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NO. 65459-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

PLUMB SERVE, LLC, a Washington limited liability company, d/b/a BENJAMIN FRANKLIN PLUMBING,

Plaintiff,

v.

VIOLA M. SCOBY and "JOHN DOE" SCOBY, wife and husband; and JOHN W. SCOBY AND VIOLA M. SCOBY REVOCABLE TRUST of October 9, 1995;

Respondents,

v

PROFIT TWO, LLC, a Washington limited liability company, d/b/a PLUMB SERVE AND OUTTODAY SERVICE; RODNEY JESSEN, individually and as part of his marital community; and GARY JESSEN, individually and as part of his marital community;

Appellants.

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR

Appellants assign error to the following Conclusions of Law[1]:

1. No. 10.
2. No. 16.
3. No. 19.
4. No. 20.
5. No. 21.
6. No. 27
7. No. 28.
8. No. 29

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[1] To the extent that any of the Conclusions of Law were mislabeled and are actually Findings of Fact, appellants assign error to them and submit they are not supported by substantial evidence.

The determination that "[t]his case has shown a technique of using the superior knowledge of the contractor to increase the price of the service" set forth in Conclusion of Law No. 38 seems more like a finding of fact. If that is what it really is, appellants submit that it is not supported by substantial evidence.

Similarly, the determination that the Jessens "knowingly approved of Benjamin Franklin Plumbing's deceptive acts . . ." in Conclusion of Law No. 50 also seems like a finding of fact, and is similarly unsupported by substantial evidence.

All of the statements set forth in Conclusion of Law No. 51 are actually findings of fact. The finding that Rodney Jessen supervised day-to-day operations of the company is not supported by any evidence and is in fact directly contrary to the testimony given on this subject. The finding that Rodney Jessen "examined the invoices and business records for Defendant Scoby's transaction" is literally correct on its face but is highly misleading in that it fails to note that this examination was not done at or near the time of the transaction, but was instead done at the time of trial nearly two years later.

The puzzling statement in Conclusion of Law No. 52 that "it is unclear whether the 'repair' was successful or not" is also probably a finding of fact. Subsequent language in that same conclusion of law makes it appear that the Court meant to say it was unclear whether the partial replacement of a portion of the sewer line was *necessary*. Whatever the Court intended to say here, it probably was attempting to describe a factual finding. The record shows that Scoby and her mother made no claim that the replacement was *not* necessary and acknowledged that it might well have been necessary. RP IV, 37. The statement in Conclusion of Law No. 52 that "Rodney Jessen was well aware that the scope of Plaintiff's work was substantially less than what Plaintiff had represented," is a statement of fact and is not supported by substantial evidence.

9. No. 30.

10. No. 31.

11. No. 37.

12. No. 38.

13. No. 40.

14. No. 41.

15. No. 43.

16. No. 44.

11. No. 46.

12. No. 47.

13. No. 48

14. No. 49

15. No. 50.

16. No. 51.

17. No. 52.

18. No. 54.

19. No. 56.

20. No. 60.

21. No. 63.

22. No. 65.

23. No. 66.

24. The ruling allowing respondent Scoby to "reopen" the trial more than two months after it had concluded, in order to present new evidence.

25. The ruling refusing to allow Rodney and Gary Jessen any

opportunity to be heard in response to the new evidence which the judge allowed and considered more than two months after trial had ended.

26. The judgment award to Scoby of $28,516.07 in fees and costs. CP 7, ¶¶ 1, 4, and 3.2.

27. The judgment provision making Rodney and Gary Jessen personally liable for the fees and costs awarded to Scoby. CP 7, ¶ 2.

28. The dismissal of BFP's claims against Scoby. CP 7, ¶ 3.1.

B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>

1. At the trial of a Consumer Protection Act claim brought against a plumbing company, the customer testified (a) that the plumber that she dealt with may very well have explained the basis for the increase in the price she was being charged; and (b) the customer's daughter testified that her mother's complaint had nothing to do with the price charged. Nevertheless, the trial judge concluded that the plaintiff had established the commission of an unfair or deceptive act by proving that a plumbing company had a practice of aggressively increasing the price for its services. Was this determination erroneous and contrary to this Court's decision in *Robinson v. Avis Rent-a-Car*, 106 Wn. App. 104 (2001)?

2. Did the trial court err in concluding that the plaintiff had proved the public interest element of a CPA claim, where the record shows that BFP did *not* increase the price charged to customer Scoby for the same job, and Outtoday Service *never* increased the price charged to customer Todd for her sink repair, and in fact *decreased* the price charged in response to her protests that the charge was too high?

3. Did the trial court err in concluding that the plaintiff had proved the injury element of a CPA claim, where the record is undisputed that the plaintiff never paid anything at all to the CPA defendant and thus the supposed unfair deceptive act of price gouging never harmed her?

4. Did the trial court err in concluding that the CPA plaintiff had proved the proximate cause element of her CPA claim, where the trial court (a) found that *other* acts – different acts from the one act which the Court found to be an unfair deceptive act -- had allegedly caused the plaintiff to suffer injury to her property; and (b) where these *other* acts were proximately caused *by the CPA plaintiff herself* when she cancelled her checks and refused to pay the CPA defendant anything for its work?

5. Did the Superior Court err in ruling that a contractor who sues to enforce a mechanic's lien can never be the prevailing party in a lien foreclosure action brought under RCW 60.04.181(3) if the contractor's recovery is based solely upon a quantum meruit theory?

6. Did the Superior Court err in ruling that the statutory definition of the term "contract price" set forth in RCW 60.04.011(2) does not include recovery in *quantum meruit*, even though the statute expressly refers to "the customary and reasonable charge" for a contractor's services, labor and equipment and quantum meruit recovery is defined as the recovery of the "reasonable value" of services rendered?

7. Where a homeowner receives the benefit of an improvement to her property and the value of that improvement includes the amount of sales tax due on the reasonable charge for the services that produced that

improvement, is it error to fail to include the sales tax in the amount of *quantum meruit* awarded to the contractor, contrary to cases such as *Powell v. Kier*, 44 Wn.2d 174 (1954), and contrary to the testimony of the homeowner's own expert that the reasonable value of the contractor's work includes the sales tax?

8. Did the Superior Court err in failing to include the cost of the permit fee in the award of *quantum meruit* that it made to the contractor?

9. Under RCW 60.04.181(3), RCW 4.84.250 *et seq.*, and the case of *Kingston Lumber v. High Tech Development*, 52 Wn. App. 864 (1988), is a Superior Court required to award attorneys' fees to a contractor who prevails in a lien foreclosure action where the claimed lien is less than $10,000, and the contractor recovers more than he was offered in settlement by the property owner?

