

62333-8

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No. 62333-8-1

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

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DAVID C. HOSEA,

Appellant,

v.

GEORGE L. TOTH AND MARIA L. PERRY,

Respondents.

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RESPONDENT'S RESPONSE BRIEF

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FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2009 OCT 14 AM 10:54

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## **I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the trial court err in disbursing 100% of the bond to Toth/Perry, a judgment creditor, without waiting for Hosea to reduce his claim to judgment or otherwise prove his claim?

2. Is RCW 18.27.040 silent as to priority among claimants of in the same tier under RCW 18.27.040(4)?

3. Where a statute is silent as to priority of claimants, does the common law rule of first in time, first in right, apply, or are the proceeds distributed pro-rata, or does the trial court have discretion to distribute the funds?

4. Even if first in time, first in right, does not apply, did the trial court err in distributing the entire bond to Toth/Perry where Hosea's claim failed for lack of evidence?

## **II. STATEMENT OF THE CASE**

### *The Toth/Perry Judgment*

On October 26, 2007, respondents George Toth and Maria Perry (Toth/Perry) filed a lawsuit against a contractor, Jonathan Griffin, and the contractor's bonding company, Old Republic Insurance Company. The lawsuit arose out of a construction contract for foundation work at the Toth/Perry residence. The complaint sought to recover from the contractor an amount no less

than \$28,314 for breach of the parties' construction contract. The complaint sought to recover from Old Republic the maximum amount available under Griffin's contractor registration bond. (CP 26-28)

On January 2, 2008, the commissioner entered an order of default against Griffin and in favor of Toth/Perry. (CP 31-32)

On February 28, 2008, the trial court, the Honorable Jeffrey Ramsdell, entered a judgment in favor of Toth/Perry and against Griffin, in the principal amount of \$9,729.39, plus \$7,098.49 in attorneys' fees and costs. (CP 34-35)

#### *The Hosea Claim*

Sometime in 2007, Hosea filed an action against Griffin and his contractor's registration bond, the same contractor and bond against whom Toth/Perry ultimately obtained a judgment. (CP 63 – shows a "07" cause number).

On April 11, 2008, Hosea obtained an order of default. (CP 63) As of August 11, 2008, Hosea had not yet obtained a judgment on his claims against the contractor or bond.

#### *The Deposit and the Disbursement*

On March 6, 2008, the bond company, Old Republic, pursuant to a Stipulation and Order, deposited the contractor's

bond proceeds of \$6,000 with the clerk of the court under the Toth/Perry cause of action. The stipulation stated that the bond proceeds would not be disbursed without further order of the court. (CP 1-13)

On July 28, 2008, Toth/Perry filed a Motion for Disbursement of Bond Funds, setting the motion for August 6, 2008. (CP 14-21) Submitted with the motion was a copy of their judgment against Griffin (CP 34-35).

On August 4, 2008, Hosea filed a response to the Motion for Disbursement. Hosea presented no proof of the amount of his claims against Griffin, or the legal basis (breach of contract, tort, CPA claim, etc) for those claims. Rather, his attorney merely stated in the response brief that the claim was for breach of contract in the principal sum of \$42,195.20, plus attorneys' fees of \$13,895.09. (CP 52) Apparently no proposed order was provided to the court. The brief did not contain any "issues presented" or "evidence relied upon" as required by KCLR 7(b)(5)(B). Toth/Perry filed a reply brief on August 5, 2008. (CP 74-78)

On August 11, 2008, the Honorable Jeffrey Ramsdell entered an order directing the clerk to disburse the entire bond proceeds to Toth/Perry. (CP 79-80).

Mr. Hosea filed a motion for reconsideration on August 15, 2009. Mr. Hosea sought an order reversing the August 11 order, and, moreover, directing the clerk to pay out the bond proceeds pro-rata, 77% to Hosea, and 23% to Toth/Perry.<sup>1</sup> On September 8, 2008, the court denied the motion. Hosea then filed this appeal on September 15, 2008.

### III. ARGUMENT

#### A. Standard of Review:

Interpretation of a statute is a question of law, reviewed de novo by the Court of Appeals. However, whether a party submitted sufficient evidence to support its case, is left to the discretion of the trial court, and will only be reversed if the trial court abused its discretion.<sup>2</sup> Under the abuse of discretion standard, “a dismissal may only be reversed if it is “manifestly unfair, unreasonable or untenable.” “A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard.”<sup>3</sup>

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<sup>1</sup> This was again based on the bare allegation that the total of both parties' claims is \$72,918.13, which is the Toth/Perry total judgment amount plus the unsupported Hosea claim for principal and fees of \$56,087.29.

