of section 552A to negligent misrepresentation claims and reaffirm our determinations in *ESCA* that reliance is justifiable if it is reasonable under the circumstances and that negligent misrepresentation defendants are not entitled to a jury instruction based on section 552A. *Id.* at 828, 959 P.2d 651.

***5** *Baik*, 147 Wn.2d at 550-51 (internal footnote omitted). According to Fullwiler, the court in *Baik* "expressly rejected the notion that a plaintiff seeking to prove negligent misposition [sic] must be 'free of negligence.' "

Fullwiler misreads *Baik*. The court there did not eliminate the reasonable reliance element for establishing a negligent misrepresentation claim. To the contrary, the court explained that comparative fault principles apply *after* the plaintiff has established that element: "*[W]here a plaintiff reasonably reposes some trust in a misrepresentation* ... the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of 'harsh result' that the comparative fault statute sought to forestall in tort claims." *Id.* at 551 (quoting *ESCA*, 135 Wn.2d at 830) (emphasis added). The court also stated that, upon remand for a trial on Lawyers Title Insurance Corporation's negligent misrepresentation claim, "*If the jury finds justifiable reliance*, it may nevertheless reduce Lawyers Title's award proportionally upon a finding that the company was to some degree negligent in causing or increasing its own damages." *Id.* at 552 (emphasis added).

Confirming this approach, the Supreme Court's opinion in *ESCA* similarly distinguishes between "the issues of justifiable reliance (the right to recover) [and] damage (the proper amount of recovery)." 135 Wn.2d at 829. And following *Baik*, the court reiterated in *Ross* that "the plaintiff must not have been negligent in relying on the representation" to prove a negligent misrepresentation claim. 162 Wn.2d at 500. Here, the trial court correctly recited this principle from *Ross* and, applying the principle, stated it "cannot find that Fullwiler Construction was free of negligence under these circumstances and that it reasonably relied on Madero's misrepresentations." In rejecting Fullwiler's claim on that basis, the trial court did not misapply the law on negligent misrepresentation.

Nor has Fullwiler persuaded us that "the trial court's findings on justifiable reliance are not supported by substantial evidence." To satisfy the fifth element of a negligent misrepresentation claim, the plaintiff must prove by clear, cogent, and convincing evidence that its reliance on the defendant's misrepresentation was "reasonable under the circumstances." *Baik*, 147 Wn.2d at 551. "The extent to which the representee must verify the truth of the representation, if he or she must do so at all, depends upon the circumstances of the case." *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 384, 745 P.2d 37 (1987). As noted previously, we review the trial court's findings regarding this issue for substantial evidence. *See supra* at 5. In doing so, there is a presumption in favor of the trial court's findings, and we defer to the trial court in resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Id.*

Substantial evidence supports the trial court's finding that Fullwiler's reliance on Madero's misrepresentations was not reasonable under the circumstances. Fullwiler had never worked with Madero before hiring it as the framing subcontractor on the Ballard Project. Based on the information Madero provided in its starter packet, Hefley believed that Madero began operating as a business "that same day." Also, Madero supplied incomplete information about its insurance. In Addendum A, Madero did not include its insurance company or a complete policy number, and Madero never provided a certificate of insurance. Upon receipt of this incomplete information, Fullwiler, as the trial court noted, did not follow up with Madero to verify that its insurance policy covered the Ballard Project.

***6** The record also shows that Fullwiler itself recognized the importance of obtaining complete insurance information from its subcontractors. The starter packet that Fullwiler provided to Madero stated, "Any subcontractor who fails to meet the requirements described in [Addendum B], regarding Certificates of Insurance, will be invoiced at the rate described in item 2 of [Addendum B]." Addendum B then clarified that if Madero did not maintain insurance covering the Ballard Project, Fullwiler would obtain such insurance on Madero's behalf and charge Madero for doing so. When Madero did not provide a certificate of insurance, Fullwiler failed to obtain insurance on Madero's behalf, which Hefley admitted was an "oversight." Substantial evidence supports the trial court's finding that Fullwiler did not prove by clear, cogent, and convincing evidence that its reliance on Madero's misrepresentations was reasonable under the circumstances.

Lastly, Fullwiler contends its failure to obtain a certificate of insurance from Madero did not render its reliance unreasonable because "there was nothing in a certificate of

insurance that would have alerted Fullwiler Construction as to the 'newly built construction' exclusion contained in Madero's actual liability insurance policy that negated insurance coverage for the Ballard project." This argument is self-defeating; if a certificate of insurance would not have disclosed whether Madero was properly insured to work on the Ballard Project, then it was not reasonable under the circumstances for Fullwiler to rely on Madero's representation that it had sufficient insurance—as specified in the contract documents—without asking for additional information verifying such coverage. The trial court's findings regarding Fullwiler's negligent misrepresentation claim are neither legally nor factually flawed.

III

Both parties request attorney fees on appeal pursuant to RAP 18.1 and the attorney fee provision in the TCA, which states, "The prevailing party shall have the right to collect from the other party its reasonable costs, necessary disbursements and attorneys' fees incurred in enforcing this Agreement." If attorney fees are allowable in the trial court, the prevailing party may recover those fees on appeal. *Aiken v. Aiken*, 187 Wn.2d 491, 506, 387 P.3d 680 (2017). Because the trial court correctly awarded fees in favor of Madero as the prevailing party at trial and Madero is also the prevailing party on appeal, we grant Madero's request for attorney fees on appeal subject to compliance with RAP 18.1 and deny Fullwiler's competing request.

Affirmed.

WE CONCUR:

Chung, J.

Diaz, J.

All Citations

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