10. Is the finding (mislabeled a conclusion of law) that Gary and Rodney Jessen both had knowledge of misrepresentations made to Scoby by the plumber on the scene and knowingly approved of them supported by substantial evidence?

11. Did the trial judge violate the appellants' due process right to an opportunity to be heard when he *sua sponte* considered the attachment of documents to a post-trial brief "as if" it were a motion to reopen the trial and to present new evidence, granted that "motion," considered the evidence and used it to justify entry of a judgment against the appellants, and yet denied the appellants' request that they be permitted an opportunity to respond to the new evidence?

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On April 3, 2008, Plumb Serve LLC, d/b/a Benjamin Franklin Plumbing ("BFP"), filed a Claim of Lien against Viola Scoby pursuant to RCW 60.04 et seq., because Scoby had failed to pay for services rendered by BFP in connection with a partial replacement of Scoby's sewer line. RP I, 55; [2] CP 695. On May 12, 2008, BFP then brought suit against Scoby for breach of contract and to foreclose on its lien. CP 680-696. BFP alleged that Scoby hired it to perform a partial sewer line replacement; that it performed the job in a workmanlike manner; that it demanded payment in the amount of $6,655.98; and that Scoby had refused to pay the amount due. CP 684.

Scoby answered the suit, denied liability, and asserted a Consumer Protection Act ("CPA") counterclaim against BFP, alleging that BFP had engaged in deceptive acts and practices, and that BP had overcharged her. CP 660-664.

On October 6, 2008, Scoby served an offer of settlement on BFP, offering to pay BFP $3,350 to settle the suit. CP 464-65 (Appendix A). This offer was not accepted.

On February 2, 2009, BFP was administratively dissolved pursuant to RCW 25.15.280. CP 416.

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[2] The verbatim report of proceedings is referred to in this brief as follows: RP I -- February 10, 2010 (trial); RP II – February 11 (trial); RP III –February 16 (trial); RP IV – February 17 (trial); RP V – February 23 (trial court's oral decision); RP VI – March 5 (post-trial motions); and RP VII – May 7, 2010 (entry of judgment and FFCL).

On February 11, 2009, BFP served an offer of settlement on Scoby, offering to accept payment of $4,000 to settle the case. CP 467 (Appendix B). This offer was also not accepted.

An arbitration hearing was held pursuant to the Mandatory Arbitration Rules and on April 28, 2009, the arbitrator awarded Scoby $9,731.25 plus her reasonable attorneys' fees. CP 469 (Appendix C). On May 7, 2009, BFP filed a timely request for trial de novo in Superior Court. CP 18.

On May 21, 2009, on the grounds that she had recently discovered that Plumb Serve LLC d/b/a BFP had been recently dissolved, CP 383, Scoby moved for permission to amend her answer to assert third party claims against additional parties, and on June 5, 2009 this motion was granted. CP 649-655, 626-648. Scoby then asserted additional claims for violation of the Consumer Protection Act and for successor company liability against third-party defendant Profit Two, LLC, d/b/a Plumb Serve and Outtoday Service.[3] CP 626-628. Scoby also amended her answer to include third-party claims of personal liability against Rodney Jessen and Gary Jessen, the owners of both BFP and Outtoday Service. CP 631. Scoby alleged that Plumb Serve and Outtoday Service was the successor to BFP, that the assets of BFP were transferred to Plumb Serve, and on this basis she sought to have the Court pierce the corporate veil and

[3] There is much potential for confusion stemming from the fact that the words "Plumb Serve" appear in both the name of the LLC which did business under the name of Benjamin Franklin Plumbing, and also in the d/b/a of the LLC named Profit Two LLC. For that reason, throughout this brief the name "Plumb Serve" is not used to refer to either company, and the two LLC's are referred to by their d/b/a names "Benjamin Franklin Plumbing" (or "BFP") and "Outtoday Service."

impose personal liability upon the Jessens. CP 636.

On October 8, 2009, BFP filed suit for relief under Chapter 7 of the U.S. Bankruptcy Code. CP 326, 329-331. Scoby moved for relief from the Bankruptcy Court's stay and on January 29, 2010 the Bankruptcy Court granted that motion in part. The Bankruptcy Court authorized Scoby to act as a "nominal plaintiff" in order to pursue her CPA claim against BFP and for removal of BFP's lien. CP 471-72. But the Bankruptcy Court's order also expressly provided that "Scoby may not seek to recover monetary damages from the Debtor [BPA]." CP 472.

The case was tried to the Court before the Honorable Eric Z. Lucas on February 10-17, 2010. The Court rendered an oral decision on February 23, 2010, finding, *inter alia*, that Scoby had failed to prove any CPA violation and had also failed to establish any basis for the personal liability of the individual Jessen third-party defendants. RP V, 19, 22-24. The court also ruled that BFP was entitled to recover $3,350 on a *quantum meruit* basis on its lien claim against Scoby. RP V, 16-17.

On March 5, 2010, the trial judge heard argument on the parties' cross-motions for awards of attorneys fees, and instructed Scoby's attorney to prepare two sets of proposed FFCL. The trial judge stated that he was thinking of possibly reversing his oral decision that Scoby had failed to prove her CPA claim. RP VI,25.

Judgment and Findings of Fact and Conclusions of Law were entered on May 7, 2010. CP 9-37. The Court awarded BFP nothing on its claim for breach of contract. CP 22 (CL No. 12). The Court awarded BFP

$3,350 on its claim of quantum meruit. CP 23 (CL No. 15). Concluding that its *quantum meruit* award did not make BFP the prevailing party under the lien statute, the Court did not award BFP any attorneys' fees. CP 23 (CL No. 16).

The trial court determined that Scoby had failed to prove her counterclaims of fraudulent transfer. CP 24-25, CL Nos. 22-25. However, the trial judge reversed his earlier oral decision and decided that Scoby *had* proved her counterclaim for violation of the Consumer Protection Act. CP 27-32, CL Nos. 32-47. The trial court further found that Rodney Jessen and Gary Jessen failed to comply with RCW 25.15.300, the statute governing dissolution and windup of an LLC's affairs, and that they were therefore personally liable for the debts of BFP. CP 25-27, CL Nos. 26-31. The court also found the Jessens personally liable for violations of the CPA. CP 32-34, CL Nos. 48-52.

Concluding that Scoby was the prevailing party because she established a CPA violation, the trial court awarded Scoby $28,516.07 in attorneys' fees and costs, allowing an offset for the $3,350 that it awarded to BFP on its *quantum meruit* claim. CP 36-37 (CL Nos. 60-64). Judgment in favor of Scoby and against Rodney and Gary Jessen was also entered on May 7, 2010. CP 6-8.