<sup>2</sup> See e.g. Univ. of Wash. Med. Ctr. v. Dep't of Health, 164 Wn.2d 95, 103-04, 187 P.3d 243 (2008)

<sup>3</sup> Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115, 118 (2006).

B. RCW 18.27.040 Is Silent as to Priority Among Claimants of the Same Tier

Statutory interpretation is a question of law, subject to de novo review.<sup>4</sup> When interpreting a statute, the court attempts to “discern and implement the intent of the legislature.”<sup>5</sup> Where the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. In discerning the plain meaning of a provision, the court considers the entire statute in which the provision is found as well as related statutes,<sup>6</sup> or other provisions in the same act that disclose legislative intent.<sup>7</sup> When a statute is ambiguous, courts then resort to aids of construction, including legislative history.<sup>8</sup>

In relevant part, RCW 18.27.040 provides:

(4) ... The surety upon the bond may, upon notice to the department and the parties, tender to the clerk of the court having jurisdiction of the action an amount equal to the claims thereunder or the amount of the bond less the amount of judgments, if any, previously satisfied therefrom and to the extent of such tender the surety upon the bond shall be exonerated but if the actions commenced and pending and provided to the department as required in subsection (3) of this

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<sup>4</sup> City of Olympia v. Drebeck, 156 Wn.2d 289, 295, 126 P.3d 802 (2006).

<sup>5</sup> Id. quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

<sup>6</sup> Other similar statutes include: RCW 19.28.071, 19.30.170, 19.28.420, 18.160.090, 60.04.181.

<sup>7</sup> See City of Olympia, 156 Wn.2d 289, 295; see also Advanced Silicon Materials, LLC v. Grant County, 156 Wn.2d 84, 89-90, 124 P.3d 294 (2005); Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 519, 22 P.3d 795 (2001).

<sup>8</sup> City of Olympia, 156 Wn.2d at 295; Advanced Silicon, 156 Wn.2d at 90.

section, at any one time exceed the amount of the bond then unimpaired, claims shall be satisfied from the bond in the following order:

(a) Employee labor and claims of laborers, including employee benefits;

(b) Claims for breach of contract by a party to the construction contract;

(c) ....

... (e) Any court costs, interest, and attorneys' fees plaintiff may be entitled to recover.

One thing is clear: the statute leaves many questions unanswered. For example, it is not clear how a surety is to deposit the bond funds. Does it file a new action solely for that purpose? Does it deposit the funds in an existing action? What if there are, say, 10 actions against the bond, with some of them in different counties? In any event, in this case, the parties stipulated that the deposit of the funds into one of three actions. (CP 1-13)

What is clear is that RCW 18.27.040 only addresses priority of multiple claimants to the extent there are "at any one time" multiple claims against the bond and those claims fall under different priority tiers of RCW 18.27.040(4). The statute allows the surety to tender the applicable and then-existing bond amount to the court. It then continues to read: "but if the actions commenced

and pending ... at any one time exceed the amount of the bond then unimpaired, claims shall be satisfied from the bond in the following order: ..." The priority tiers (labor, breach of contract, etc) thus kick in when "at any one time" there are multiple "claims" against the bond that exceed the amount of the bond "then unimpaired."

The "then unimpaired" refers to the "any one time" when multiple claims exist. "Impairment" occurs when there is a final judgment against the bond.<sup>9</sup> Therefore, if a party obtains a final judgment, and at that time there have been no other actions filed and provided to the department, that party has "impaired" the bond, and is entitled to priority, even if another party subsequently files a claim before the bond is paid to the judgment creditor. In contrast, if "at any one time" prior to impairment of the bond, there are multiple claims against the bond, and the claims fall under different priority tiers, then the five levels of priority apply.

Cook v. National Indemnity is thus correct, even though it relied somewhat on a WAC provision that was subsequently repealed. In Cook, there were "at .. one time" multiple claims "commenced and pending" while the bond was still "unimpaired" by

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<sup>9</sup> See RCW 18.27.040(7) stating that a final judgment impairs the bond, and that there must be a new bond "unimpaired by unsatisfied judgment claims."

any judgment. This Court held that in such a situation, the trial court had to follow the priority tiers and disburse the bond to the party in the higher priority tier, even if that party obtained a judgment after the parties in lower priority tiers. Otherwise, as this Court noted, the five tiers of priority would be meaningless.<sup>10</sup>

However, significantly for this case, RCW 18.27.040(4) is silent as to how to disburse bond proceeds to multiple claimants in the same tier when the amount of those claims of equal priority exceed the amount of the bond then unimpaired. Nothing in the statute addresses priority between multiple claimants for employee labor, or multiple claimants for breach of contract, etc.<sup>11</sup> The question then is, when a statute is silent on the issue at hand, what rules apply?

