

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

OVERLOOK AT JUANITA BAY
CONDOMINIUM OWNERS ASSOCIATION, a
Washington corporation,

Plaintiff,

v.

CASCADE-JUANITA CONDOMINIUMS, LLC,
a Washington limited liability company, HOBAN
REALTY INTERESTS, LLC, a Washington
limited liability company, JJB REAL ESTATE
LLC., a Washington limited liability company,
THOMAS P. HOBAN, JR and MARGARET R.
HOBAN, a marital community; SHAWN A.
HOBAN AND KATHLEEN R. HOBAN, a marital
community; JIMM J. BUTLER and RACHEL F.
BUTLER, a marital community; HOBAN &
ASSOCIATES, INC. dba COAST REAL
ESTATE SERVICES, a Washington corporation;
COMMERCIAL CONSTRUCTION
MAINTENANCE CO., INC. dba CPM
COMMERCIAL PROPERTY MAINTENANCE,
INC. a Washington corporation,
Defendants.

CASCADE-JUANITA CONDOMINIUMS, LLC,
a Washington limited liability company

Third Party Plaintiffs,

v.

SACOTTE CONSTRUCTION, INC.,

Third Party Defendants

NO. 05-2-02635-9SEA

DEFENDANT HOBAN REALTY
INTEREST LLC'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

1 ARMAUR PLUMBING USA, INC. a Washington)
corporation; DENISE KEFFELER, dba AWC)
2 ENTERPRISES, INC., a Washington corporation;)
BELL TOWN WATERPROOFING, LLC A)
3 Washington limited liability company;;)
GORDON SKOOG CONSTRUCTION, INC. a)
4 Washington corporation; K.D.L. ENTERPRISES,)
INC. a Washington corporation; fka WESTERN)
5 CLEARVIEW RAILING SYSTEMS,; KW)
JENSEN CO.,, a Washington sole proprietorship;)
6 OTIS ELEVATOR COMPANY, a New Jersey)
corporation; START TO FINISH, INC., a)
7 Washington corporation ; and WOODLAND)
VENTURES, LLC, a Washington limited liability)
8 company,)

9 **Fourth Party Defendants**)

10
11 **I. RELIEF REQUESTED**

12 Defendant Hoban Realty Interests, LLC (“HRI”) moves for partial summary judgment
13 dismissing the claims of Plaintiffs against it for negligence and negligent misrepresentation. These
14 are the only remaining claims against HRI after the execution of a settlement agreement between
15 plaintiff and number of defendants.

16 Plaintiff seeks damages for economic loss arising from alleged condominium defects. HRI is
17 not a party to any contract with the plaintiff, and Washington law does not allow a plaintiff to recover
18 for economic loss in negligence or for negligent misrepresentation. The question of the
19 recoverability of attorney’s fees should be reserved pending the outcome of this motion.

20 **II. STATEMENT OF FACTS**

21 This is a condominium construction defect suit regarding the Overlook at Juanita Bay
22 Condominiums (“Overlook”). Overlook is a mixed residential (32 units) and commercial (1 unit)
23 condominium complex located in Kirkland, Washington. Declaration of Mark A. Clausen in Support
24 of Motion for Partial Summary Judgment (“Clausen Declaration”), Exhibit 1. Overlook was formed
25

1 by condominium declaration filed on July 17, 2002 by the Declarant, defendant Cascade-Juanita
2 Condominiums, LLC ("CJC"). Clausen Declaration, Exhibit 2. CJC, created in 2001, is a limited
3 liability company made up of two LLCs: JJB Real Estate, LLC and HRI. Declaration of Tom Hoban
4 in Support of Motion for Partial Summary Judgment ("Hoban Declaration"), ¶ 2, 3. Exhibit 2. Tom
5 Hoban and Shawn Hoban are members of HRI. *Id.* JJB Real Estate was an LLC solely owned by
6 Jimm Butler. At the time CJC was formed, Mr. Butler had conceived the project and agreed to direct
7 the construction. He promised the Hobans that he would take all actions necessary for completion of
8 construction, including hiring the contractor, deciding on the design, working on the construction
9 administration and getting the units ready for sale. Hoban Declaration, ¶ 3. HRI was not to have any
10 part in the construction of the project. Jimm Butler was at all relevant times the registered agent for
11 CJC, and directed the construction of the Overlook project as owner. Hoban Declaration, ¶ 3. CJC
12 contracted with defendant Sacotte Construction, Inc. ("Sacotte") for the construction of Overlook.
13 HRI was not a party to the construction contract. Hoban Declaration, ¶ 3.