2. FACTS PERTAINING TO THE CASE

a. <u>Plumb Serve d/b/a Benjamin Franklin Plumbing</u>.

Plumb Serve, LLC was formed by Rodney and Gary Jessen. RP I, 31, 96, 103. It did business under the name Benjamin Franklin Plumbing. RP

I, 31. Rodney Jessen owned 90% of the company and his son Gary Jessen owned 10% of it. RP I, 31. Rodney employed his son to work as the general manager of the company. RP I, 33. As such Gary Jessen was responsible for day to day operation of the company, and also for collection of debts. RP I, 33. Rodney Jessen was not involved in day to day operations. RP III, 116.

Rodney and Gary Jessen also formed, owned and operated Profit Two, LLC, another plumbing company, which does business under the name Outtoday Service. RP I, 96. Benjamin Franklin Plumbing was dissolved in 2008, RP I, 102. Gary Jessen believes Profit Two was formed in 2008 shortly before Benjamin Franklin Plumbing was shut down. RP I, 97; RP III, 93. Although they were in the exact same business – plumbing – they were two completely separate businesses. RP III, 94. They operated out of different locations. RP I, 104. They did not transfer any assets from BFP to Outtoday. RP I, 104.

b. <u>Change from Repair Job to Replacement Job</u>

The trial court found the following facts.

> On March 25, 2008, Viola Scoby's washing machine backed up causing a flood in her home. She looked in the yellow pages for help and found a firm called Benjamin Franklin Plumbing ("BFP"). She chose BFP, because it was a member of the Better Business Bureau, because it had a good name, and because it indicated that one hundred percent satisfaction was guaranteed.[4]

[4] Benjamin Franklin Plumbing lost its membership in the Better Business Bureau at the end of 2007. RP I, 99. At time BFP lost its membership, its yellow pages advertisement had already been published in the current phone book and it remained there for twelve months until the next edition of the book was published. RP I, 99. Thus the phone book which Scoby used in March of 2008 contained a yellow pages listing which showed that

> On the date she called the Benjamin Franklin Plumbing technician, he came to her home. What happened after that is not entirely clear. Mrs. Scoby does not recall the details of the transaction. But according to Exhibit 1, she wrote three checks. The first was for $1,684.68. This amount was crossed out and then two other checks were written, one for $3,552.93, and the second one for $3,103.05. These checks seemed to reflect the fact that the original scope of the work was changed, The cross-outs on Exhibit 1 reflect the same implication.
>
> The first scope of the work was $1,684.68 for which she paid in full and then at some point this was changed and the new scope of work was $6,655.98.

CP 10-11, FF 2-4.

The BFP plumber who went to Scoby's home was Alex Shelton. RP I, 44. Shelton was not called as a witness by any party at trial. By the time of trial, he no longer worked for BFP and Gary Jessen had no idea where he could be found. RP I, 65-66. However, Gary Jessen read the contract documents which Shelton prepared and which Scoby signed. From those documents, Gary Jessen reconstructed what happened when Shelton went to Scoby's home. RP I, 36-43. CP 689-691, the invoice for the work to be done documented the fact that initially Shelton agreed to clear the main sewer line for $499, to install a clean out for $2,245, and to clear out the laundry drain, the kitchen sink line and two lavatory lines for $350, for a total of $3,094. CP 689-691 (Appendix D); and RP I, 38-40, 42. However, this figure of $3,094 was scratched out and a new price of $6655.98 was written in. *Id.* Under the heading "Authorization to Proceed with Work" the invoice form states: "I have the authority to order

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BFP was a member of the Better Business Bureau. After it lost its membership, BFP simply told its employees that if they were asked if BFP was a member of the Better Business Bureau they should explain that it was *not*. RP I, 99.

the above work and hereby authorize you to proceed with the above work." *Id.* Scoby signed the form here. *Id.* In addition Scoby also signed under the heading "ACCEPTANCE OF WORK PERFORMED" where the invoice states in part "I acknowledge satisfactory completion of the above described work and that the premises has been left in satisfactory condition." *Id.*

Gary Jessen testified that the invoice amount was changed because the scope of the work to be done changed. Shelton changed the work from a repair job to a replacement job. RP I, 43. Similarly, on cross-examination Rodney Jessen testified that price for a repair job was never increased; instead, a new and different type of job service – a partial replacement -- was contracted for, and that different job had a higher price:

> Q. Mr. Jessen, when you have a case like this, where the job doubles in price during the course of – from the person arriving to the departure same day of the technician, don't you get a lot of feedback about those kinds of cases?
>
> A. ***As a matter of fact this job didn't double in price. It was a different job.*** We started out doing one thing and it didn't clear. Now, $350 of it you can call somewhat preventive or gratis, wasn't necessary, but was necessary because we didn't want to mess up our clean out. ***But once we investigated it, it was replacing a side sewer [which] is different than doing a clean out and repairing a short section. It's a different job.***

RP III, 146 (emphasis added).

The plumber, Shelton, provided Scoby with an Additional Notes Form, CP 692, which contained further information about the work authorized. RP I, 45, CP 692. This form documented the change from a repair to a

replacement project. The form, entitled "OPTION," states:

> To replace 21-25 linear feet of 4" sewerline from edge of garage out approx. 25 ft to remove damaged root section will install 2 way c/o and 2 locking ring & covers.
>
> Warranty (x) Standard 2 year ( ) Other $6525.12 + tax 580.74 = $7,105.86.

CP 692 (Appendix E).

Below this the Additional Notes Form also states: "Customer to have asphalt patch done." CP 692. This is followed by Viola Scoby's signature in two places. CP 692. Scoby acknowledged her signatures appeared on this document, on the contract, on a company "rewards club" document, and on the two checks that she gave Shelton for payment for the work to be done. RP I, 78-79. CP 689-691, CP 692, and CP 693.

Gary Jessen also testified that the documents, including Exhibit No. 3, CP 693a "Club Rewards" agreement, showed that for $239.40 Scoby purchased a membership in Benjamin Franklin Plumbing's "Rewards program," and that this purchase entitled her to a ten percent discount on any repair. RP I, 36-37. Thus, her club membership purchased at $239.40 entitled her to a $652.51 discount off the pretax price of $6,525.12. RP I, 37; Exhibit No. 1. After accounting for taxes and the cost of membership in the rewards program this led to a final price of $6,655.98. RP I, 49.

c. <u>Scoby's Inability to Remember her Interaction with Shelton</u>.