C. First In Time, First In Right Is the Applicable Common Law Rule

Under Washington law, “when resolving conflicts, Washington generally follows a first-in-time, first-in-right” rule.”<sup>12</sup> First in time, first in right is the “general rule, in the absence of statutory regulation to the contrary,” when it comes to judgment and

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<sup>10</sup> Cook v. National Indemnity et al., 47 Wn.App. 110, 113, 733 P.2d 1002 (1987)

<sup>11</sup> Compare, for example, RCW 18.27.040(9) (priority against security held by department is in order of receipt by department of a copy of a final judgment);

<sup>12</sup> Robb v. Kaufman, 81 Wn.App. 182, 190, 913 P.2d 828 (1996); see also Homann v. Huber, 38 Wn.2d 190, 228 P.2d 466 (1951)

other types of liens.<sup>13</sup>

Under a then-similar Arizona statute, the Arizona Supreme Court held that where the bond statute was silent as to priority, the gap would be filled in by case law holding that the first to obtain a final judgment was entitled to the proceeds.<sup>14</sup> And in City and County Savings Bank v. Oakwood Holding, 387 NYS.2d 512 (1976), the court held that while “the common law rule of first in time, first in right may of course be altered by statute ... in the absence of any legislative changes it is well established that the common-law rule still controls.”

RCW 18.27.040 authorizes first in time first in right, at least in that the surety is authorized to pay a claim or judgment as long as the payment is made “in good faith.” There is no time limit that the surety must wait before paying the first claim. Thus, the first party to make a claim may collect the entire bond, and others filing later are not entitled to any of the proceeds.

Moreover, nothing in the statute sets out a procedure that could be used to make pro rata disbursement workable. There is no time limit on making claims against a deposit. There is no

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<sup>13</sup> See id.

<sup>14</sup> See Hartford Accident and Indemnity Co., v. Phoenix Sand & Rock, Inc., 116 Ariz. 366, 367-68, 569 P.2d 308 (1977) citing Husky v. Lee, 2 Ariz. App. 129, 406 P.2d 847 (1965).

requirement to provide notice to other parties of a motion for disbursement. There is no procedure for multiple parties to present proof of their claims. How does a party know when, or how, to obtain the funds? Is a six-day motion sufficient? Is a motion for summary judgment, or show cause hearing? What is the proper response to that motion? Once a party files a motion for disbursement, are all other parties required to come forward with proof of their claims? Or can they stop disbursement by merely arguing they are entitled to share in the bond and then forcing all other parties to wait until all claimants have a final judgment under CR 54, 55, or 56? And how does a party know the identity of all other claimants in order to give them notice of a motion for pro-rata disbursement? Is a party required to have a judgment before receiving any of the bond proceeds?<sup>15</sup> If not, what proof is required, and how are claimants to dispute claims by other claimants when they lack knowledge of the underlying claim against the contractor?

The statute provides no answers to any of these questions, and more. Therefore, the default common law rule of first in time,

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<sup>15</sup> Under CR 81 and Spokane Research & Defense Fund v. Spokane, 155 Wn.2d 89, 104-05, 117 P.3d 1117 (2005), it is not clear whether the statute, which appears to allow payment of a "claim," would overcome the civil rule requirement of a final judgment.

first in right applies, and solves all of these issues. Each party must prove their claim in their own cause of action against the bond or contractor, and the first party to obtain a judgment is entitled to the proceeds. If the bond company does not want to hold the bond waiting for the first party to obtain a final judgment, or otherwise does not want to confirm who was in fact first in time, it can deposit the funds into the court, either in a new action, similar to RCW 61.24.080, or in one of the pending actions with notice to all other parties who have filed against the bond.

First in time, first in right prevents another problem with pro rata distribution, namely that where there are many claims against a bond, no one party has any incentive to pursue the bond proceeds because each party's share is negligible. In such a case, the bond proceeds sit in the court, while many – sometimes 10 or more lawsuits, sit in limbo with no attorney authorized to spend attorneys' fees to get such a small share of the bond proceeds.

First in time, first in right also avoids situations where a party incurs attorneys' fees to prevail in a case, but before a judgment is entered, another party files a much larger claim, which, under automatic pro rata distribution, would deprive the first party of the fruits of its efforts.