15 During construction, before any units were sold, a mildew odor was detected in the project.
16 Two industrial hygienist firms were hired to investigate. The firms found mold in limited areas, and
17 elevated moisture readings. Hoban Declaration, ¶ 4. CJC then hired ERD, an experienced water
18 penetration consultant to remedy the mold, dry the damp material and specify a scope of work to
19 ensure no further water penetration. Hoban Declaration, ¶4. At no time did HRI enter into any
20 contract with ERD. ERD recommended a scope of work, which Sacotte ultimately represented that it
21 had performed. Hoban Declaration, ¶ 4.

23 CJC and Sacotte later became embroiled in a fee dispute regarding Sacotte's work. The
24 project finished late and the costs increased significantly. Hoban Declaration, ¶ 5. As a result, costs
25 to complete exceeded CJC's bank loan proceeds. JJB Real Estate failed to provide the funding. Mr.

1 Butler did not complete his duties in closing out the construction. HRI injected funds necessary to
2 complete the project and proceed with the sale of units. Hoban Declaration, ¶ 5. HRI at no time
3 entered into any agreement with any purchaser or with the Overlook HOA. *Id.* Shawn Hoban at no
4 time had any personal involvement in the project or sale of any units. *Id.*

5 CJC filed for bankruptcy protection on July 13, 2004 Clausen Declaration, Exhibit 3. On
6 January 18, 2005, the Plaintiffs filed the instant action regarding defective workmanship and
7 materials and resulting water damage to the Overlook at Cascade-Juanita Condominiums. On
8 September, 2005 Plaintiffs filed their First Amended Complaint. Clausen Declaration, Exhibit 1.
9 Plaintiff sued CJC, Messrs. Hoban and Butler as well as JJB, HRI and others for a number of causes
10 of action, including liability as declarants, violations of the Consumer Protection Act, negligence and
11 negligent misrepresentation. On May 25, 2006, HRI filed its Answer. Clausen Declaration, Exhibit 5.

13 Sometime during the summer of 2006, plaintiff settled with a number of the defendants. The
14 settlement pertaining to HRI provided for resolution of all claims against it -- including claims that
15 HRI was liable as a declarant -- except the negligence and negligent misrepresentation claims. The
16 mechanics of the resolution are still unclear to HRI's current counsel,¹ but the ultimate result is that
17 the negligence and negligent misrepresentation claim are the only remaining claims for adjudication
18 in this action. Clausen Declaration, ¶

19 **III. ISSUES PRESENTED**

20
21 1. Can a defendant who has no contractual relation with plaintiff be sued in negligence for
22 alleged economic losses arising from a construction project?

23
24 ¹ An earlier version of the settlement agreement provided for dismissal of the claims against HRI along with the
25 individual defendants. As of the time of filing this motion, current counsel for HRI has not been provided with a fully
executed copy of the motion, ostensibly because of concerns about the confidentiality clause in the agreement. Counsel
for plaintiff has told counsel for HRI that the settlement agreement provides that HRI agreed to judgment entered against
it with the plaintiff's covenant not to execute. When the settlement agreement document is provided, supplementation of
this memorandum will follow to clarify the procedural status.

1 2. Can a defendant who has no contractual relationship with plaintiff be sued for negligent
2 misrepresentation for alleged economic losses arising from a construction project?