Viola Scoby was 83 years old at the time of trial. RP I, 91. In her testimony she repeatedly acknowledged that she did not have a good memory of the contents of her discussions with Alex Shelton, but she did

recall that he first told her that he would repair the sewer line and then told her that he found it that was not possible and it had to be replaced:

> Q. I am going to hand to you what's been marked and admitted as plaintiff's exhibit 1. ***Do you recall if the plumber went over the changes and the pricing with you***?
>
> A. ***I don't recall that he did, but he might have.***
>
> Q. Do you recall discussing – or did you have any discussions with him in terms of changing the scope of the work?
>
> A. If he told me, I don't remember.
>
> Q. Do you remember any conversations that you did have with him?
>
> A. Not greatly. He came, looked at my washing machine, I said what's wrong with it, he said the sewer is plugged up. And I said what do we do about it. And he said we clean it out, or he might have said change it, one of the two. ***He said that they intended to repair it first and found out that didn't work, and so then they had to put in new.*** That's what he said here today as well.

RP I, 92-93 (emphasis added).[5]

Scoby said on one occasion she went outside the house to inspect the work that Shelton was doing, but when asked what she saw when she went to observe the hole he was digging she replied that she "couldn't really tell you." RP I, 80. When she was asked "How did you feel about the work that was done at your home?" Scoby replied: "Like I say, I have no idea how it's supposed to look. So far as I could tell, it had looked okay. And then of course when it was covered over it looked fine." RP IV, 66.

d. <u>Intervention and Complaints Lodged by Scoby's Daughter</u>.

Wanda Kristjanson, Scoby's daughter, testified that her mother called

[5] In follow up questioning counsel established that when Scoby said "he" said that here today, she was referring to Gary Jessen and *not* to the plumber Alex Shelton. RP I, 93.

her around 5 p.m. and told her that the plumber had been there all day. RP IV, 12. Kristjanson said her mother sounded "a little frantic," related that the bill had increased from $3,000 to $5,000 and then to $7,000, and that when she asked her mother what was going on her mother replied "I don't know." RP IV, 13. Kristjanson said she was concerned because her mother was "very easily taken advantage of" because "she just doesn't understand the complications of business." RP IV, 13.

Over appellants' relevancy objection Kristjanson was allowed to give past examples of her mother's behavior. RP IV, 13-14. She said about nine months prior to this incident, her mother had purchased a new home security system even though she already had a perfectly good security system because someone had talked her into it. RP IV, 14. Her mother confided in her later that she had no idea what she was buying at the time: "She said he came and talked to her and the next thing she knew, there was a crew that took out her old security system and put in a new one." RP IV, 14.

Kristjanson also was allowed to testify that one day at the beginning of spring her mother bought 320 primroses to plant in her garden, even though her yard was nowhere near big enough to accommodate that many primroses. RP IV, 15. Kristjanson said that in general her mother's "memory, her comprehension is and has not been very good in the last few years." RP IV, 14.

Kristjanson got the name of the plumber from her mother and called him on the phone and asked him what the job was about. RP IV, 15.

Shelton told Kristjanson "he tried to clear the line and he couldn't, and he had to replace the sewer line outside of her house. And I told him I would be there at 9:00 the next morning." RP IV, 15.

On March 26, Kristjanson got to her mother's house at 9; Shelton was there but, according to Kristjanson, he did not actually start working until 10. RP IV, 16, 17. She saw that he was preparing to use a jackhammer to break up the asphalt driveway prior to digging the trench down to the sewer line. RP IV, 17. Kristjanson left and came back to the house around 3 p.m. in time to encounter Shelton who was leaving. RP IV, 18. He said he would be back the next day. RP IV, 18.

When asked if she spoke to Shelton about the cost of the work he was doing, Kristjanson said he explained that he charged her mother $250 extra "to join the club" which "gave her a ten percent discount." RP IV, 18. Kristjanson agreed it was wise for her mother to buy the club membership: "So it was $250 to get $660 off. So it was a $400 savings, and it was kind of a no-brainer to do it." RP IV, 18.

Kristjanson said she looked over the invoice "but it was just so scratched out and added, and scratched out and added, absolutely nothing made any sense to me." RP IV, 19.

> A. . . . And the one thing that I did get was the first day, and, you know, I believe he was there eight hours, and it was snaking out the sewer line. And that was $499 plus $350 for the inside pipes, I believe. So it was – his first day was $850 for cleaning out lines.
>
> Q. All right.
>
> A. After that I asked him to come outside and show me what

> he was going to do. So we went out in front of the garage, and he said it would start here and it would go to the end of her driveway, which was approximately 23 feet, and he would replace the sewer line.
>
> * * *
>
> A. And I had my three questions formulated before I got there. It was: What are you going to do? How long is it going to take? And, Is there any alternative? So I asked him those three questions. So it was complete new sewer line on her property, it would take two-and-a-half days. And if we didn't do it now, the roots would return and in no time we would just be calling him back.

RP IV, 19-20.

On the third day, Shelton called Kristjanson at 11:30 and said he was done. RP IV, 20. She calculated that Shelton worked a total of 8-1/2 hours to replace a section of the sewer line (in addition to 8 hours on the first day trying to snaking out the sewer line). RP IV, 19-20.

Kristjanson said that when she examined the work that Shelton had done, she was "absolutely shocked" to find that the trench which he had dug "did not go to the end of her [mother's] driveway . . ." RP IV, 22. Kristjanson measured the length of the trench which Shelton had dug and then refilled and found that it was 14 feet seven inches long. RP IV, 23. She also took pictures of the work Shelton had done. RP IV, 22 and CP 646. According to Kristjanson, she took the photos to depict the amount of sewer line that was replaced. RP IV, 23.

> He [Shelton] stopped [replacing the old line] right at where the tree root problem was, so we were expecting new line to go to the end of her property. And looking at what he had done, I felt like he went right to where the problem was and replaced that, but the rest of the pipe is still old, and it's right in the area where the trees did the damage. And we felt like she was getting a new sewer line, and there would never be in her lifetime a problem again with it. And this is

> like they stopped right where the problem was, so now we have old pipe, and the problem can happen all over again.

RP IV, 23-24.

Kristjanson complained to BFP about the fact that Shelton did not replace as much of the line as he said he was going to replace. Twice she spoke to employee Fred Bosio [sic], but despite her requests no one from BFP came out to look at the property to see what Shelton had done. RP IV, 26. She had several more conversations with Robert Wadleigh and also told him that Shelton had not finished the job. RP IV, 26. She said that she was told "that they were going to replace 21 to 25 feet of sewer line, and they replaced approximately 14 feet." RP IV, 26-27.