In sum, pro rata disbursement is inefficient, imposes too much burden and expense on parties seeking a small fund, and will often be unworkable where there are multiple claimants. The default common law rule of “first in time, first in right,” gives bond claimants an incentive to bring and prove their case in a timely manner. This makes proceedings against a bond quicker and more efficient, and avoids clogging the courts with a multiplicity of suits all waiting around for the last claimants to prove their cases so the funds can be distributed pro rata. Once a judgment is obtained, the bond is “impaired,” and, if exhausted, all other parties know there is no need to pursue the bond. They can then dismiss their claims, and put their assets to more productive uses.

D. Pro-Rata Disbursement is Not The Law

Mr. Hosea claims that “the only logical remedy where multiple claims within the same class exceed the bond proceeds, is to divide the bond proceeds pro rata among the claimants.” Mr. Hosea then relies on Cook, but as noted above, Cook only addresses the situation where the multiple claimants are in different tiers under RCW 18.27.040(4)(a)-(e). It does not address priority among claimants within the same tier.

Mr. Hosea also suggests that the first in time, first in right

destroys the priority scheme of RCW 18.27.040(4)(a)-(e). But this, of course, is not the case, since that scheme only addresses priority among claimants in different tiers. It says nothing about priority among claimants with the same type of claim. Thus, applying the default common law rule of first in time first in right does not defeat the purpose of the statute.

Mr. Hosea also claims that Department of Revenue v. National Indemnity<sup>16</sup> “note[s] the proper procedure for satisfying multiple claims within the same class.” But this is also false. Department of Revenue dealt with a situation where there was only one claim, holding that “RCW 18.27.040 contains no authority for the trial court to stay an action against a contractor’s bond when only one claim has been brought against that bond.”<sup>17</sup> Nothing in that opinion addresses priority among claimants of the same tier.

Mr. Hosea also relies upon the Legislature’s statement of purpose in RCW 18.27.140. Enacted in 1983 – some 20 years after RCW 18.27.040. RCW 18.27.140 reads: “It is the purpose of this chapter to afford protection to the public including all persons, firms, and corporations furnishing labor, materials, or equipment to

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<sup>16</sup> Department of Revenue v. National Indemnity, 45 Wn.App. 59, 723 P.2d 1187 (1986).

<sup>17</sup> Dep.’t Revenue, 45 Wn.App. 59, 61.

a contractor from unreliable, fraudulent, financially irresponsible, or incompetent contractors.” Mr. Hosea then quotes from the unpublished opinion (Ibsen v. Kuhlman), where Division III stated that “protection of all persons within the priority structure – is served only by” pro rata distribution amongst parties of the same tier.

Mr. Hosea should not be citing Ibsen v. Kuhlman, as it is unpublished and therefore not precedent.<sup>18</sup> In any event, nothing in RCW 18.27.140 supports a blanket rule of pro rata distribution among same tier claimants. The section has two parts. The first states: “It is the purpose of this chapter to afford protection to the public.” In itself, this is of course an obvious statement that adds nothing to the meaning of the provisions of the chapter.

The second part of RCW 18.27.140 goes on to state that the protection of the public “includ[es] all persons, firms, and corporations furnishing labor, materials, or equipment to a contractor.” Regardless of what this might mean in other cases, neither of the claimants in this particular case furnished “labor, materials, or equipment to a contractor.”

Since the second part of the statute does not cover either of the parties in this case, the only possible basis for any reliance on

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<sup>18</sup> See GR 14.1; see also O’Neill v. City of Shoreline, 145 Wn. App. 913, 937, 187 P.3d 822 (2008).

RCW 18.27.140 would be its bland statement that the entire chapter, most of which deals with registration requirements, insurance, licensing, etc. is to protect the public. Such reliance would, frankly, be a cop out from the task at hand, i.e. determining priority to the bond where the statute is silent as to that priority.

Moreover, providing pro rata distribution does not protect the public any more than the common law rule of first in time, first in right. It does not protect the public to allow a party to file a claim right before another party obtains a judgment, and then take most of the bond proceeds. It does not protect the public to make the likely recovery so small that no one has an incentive to pursue the bond. It does not protect the public to leave claimants with no way of knowing whether their claim will be paid in full or whether other claims will be made at the last minute. First in time, first in right, is the default rule that everyone knows and understands and can more accurately judge their risk and potential reward in deciding whether to pursue the bond.