3 **IV. EVIDENCE RELIED UPON**

- 4 A. Thomas P. Hoban Declaration
5 B. Mark A. Clausen Declaration
6 C. Pleadings, Records and files herein

7 **V. ARGUMENT**

8 The moving party bears the initial burden of showing the absence of a genuine issue of
9 material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989); *West*
10 *Coast, Inc. v. Snohomish Cty.*, 112 Wn. App. 200, 205, 48 P.3d 997 (Wn. App. 2002). Once met, the
11 burden shifts to the party with the burden of proof at trial to produce evidence sufficient to establish
12 the existence of **every element** essential to that party's case. *Young*, 112 Wash.2d at 225, 770 P.2d
13 182; *West Coast, Inc. v. Snohomish Cty.*, 112 Wn. App. at 205-06. If the claimant fails to meet that
14 burden, summary judgment is appropriate because there can be no genuine issue of material fact
15 given that a complete failure of proof concerning an essential element of the nonmoving party's case
16 necessarily renders all other facts immaterial. *Young*, 112 Wash.2d at 225, 770 P.2d 182 (quoting
17 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *West Coast,*
18 *Inc. v. Snohomish Cty.*, 112 Wn. App. at 206.

19 Hoban Realty Interest is entitled to Partial Summary Judgment herein.

20 **A. HOBAN REALTY INTEREST HAS NO CONTRACTUAL RELATIONSHIP WITH**
21 **PLAINTIFFS, AND CANNOT BE LIABLE FOR ANY ECONOMIC LOSSES**
22 **RESULTING FROM THE ALLEGED CONSTRUCTION DEFECTS.**

23 In the remaining claims against HRI, Plaintiff alleges no contractual relationship with HRI
24 involving the construction of the project or sale of any unit. Instead, it sues in tort for negligence and
25 negligent misrepresentation. A cause of action for "negligent construction" does not exist under
Washington Law. *Atherton Condominium Apartment-Owners Bd. Of Dir's v. Blume Dev. Co.*, 115

1 Wn.2d 506, 526-27, 799 P.2d 250 (1990); *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wn.2d
2 406, 745 P.2d 1284 (1987):

3 Further, to the extent that Overlook claims rights under the Washington Condominium Act, it
4 similarly has no claim for economic loss arising from negligence. Overlook's rights are against the
5 declarant, but those claims were fully and finally resolved by the settlement agreement. Clausen
6 Declaration, Exhibit 5. Overlook has no remaining statutory claim against CJC or HRI.

7
8 **1. Washington Law Does Not Allow a Party to Recover in Negligence for Contract-Based
Economic Losses.**

9 *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987) controls
10 the claim of negligence against HRI. *Stuart* involved, *inter alia*, a claim for negligent construction
11 brought by a condominium homeowners association against the builder-vendor for alleged defects in
12 private decks and walkways constructed in violation of the applicable UBC provisions. In *Stuart*, the
13 plaintiffs had not suffered any personal injuries, nor was there any evidence of physical damage. Rather,
14 the plaintiffs had suffered economic damage; i.e., the cost to repair the deteriorated decks and walkways.
15 Although the trial court allowed the claim, our Supreme Court reversed on the basis that tort recovery
16 was an inappropriate remedy for the damages pleaded:
17

18 The current law in Washington does not recognize a cause of action for negligent
19 construction on behalf of individual homeowners. Beyond the terms expressed in the contract of
20 sale, the only recognized duty owing from a builder-vendor of a newly completed residence to its
first purchaser is that embodied in the implied warranty of habitability, which arises from the sale
transaction.

21 *Stuart*, at 417.

22 [...]

23 Owners seek only economic damages. Accordingly, their claim is barred by *Stuart*.

24 *Atherton Condo Ass'n v. Blume Dev.*, 115 Wn.2d at 526.