Eventually Kristjanson spoke with Gary Jessen, and again complained that only 14 feet of the old sewer line had been replaced. RP IV, 28. Gary Jessen told her that "linear feet does not mean in a straight line. So the sewer line could go down four feet, over fourteen feet, and then back up four feet, and that makes 22 feet." RP IV, 28. "Gary Jessen said that sewer line has to slope down, so the amount of slope in that 14 feet could have added another eight feet of pipe." RP IV, 32.

e. <u>Acknowledgment That The Work Performed Solved the Problem and Was Done in a Workmanlike Manner</u>.

The work performed was inspected by the city of Mountlake Terrace and it passed an inspection conducted on March 28, 2008. RP I, 51-52.

Scoby could not recall if she ever asked her daughter to do anything for her during the time the sewer line was put in. RP IV, 66. When asked if it was her daughter's idea to stop payment on the checks that Scoby had

given to Benjamin Franklin Plumbing, Scoby replied, "I believe so." RP IV, 67.

Kristjanson conceded that there were no more problems with the sewer line after Benjamin Franklin Plumbing performed the replacement work. RP IV, 40. She also stated, "My complaint was not about the price [charged by BFP]. My complaint was the amount of work that was done versus the amount of work that was contracted to be done." RP IV, 52.

Although she herself did not have any way of knowing whether a replacement of any portion of the sewer line was necessary, Kristjanson conceded that replacement might have been necessary. RP IV, 37.

The trial court granted BFP's motion for an order directing Scoby to allow an inspection of the sewer line, and the Jessens had an employee videotape a camera inspection of the line. RP I, 7; RP II, 4. The video was played in court and admitted at trial. RP II, 17, 21.

f. Nonpayment of the Plumbing Company's Invoice and Placement of a Lien on The Scoby Property.

Because she felt that BFP had broken the contract by not replacing as much old sewer line as they had promised to replace, on April 2, 2008, Kristjanson placed stop payment orders on the two checks her mother had written to pay the company; she felt this was "the only way to get their attention." RP IV, 29; 47-48. See also RP I, 53-54 & Exh. 5. She attempted to negotiate a compromise price and "tried to get them to accept, you know, somewhere in the $3500 to $4,000 range, half the money for the amount of work that was completed." RP IV, 29. But BFP

refused to accept the offer and on April 3, 2008 Gary Jessen filed and served a lien for $6,655.98 on the Scoby property. RP I, 54-55 & Exh. 6. Scoby never paid any portion of $6,55.98 bill and accordingly BFP filed suit to have a judgment entered for that amount. RP IV, 56.

g. Flat Fee Pricing and Time Plus Material Pricing.

There was extensive testimony about BFP's standardized flat fee pricing. CP 16, FF 30. BFP was operated as a franchisee of a national plumbing services corporation headquartered in Florida, and was obligated to use the franchisor's pricing book. RP I, 40-41; RP II, 84. Scoby presented the testimony of Robert Wadleigh, a former employee of BFP. RP II, 74. Wadleigh testified that all plumbing companies use price book guidelines to price jobs. RP II, 87-88. According to Wadleigh, BFP's contract price of $6,655.98 for the work done at the Scoby residence was "a good price," and it was consistent with what he would expect other plumbing companies to charge. RP II, 94.

Scoby also presented the testimony of Kevin Flynn, a manager for another company called Raymark Plumbing. RP II, 198. After putting a camera down the sewer line and inspecting the work that BFP had done for Scoby, Flynn testified that using a time plus materials calculation, he thought that $3,350 plus tax was a reasonable price to charge for the work that had been done. RP II, 110, 113. Flynn testified that the largest cost for plumbing repair jobs was the cost of labor. RP II, 118.

h. Complaint by Michelle Todd Regarding Sink Repair.

In an attempt to show a pattern of unfair and deceptive acts which

would support her CPA claim, Scoby presented evidence of a separate incident involving a plumbing repair by different Jessen operated plumbing company. Even though Scoby's plumbing transaction involved BFP, Scoby presented the testimony of Michelle Todd who described her experience with Outtoday Service, the d/b/a of a different plumbing company. RP II, 161.

Todd hired Outtoday to repair her kitchen sink which fell into a kitchen cabinet when the glue holding the sink into position failed. RP II, 133-134. She contacted a referral service to get a referral to a plumbing contractor and then was contacted by Victoria Glover of Outtoday. RP II, 134. Glover told Todd that for a charge of $89 she could send someone to Todd's house to look at the sink, assess the situation, and give a repair estimate. RP II, 135. Todd agreed and so a plumber named Chuck came out to her house that afternoon. RP II, 136-137.

When he looked at the sink he said it would cost $261 for him to do a diagnostic troubleshooting that would enable him to fully assess the problem. RP II, 137. That $261 would be in lieu of the $89 fee that Todd had agreed to pay in order for him to come to her house that same day. RP II, 137. The plumber said that because the kitchen cabinet was made of granite, he thought a repair might involve having to break and then replace some of the granite, and that could make the cost run into thousands of dollars. RP II, 138. On the other hand, he wouldn't know if breaking the granite would be necessary, or what the actual cost would be until he did an in depth assessment. RP II, 138.

Todd felt she was stuck and had to keep going with the Outtoday plumber because he was now there at her house. RP II, 139. He looked at the situation and gave her an estimate that a repair would cost $1,100. RP II, 139. Todd called her husband and after they talked it over they agreed to authorize the repair for that amount. RP II, 140. The plumber went on a website, printed out a $50 discount coupon for them, and said that would reduce the price to $1,050. RP II, 140. Michelle Todd then signed the work order. RP II, 140-141.

Actual repair work did not start until the next day. RP II, 141. That day the plumber worked about an hour and then said he would have to come back the next day to finish the job. RP II, 142. In fact, it actually took two more days to finish the job. RP II, 142. All told it took three days for the job to be completely done, but the plumber only worked about two and a half hours over those three days. RP II, 143. He then asked Todd for full payment and she "flipped out" because he was insisting on payment of the full amount for two and a half hours of work. RP II, 143. After Todd was offered a ten percent discount which reduced the amount to $990 she reluctantly paid that amount. RP II, 146, 155.

i. Closing Argument: Scoby's Contentions About Unfair and Deceptive Acts by Benjamin Franklin Plumbing.

In closing argument in support of her CPA claim, Scoby contended that BFP had engaged in "three general categories of unfair and deceptive acts." RP IV, 96. First, Scoby claimed that the yellow page advertisement "showing that BFP was a current member of the Better Business Bureau"

was deceptive because by the time Scoby read the advertisement in the phone book BFP had lost its BBB membership. RP IV, 96-97.[6]

Second, Scoby claimed that BFP intentionally used "confusing and excessive and deceptive pricing." RP IV, 96. "They start with one price, it ends up at an increased price." RP IV, 92. Scoby seemed to contend that the use of flat fee pricing books was an unfair and deceptive act, stating, "If these pricing guides are so comprehensive and detailed, then why aren't the prices and the scope of the work clearly disclosed to the consumer at the very start?" RP IV, 98. Scoby attempted to draw a parallel between her own sewer replacement job performed by BFP, and Todd's sink repair performed by Outtoday Service. RP IV, 98-99.