E. Even if Pro-Rata Were the Default Rule, It is Not Required in Every Case

Even if this Court finds that the default rule should be pro rata disbursement among same tier claimants, no hard and fast rule

should be adopted because (a) the statute is silent and itself adopts no such rule, and (b) since pro rata distribution is an equitable rule, there may be circumstances where it would be within the discretion of the trial court to follow a different course. For example, the trial court may find that one party, through pre-judgment attachment or the like, already recovered a substantial sum directly from the contractor, putting the contractor out of business, and therefore it would not be equitable to disburse any of the bond proceeds to that party. Another example could be where one party is guilty of laches, an unreasonable delay in bringing a claim against the bond, and the trial court finds that such unreasonable delay deprives that party of a right to share in distribution. Finally, there may also be cases where a party's claim to the bond, while not opposed by the now out-of-business contractor, is just too weak – i.e. it lacks sufficient evidentiary or legal support – to entitle the party to share in the distribution, and that a party with a final judgment should take over others who present questionable claims, particularly if presented at the last minute.

In sum, this Court should fill in the gap in the statute with the common law rule of first in time, first in right. If, however, the court is inclined to require or allow pro-rata distribution, the trial court

must have discretion to instead apply other rules as the circumstances permit.

F. Pro Rata Was Not Required in this Case

In this case, even if pro rata distribution is deemed to be the preferred method for same tier claimants, the trial court had discretion to disburse the entire bond funds to Toth/Perry. The basis for that discretion in this case is the fact that Hosea failed to provide the trial court with sufficient evidence to prove his claim to the bond proceeds.

Under RCW 18.27.040(4), a party seeking or opposing disbursement has the burden to prove which priority tier under RCW 18.27.040(4) covers its claim. Otherwise, there is no way for the trial court to know whether a disbursement vis-à-vis multiple parties needs to wait for a party in a higher tier to prove its claim.<sup>19</sup> Moreover, also implicit in the statute is the universal requirement that a party actually prove the basis for and amount of its claim before bond proceeds will be disbursed by the clerk to that party.

In sum, at a minimum, to prove its claim to a distribution, a party must provide (a) proof supporting its claim to be in a particular priority tier, (b) legal and factual support for liability, and (c)

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<sup>19</sup> See e.g. Cook, 47 Wn.App. 110.

evidence of the amount of the contractor's liability.

Mr. Hosea's response brief failed to meet these requirements. There was no evidence before Judge Ramsdell that Mr. Hosea is in the same or higher priority tier as Toth/Perry. Moreover, while Mr. Hosea sought disbursement of the proceeds pro-rata based on the amount of each parties' claim, Mr. Hosea provided no evidence to support the amount of his claimed damages. There is nothing but the bare allegation in the response brief that a particular sum is owed by the contractor Griffin for breach of contract. There is no evidence of how the contractor breached his contract, or the damages caused, or whether some of the damages are for breach of contract, while others are for some other type of claim that would not be entitled to any of the bond proceeds (e.g. a tort, or a Consumer Protection Act claim).

Because there was a lack of evidence from Mr. Hosea, the trial court had discretion to refuse to accept the bare allegations of a right to distribution, and to disburse the full amount of the proceeds to Toth/Perry on their judgment. Thus, trial court did not abuse its discretion in disbursing the full proceeds to Toth/Perry.

One might argue that the trial court should have given Mr. Hosea a second opportunity to present evidence of his claim.

However, it is not an abuse of discretion, particularly in a \$6,000 case, to give a party only one bite at the apple.

#### IV. CONCLUSION

RCW 18.27.040 is silent as to the priority among multiple claimants in the same priority tier. As such, the default common law rule of first in time, first in right, applies. Toth/Perry were the first to obtain a final judgment, and therefore are entitled to the entire bond. But even if pro rata distribution were the rule, it was incumbent on Hosea to present evidence supporting his claim to the trial court, and, when he failed to do so, the trial court did not abuse its discretion in disbursing the entire bond to Toth/Perry. The trial court should be affirmed.

DATED this 12th day of October 2009.

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By   
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CERTIFICATE OF SERVICE

I, Patty Schultz, declare as follows:

1. I am a secretary with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On October 12, 2009, I deposited a copy of the foregoing Toth/Perry Response Brief in the U.S. Mail addressed to all counsel of record at the following address:

Timothy J. Knowling  
309 W. Republican  
Seattle, WA 98119

3. Also on October 12, 2009, I filed via U.S. Mail the original and one copy of the foregoing Toth/Perry Response Brief in the Washington Court of Appeals, Division I, at the following address:

Court of Appeals, State of Washington  
Division I  
One Union Square  
600 University St  
Seattle, WA 98101

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

DATED: October 12, 2009, at Seattle, Washington.

  
\_\_\_\_\_  
Patty Schultz