1 When the only damages alleged are damage resulting from defective construction, those
2 damages are economic losses. *Atherton* at 526. Contract-based economic losses are recoverable only
3 based on the remedies provided in the contract. *Berschauer/Phillips Constr. Co. v. Seattle School*
4 *Dist. No. 1*, 124 Wn.2d 816, 821, 881 P.2d 986 (1994). When the plaintiff lacks a contractual right to
5 sue a defendant, there can be no recovery.

6 CJC entered into the sale contracts and deeds with the initial condominium purchasers, and
7 indirectly, through the condominium declaration, with Overlook. HRI at no point entered into any
8 agreement with either Overlook or any member of Overlook. In this regard, the plaintiff's claims are
9 comparable to the contractor's claims directly against the architect in *Berschauer Phillips*. In
10 *Berschauer-Phillips*, the general contractor, who was not in privity with the architect or the
11 engineering firm, sued them, among other theories, directly in tort. The architect and engineer moved
12 for summary judgment to dismiss the tort-based claims because of the economic loss rule. The
13 Superior Court agreed. So did our Supreme Court. It stated, in pertinent part, as follows:

14 The economic loss rule was developed to prevent disproportionate liability and allow parties
15 to allocate risk by contract. Michael D. Lieder, *Constructing a New Action for Negligent*
16 *Infliction of Economic Loss: Building on Cardozo and Coase*, 66 Wash. L. Rev. 937, 940-41
17 (1991). Economic loss is a conceptual device used to classify damages for which a remedy in
18 tort or contract is deemed permissible, but are more properly remediable only in contract.
19 *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 861 n.10, 774 P.2d
20 1199, 779 P.2d 697 (1989). Moreover, "economic loss describes those damages falling on the
contract side of 'the line between tort and contract.'" *Graybar*, at 861 n.10 (quoting
Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173 (3d Cir.
1981)). *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wn.2d 816, 821-22, 881 P.2d 986
(1994)(emphasis added)...

21 We follow the *Stuart* and *Atherton* line of cases and maintain the fundamental boundaries of
22 tort and contract law by limiting the recovery of economic loss due to construction delays to
23 the remedies provided by contract. We so hold to ensure that the allocation of risk and the
24 determination of potential future liability is based on what the parties bargained for in the
25 contract. We hold parties to their contracts. **If tort and contract remedies were allowed to
overlap, certainty and predictability in allocating risk would decrease and impede future
business activity. The construction industry in particular would suffer, for it is in this
industry that we see most clearly the importance of the precise allocation of risk as
secured by contract.** The fees charged by architects, engineers, contractors, developers,

1 vendors, and so on are founded on their expected liability exposure as bargained and provided
2 for in the contract. [Emphasis added]

3 *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wn.2d at 826-27. As a result, negligence claims cannot
4 be maintained against third parties and strangers to the construction-related contract.

5 Even under a traditional negligence analysis, the result is the same. The elements of
6 negligence are (1) the existence of a duty owed by the defendant to the plaintiff, (2) breach of that
7 duty, and (3) injury to plaintiff, (4) proximately caused by the breach. *Hertog v. City of Seattle*, 138
8 Wn.2d 265, 275, 979 P.2d 400 (1999); *Keller v. City of Spokane*, 104 Wn. App. 545, 551, 17 P.3d
9 661 (2001).

10 The threshold determination is duty: Does the defendant owe any obligation of care to the
11 plaintiff? This determination includes the existence and the nature of the duty. This is always a
12 question of law. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998);
13 *McKenna v. Edwards*, 65 Wn. App. 905, 912, 830 P.2d 385 (1992). And it is, therefore, determined
14 by the court, not a jury. *Hertog*, 138 Wn.2d at 275; *Keller v. City of Spokane*, 104 Wn. App. at 552.