Third, Scoby said that "the manner in which" BFP "deal[s] with customer complaints" was an unfair and deceptive act. RP IV, 96. "In this case they simply placed a lien on the house, even though they knew the [Scoby] family . . . had many concerns about the invoice and what was actually done at the home." RP IV, 96. "They refused, they absolutely refused to come back to the property" to inspect it to see how much of the sewer line had actually been replaced. RP IV, 99.

Finally, Scoby argued that these unfair and deceptive acts caused her to suffer damage because she ended up being sued and having a lien

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[6] Scoby never did explain what she thought BFP was supposed to do about the fact that its yellow page advertisement, which was accurate when it was purchased and first published, became inaccurate after BFP lost its membership in the Better Business Bureau. Scoby simply said that the ad's mention of BBB membership became an untrue representation, and that the fact that BFP had not intended to make any misrepresentation was irrelevant. RP IV, 97.

placed on her property:

> Mrs. Scoby has been damaged by this. She is the defendant in this suit. There is a lien against the property. It's a slander on title. To remove this lien she's had to spend a substantial amount of money to defend this suit. And again, she's a widow and not working. This has been an extremely expensive defense for her.

RP IV, 99-100.

j. <u>Initial Oral Decision of February 23rd: Admission of the Consent Decree Solely to Show That There was A Judgment Entered</u>.

On February 23, 2010, six days after hearing closing argument the trial judge rendered his initial oral decision in the case. The first issue the court addressed was the admissibility of the Consent Decree. Having previously reserved ruling on that issue, Judge Lucas ruled that under ER 803(a)(22) and (23) the consent Decree was admissible as a judgment, but that it was only admissible to show the existence of a judgment, and that none of the statements in the judgment were admissible for any purpose. RP V, 12-13. This ruling was later confirmed in the court's written FFCL as Conclusion of Law No. 3. CP 19.

k. <u>Initial Oral Decision: Ruling Finding a Breach of Contract by BFP and Awarding BFP Quantum Meruit Damages Which Exceeded $3,350.</u>

In his initial oral decision, the trial judge found that although BFP fixed Scoby's draining problem, the video camera inspection of the sewer line, showed that BFP did not replace 21-25 feet of Scoby's old sewer line as it had contracted to do. RP V, 4. He found that the video showed that replaced section of the sewer line only covered about 14 feet. RP V, 4.

He also expressed some doubt as to whether any replacement had actually been necessary:

> It is also unclear whether the "repair" was successful or not. This is important in determining whether she had an actual choice whether to repair or replace as testified to by Gary Jessen.

RP V, 5.[7]

On BFP's claim for breach of contract, Judge Lucas ruled that even assuming that a contract had been formed for replacement of 21 to 25 feet of the sewer line, BFP had failed to perform the contract because it had only replaced about 14 feet of the line. RP V, 14. This ruling was later memorialized the written FFCL as follows:

> In this instance, the Court does not believe that this contract as written has been performed. The scope of work on the final contract price was, "to replace 21-25 feet of 4 inch sewer line from the edge of the garage out approximately 25 feet to remove damaged root section, Will install two way cut out and two locking ring covers.
>
> This was not done. At most the video shows sewer line replaced from the edge of the garage amounting to 14 feet. Plaintiff tries to interpret this clause to mean "total linear feet." But that simply is not what it says. And if this is what it mean[t] then the contract is ambiguous. Generally ambiguous terms are to be construed against the drafter. [Citation omitted]. In this instance, this Court does not see any reason why this ambiguity should be construed otherwise.

CP 21-22, CL 7 & 8.

Although he found that BFP failed to perform the contract and thus was not entitled to recovery for breach of contract, Judge Lucas did find

[7] This doubt was later reasserted in the written FFCL later entered by the Court in Conclusion of Law No. 10. CP 22-23.

that BFP was entitled to recover quantum meruit damages:

> Quantum meruit. A defaulting contractor is entitled to quantum meruit damages for part performance measured by the reasonable value of its services to the other party to the extent that a benefit was conferred to the other party. Restatement (Second) of Contracts, section 370 (1981). And this is also memorialized in Washington in a case called *Ducolon Mechanical Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707 (1995).
>
> It is not disputed that there was part performance and that the sewer did operate after the work was performed. As such some compensation is due.
>
> However, Plaintiff did not provide any evidence with regard to its costs or the reasonable value of the work, so the Court is not in a position to make a monetary award on the evidence the Plaintiff offered.
>
> However, an alternative price based on Mr. Flynn's evidence, does present the Court with arguable "reasonable value of its services" as required by quantum meruit analysis. As such, ***this Court awards $3,350 plus tax, permit and interest from the date the job was completed.***

RP V, 16-17 (emphasis added).

Although the Court orally determined that BFP was entitled to this award of quantum meruit damages, it concluded that this award did not make BFP the prevailing party and thus it was not entitled to attorneys' fees under the lien statutes:

> Attorney's fees. An award of quantum meruit damages does not make Plaintiff the prevailing party, as such attorney's fees are not awarded.

RP V, 17.

l. Initial Oral Decision: Ruling That Scoby Had Failed to Prove Her Consumer Protection Act Claim By Failing to Prove the Public Interest, Injury, and Causation Elements of the Claim.

The trial court also initially ruled that Scoby had failed to establish all

five elements of a CPA claim:

> Consumer Protection Violation. To prevail on a Consumer Protection Violation claim a Plaintiff must proof [sic] each of the following five elements: (1) that the defendant engaged in unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) that affects the public, (4) causes injury, (5) to Plaintiff in his or her business or property. *Dwyer vs. J.I. Kislak Mortgage Corporation*, 103 Wash. App. 542 (2000).
>
> "To meet the third element and prove the violation of the public interest, claimant must prove either the consumer protection test elements or the private dispute test elements." That's from *Hangman Ridge vs. Safeco Insurance*.[8]

RP V, 19-20.

Recognizing that BFP had provided a service, not a product, the Superior Court noted that in addition to the five general elements for a CPA claim, Scoby also had to satisfy the four elements of the private dispute test set forth in *Hangman Ridge*.

> "Ordinarily a breach of private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest . . . However, it is the likelihood that additional Plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest."
>
> As such, under *Hangman Ridge*, in addition to the general elements for a Consumer Protection Act claim, that must be proven claimant must also show:
>
> "Factors indicating public interest in this context include (1) Were the alleged acts committed in the course of the defendant's business? (2) Did defendant advertise to the public in general? (3) Did the defendant actively solicit this particular Plaintiff indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal

[8] 105 Wn.2d 778, 719 P.2d 531 (1986).

> bargaining positions? . . .

RP V, 20, (quoting from *Hangman Ridge*).

The Superior Court concluded that Scoby had failed to prove the elements of the private dispute test, and thus had failed to prove that BFP's unfair act affected the public interest because she had not proved that there was a likelihood that additional plaintiffs had been or would be injured in exactly the same fashion that Scoby had been injured. RP V, 22. Although the Superior Court found there was an unfair practice of "using the superior technical knowledge of the contractor to increase the price of the service," RP V, 21, Scoby had not shown that there was a pattern of employing this unfair practice:

> A person calls in an emergency, who is in need of special knowledge. The LLC's technician is that person. Then they proceed to use that knowledge to enhance the emergency and verify and justify additional dollars. This is how the price gouging has been arrived at.
>
> However, in this case only two examples of this behavior had been shown. Two examples is not a pattern. And in particular, two examples does not show the likelihood that additional Plaintiffs have been or will be injured in exactly the same fashion.
>
> The Consent Decree cannot provide proof of pattern or repeated acts and this Court believes that *Hangman Ridge* requires such a showing under the facts of a case like this one.

RP V, 22.

In addition, Judge Lucas went on to rule that Scoby had failed to prove the fourth and fifth elements of the Hangman Ridge test because she had not shown that the unfair act had caused her to suffer injury to her business or property:

> Also elements 4 and 5, that the acts caused injury to the Plaintiff in his or her business or property has not been sufficiently shown. If the injury is failure of workmanship, that has not been shown.
>
> Neither Ms. Todd nor Ms. Scoby complained that their problem was not solved. And if the injury is price gouging, this also has not been shown. No evidence whatsoever was provided to this Court showing what the Jessen's profit margin was or what their costs were. Mr. Flynn provided an alternate price, but this is not sufficient to show that Jessens obtained excess profit in their operation.
>
> If price gouging is the injury then to prove it you have to show, in this Court's view, excess profit of a certain percentage, whether a hundred percent, two hundred, three hundred, four hundred or five hundred. This has not been shown and it easily could have been. . . .
>
> As such, it has not been shown that the pricing scheme was generally unreasonable under these facts.
>
> Since elements 3, 4 and 5 have not been proven under a Consumer Protection Act analysis, this claim fails.

RP V, 23-24.

m. <u>Initial Oral Decision: Ruling That Scoby Had Failed to Prove Any Basis for Imposing Personal Liability Upon the Jessens</u>.

Finally, in his February 23, 2010 oral ruling, the trial judge rejected Scoby's argument that he should impose personal liability on the Jessens for BFP's conduct, because there was no evidence that they had done anything wrong, and there was no showing that Outtoday Service was the same entity as the now dissolved entity BFP:

> Finally, no personal liability has been proven ***because no wrongdoing has been shown on the part of the Jessens***.
>
> It is not illegal to declare bankruptcy in one corporation and limit the claims thereby to that entity and then to restart in a

> different business, unless claimant provides evidence which reveals active efforts to hide or misrepresent assets in some kind of legal maneuver and then tracks those assets so that the Court can determine a value. This Court sees no reason to pierce the corporate veil.
>
> As such, any claim for personal liability on this basis fails. This Court makes no ruling on any personal liability under RCW 25.15.303.

RP V, 19 (emphasis added).

n. <u>The Trial Court's Initial Decision to Award Scoby Attorneys' Fees, Retraction of That Decision, and The Decision to Call for Briefing on the Attorneys' Fees Issues</u>.

Immediately after delivering his oral ruling on the merits of the various claims and third party claims, the trial judge announced his intention to make an award of attorneys' fees to Scoby, stating simply: "Ms. Scoby is due attorney's fees as the prevailing party." RP V, 24. The Court proceeded to state that the hourly rate of $225 requested by Scoby's attorney was too high, and he announced that he was prepared to use a lower rate of $112.50, and to award Scoby $21,622.50 for the 192.2 hours of attorney time which had been claimed and documented. RP V, 24.

Counsel for BFP then questioned the trial court's unexplained assertion that Scoby was the prevailing party and informed the trial judge of several matters of which the Court was presumably unaware, such as a prior arbitration award and some previously exchanged settlement offers which affected the legal analysis of who was the prevailing party in the case. RP V, 26-27. BFP's counsel also noted that BFP was entitled to attorneys fees under the lien claim statutes because the Court had awarded

BFP damages in quantum meruit. RP V, 27.

In response to these arguments, the trial court retracted its oral determination that Scoby was the prevailing party and ordered the parties to brief that issue, and to brief all issues pertaining to who was entitled to an award of attorneys' fees:

> So guess what, you are going to have to brief this, as to who the prevailing party is. These are the issues you are going to have to cover in your briefs, who the prevailing party is, attorney's fees, who should get them and how much. That's basically the two issues.
>
> And the prevailing party, you are going to have to handle the arbitration problem and the settlement offers. Because already I've heard a factual dispute as to when the offer was made, whether it was before or after arbitration and there is absolutely no way I'm going to decide that based on the oral presentation. There is going to have to be briefing on that.

RP V, 34-35.

o. <u>Submission of Briefing With Each Side Arguing That It Was the Prevailing Party</u>.

In accord with the trial judge's directions, BFP submitted post-trial briefing in which it explained why it was the prevailing party on its claim against Scoby. BFP drew the Court's attention to the fact that in *Kingston Lumber v. High Tech Development*, 52 Wn. App. 864, 765 P.2d 27 (1988) this Court held that even though the lien foreclosure statute[9] made an

[9] At the time *Kingston Lumber* was decided, the statute which gave the trial court *discretion* to award attorneys' fees to the prevailing party was RCW 60.04.130. That statute was later repealed on June 1, 1992 by Laws 1991, ch. 281, § 31. At the same time, a new statute providing for a discretionary award of attorneys' fees in lien foreclosure action was enacted by Laws 1991, ch. 281, § 18, and that statute, which exists today, was codified as RCW 60.04.181. The present statute, like the former statute, employs the permissive word "may" to vest the trial court with discretion to grant attorneys' fees to the prevailing party.

award of attorneys' fees to the prevailing party *discretionary,* when the amount of the lien was ten thousand dollars or less, the provisions of RCW 4.84.250 made it *mandatory* that the trial court award attorneys' fees to the prevailing party. RCW 4.84.250 provides:

> Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there ***shall*** be taxed and allowed to the prevailing party as part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

(Emphasis added).