15 As we have already seen, HRI and plaintiff entered into no contract. HRI therefore had no
16 contractual duty toward them. Nor did it have any common law duty. The Court in *Atherton*
17 dismissed a claim against an architect for negligence in performing its duties. It stated, in pertinent
18 part, as follows:
19

20 Owners also fail to articulate a recognizable negligence claim. Owners do not
21 demonstrate what, if any, duty Westlin [the architect] owed to them. Owners do not indicate
22 that Westlin breached any duty of care and that such breach was the proximate cause of the
23 alleged damages. In addition, Owners appear to seek only economic loss damages which are
not recoverable under tort law. See R. Cushman & T. Bottum, *Architect and Engineer*
Liability: Claims Against Design Professionals SS 7.9 (1987).

24 *Atherton*, 115 Wn.2d at 534, fn.17.
25

1 Like the architect in *Atherton*, HRI did not participate in the construction. Like the architect in
2 *Atherton*, HRI did not enter into any agreement with plaintiff. Plaintiff has alleged no actions of
3 HRI that were taken by HRI on its own behalf, independent of its position as a member of CJC.
4 CJC was the pertinent party in entering into contracts with purchasers. Hoban Declaration, ¶5, 6.
5 Under well established principles in *Stuart*, *Atherton*, *Berschauer Phillips*, and other cases, the
6 negligence claim against HRI must be dismissed as a matter of law.
7

8 **2 Plaintiff Cannot Sue for Negligent Misrepresentation on Contract-Based**
9 **Defective Construction and Warranty Claims.**

10 Plaintiff also sues HRI for negligent misrepresentation. Plaintiff's theory is that HRI
11 negligently failed to inform the plaintiff and homeowners of the alleged defective construction.
12 Negligent misrepresentation, as the name implies, also is a tort-based theory arising from alleged
13 negligence, so plaintiff's negligent misrepresentation claim is barred by the economic loss rule as
14 discussed in the previous section.

15 The elements of negligent misrepresentation are (1) a false statement (2) made by the
16 defendant to induce a business transaction (3) upon which the other party justifiably relies.
17 *Controlled Atmosphere, Inc. v. Branom Instrument Co.*, 50 Wn. App. 343, 350-51, 748 P.2d 686
18 (1988); *Haberman v. WPPSS*, 109 Wn.2d 107, 161-62, 744 P.2d 1032, 750 P.2d 254 (1987), appeal
19 dismissed, 488 U.S. 805 (1988). As the measure of fault is negligence, the measure of justification is
20 ordinary care. *Brown v. Underwriters at Lloyd's*, 53 Wn.2d 142, 150, 332 P.2d 228, 233 (1958); *J &*
21 *J Food Centers v. Selig*, 76 Wn.2d 304, 456 P.2d 691 (1969). As we have already seen, HRI did not
22 enter into any agreements with the homeowners or plaintiff. As such, plaintiff

23 Controlling Washington law has applied the economic loss rule to bar claims for negligent
24 misrepresentation. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 211, 969 P.2d 486 (1998).
25

1 The court in *Griffiths* analyzed the economic loss rule as applied to a negligent misrepresentation
2 claim, as follows:

3 In *Stuart*, condominium homebuyers sought damages from the builder-vendor for
4 defects in private decks and walkways. The damages asserted were solely economic,
5 consisting of the costs of repairs. No claim was made for personal injury or property damage.
6 The Supreme Court recognized that "homeowners faced with losses that are not of their own
7 making present a sympathetic case," but held that Washington does not recognize a cause of
8 action for negligent construction on behalf of individual homeowners. *Stuart*, 109 Wn.2d at
9 417-18.

10 In *Atherton*, a condominium association sought damages for construction defects
11 from the builder-vendor, the architect, and the building inspector. Relying on *Stuart*, the
12 Supreme Court affirmed the dismissal of these claims, again holding that Washington does
13 not recognize a cause of action for negligent construction. *Atherton*, 115 Wn.2d at 526.

14 In *Berschauer/Phillips*, the court relied on these two cases in **applying the economic
15 loss rule to allegations of negligent misrepresentation in a construction case, holding that
16 recovery of economic loss due to construction delays was limited to remedies in the
17 contract.** [Emphasis added]

18 *Griffith*, 93 Wn. App. at 212.

19 In *Griffiths*, homeowners who had purchased their homes from Centex, the builder/vendor,
20 sought damages for breach of express warranty, negligent misrepresentation, and violation of the
21 Consumer Protection Act. Although acknowledging the sympathetic nature of the plaintiffs'
22 claims, the court barred the negligent misrepresentation claim because of the economic loss rule.

23 The Class attempts to exempt its contracts from the holding of *Berschauer/Phillips* by
24 emphasizing that they involve "**private homebuyers in the residential market.**" This
25 distinction did not persuade the court in *Stuart*, however. *Stuart*, 109 Wn.2d 417-23. The
Class also makes a general argument about the type of wrong asserted in the negligent
misrepresentation claim, i.e., Centex's **breach of duty to exercise reasonable care in
communicating information relevant to the transaction.** But the *Berschauer/Phillips* court
held the economic loss rule applied to bar that exact claim. *Berschauer/Phillips*, 124 Wn.2d at
827-28.

We conclude that *Berschauer/Phillips* controls the disposition of this case, and that
when a contract allocates liability, the economic loss rule bars claims of negligent
misrepresentation by homebuyers against builder-vendors. *Griffiths* at 212-213.

When the only damage claim is for the defective product itself, and not persons or other
property, the Washington Supreme Court has held that a "risk of harm" analysis is applicable to

1 determine whether the claim fits within the economic loss exclusion. *Touchet Valley v. Opp &*
2 *Seibold Constr.*, 119 Wn.2d 334,353-54, 831 P.2d 724, (1992); *WWP v. Graybar Electric Co.*, 112
3 Wn.2d 847, 855-67 , 774 P.2d 1199 (1989) (only issue was whether claim for replacement of
4 defective insulators constituted an economic loss); *Stuart v. Coldwell Banker*, 109 Wn.2d 406, 420,
5 745 P.2d 1284 (1987) (only claim was for construction defects in condominium decks and
6 walkways.) The risk of harm approach requires consideration of the particular circumstances, looking
7 to factors such as the nature of the defect, the type of risk it posed, and the manner in which the injury
8 arose. *Graybar*, 112 Wn.2d at 861, 866; *Stuart*, 109 Wn.2d at 420-21. *Staton Hills*, supra., at 595-96.

9 Plaintiffs fail to establish the validity of their underlying claims. Like the plaintiffs in *Stuart*
10 *v. Coldwell Banker*, and unlike those in *Touchet Valley*, plaintiffs here have suffered no catastrophic
11 loss. While their allegation of damage from water infiltration from siding, walkways and flashings is
12 sympathetic, it does not equate with the sudden collapse of a multi-ton grain silo as in *Touchet*
13 *Valley*. Rather, it is **directly** comparable to the deterioration of the decks and walkways from water
14 penetration in *Stuart*, precisely the type of damages which the court finds to be economic loss. All
15 of the alleged damages are to gradually deteriorating building systems. The damages are for the cost
16 to repair the alleged defects. As in *Stuart*, *Atherton*, and *Griffiths*, such damages are barred by the
17 economic loss rule, regardless of whether information was conveyed negligently.
18

19 Conclusion

20 For the foregoing reasons, Hoban Realty Interests, LLC requests that this court dismiss the
21 Plaintiffs' claims for negligence and negligent misrepresentation with prejudice. Because those are the
22 only claims remaining for adjudication, HRI should be dismissed from any further claims in this action.
23 The question of recoverability of attorney's fees should be reserved for separate hearing. A proposed
24 Order accompanies this Motion.
25

1 DATED this 30 day of September, 2006

2 CLAUSEN LAW FIRM PLLC

3 

4 Mark A. Clausen, WSBA #15693

5 Toni I. Imfeld, WSBA # 16329

6 Attorneys for Defendant Hoban Realty Interests, LLC

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