Harmonizing RCW 4.84.250 with the former attorney fee statute governing lien foreclosure actions, this Court held that attorney fee awards to the prevailing party were mandatory where the lien was for ten thousand dollars or less:

> Under RCW 60.04.130, a trial court in lien cases has the discretion to award attorney's fees, but if the amount in controversy is $10,000 or less, RCW 4.84.250 mandates fees to a prevailing party. Construed in this manner, RCW 4.84.250 does not require any award which RCW 60.04.120 would prohibit; ***it simply makes mandatory some awards that would otherwise be optional.***

Kingston Lumber, 52 Wn. App. at 867 (emphasis added).

In *Kingston Lumber* the plaintiff recovered nothing, so the defendant was the prevailing party and therefore this Court held that the Superior Court was required to award the defendant his attorneys' fees. *Id.* at 868.[10]

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[10] "Since Kingston Lumber's claim was dismissed and it recovered nothing, Puckett Is a prevailing defendant and is therefore entitled to attorney's fees under RCW 4.84.150." (Footnote omitted).

Since the trial court had orally ruled that BFP was entitled to recover $3,350 plus sales tax and interest on its lien claim, BFP argued that it was the prevailing party in the lien foreclosure action, and therefore it was statutorily entitled to an award of attorneys' fees under RCW 60.04.181. CP 455. BFP's attorney documented 117.7 hours of work and using an hourly rate of $280 per hour he sought an award of $32,956. CP 479.

Defendant Scoby had offered BFP $3,250 in settlement prior to trial. BFP noted that it had done better than this because the trial court had awarded it "$3,350 plus sales tax and interest." RP V, 17. Since sales tax of 8% amounted to an additional $268, and since interest at the statutory rate of 12% per annum from March 2008 to February 2010 (23 months) was $770.50, BFP noted that the trial judge had orally awarded it $4,388.50 on its lien foreclosure action. CP 458. Thus BFP had done better than it would have done had it simply accepted Scoby's settlement offer of $3,350, and as such it was the prevailing party on its lien foreclosure claim.

Turning to Scoby's third party claims against the Jessens and Outtoday Service, the trial court had orally ruled that Scoby had failed to prove any of these claims. Accordingly, BFP argued that Scoby was not the prevailing party on any of these claims, since she had recovered nothing on them, and therefore Scoby was not entitled to recover any award of attorneys' fees. CP 458, 462.

Scoby also filed post-trial briefing on the prevailing party status issues. Even though she had been (orally) ordered to pay BFP $3,350 plus tax and

interest, she argued that *she* was the prevailing party in the lien foreclosure action. She contended that BFP had not obtained a valid lien "for the contract price" as required by RCW 60.04.021 because the amount BFP had recovered did not meet the statutory definition of "contract price." CP 439. The term "contract price" is defined as the amount agreed upon, or if no amount was agreed upon, then the contract price is "the customary and reasonable charge therefore." Ignoring the fact that the trial court had orally ruled that BFP was entitled to a lien of $3,350 (plus tax and interest), Scoby argued that the amount of the lien *claimed* -- $6,655.98 – was neither the amount agreed upon nor the customary and reasonable charge." CP 439-440. Therefore, she contended that BFP had not obtained any valid lien at all, and that she was the prevailing party on the lien foreclosure action.

p. The March 5th Hearing

(1) Trial Court's Rejection of BFP's Contention That It was the Prevailing Party In The Lien Foreclosure Action On the Ground That "You Can't Be The Prevailing Party in *Quantum Meruit*, Period."[11]

On March 5, 2010, the Court heard argument on the issues regarding who was the prevailing party for purposes of making awards of attorneys' fees. First, although no party had raised this argument, the Court *sua sponte* announced that under the case of *Ducolon Mechanical v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 893 P.2d 1127 (1995), it was simply impossible to be the prevailing party on a lien foreclosure claim if

[11] RP VI, 4.

the only recovery obtained was a quantum meruit recovery. RP VI, 2.[12] The trial judge noted he had some experience with this particular issue and he had cited *Ducolon* in a case he had handled and won when he was in private practice. RP VI, 2.

BFP argued that the judge's reliance on *Ducolon* was misplaced, that the case was not on point, and that the Court was ignoring the decision in *Kingston Lumber* and was failing to perceive the significance of the difference between cases like this one where less than $10,000 damages were sought, and cases like *Ducolon* where a much larger claim was made. RP VI, 8-9. Moreover, BFP argued that the statutory definition of the term "contract price" specifically recognized that a contractor who prevailed on a quantum meruit theory could be a prevailing party. RP VI, 11. The trial court flatly disagreed. RP VI, 11.

(2) The Trial Court's Elimination of Any Award of Prejudgment Interest on the *Quantum Meruit* Recovery.

At Scoby's request, the trial judge announced that because recovering under *Quantum meruit* was recovery of an unliquidated sum of money, which was ineligible for prejudgment interest, RP VI, 4, he was changing his prior ruling awarding BFP $3,350 "plus *tax, permit and interest* from the date the job was completed." RP V, 17 (italics added).

[12] I think the first issue is whether you had received a warrant quantum meruit, you could be the prevailing party. I think the answer to that question is no. And I cite the case of *Ducolon Mechanical vs. Shinstine/Forness*, 77 Wn. App. 707 [a] 1995 case.

(3) The Trial Judge's Announcement That He Was Going to Rethink His Rulings On Scoby's Consumer Protection Act Claim, and on Her Claim That the Jessens Should Be Held Personally Liable.

Although Scoby had not submitted any post-trial briefing or made any post-trial argument that asked the trial judge to reconsider his oral ruling that Scoby had failed to prove her CPA claim, the trial judge announced *sua sponte* that he was going to rethink that ruling. Commenting on his prior oral ruling that Scoby had failed to prove the public interest element of a CPA claim, the judge directed Scoby's counsel to prepare two alternate sets of proposed FFCL so as to give him the option to adopt either one:

> I'm going to give that some more thought because I know that my decision on the consumer act claim was close, it was based on . . my interpretation of the *Hangman Ridge* case, and that special provision with respect to the private dispute test and those elements. And so from a legal standpoint, based on my interpretation, I found that the facts weren't sufficient to meet that test, ***but I might rethink that.***

RP VI, 25.

Scoby did submit post-trial briefing in support of her argument that the Jessen third-party defendants should be held personally liable for failure to properly wind up the now dissolved company that had been doing business as BFP, and she argued that the judge should reconsider that ruling. RP VI, 5. The trial judge announced that he was not clear about what Scoby had or had not proved with respect to that claim, and therefore he would also reconsider his prior oral ruling as well. RP VI, 5, 24-25.

q. The May 7th Hearing

(1) The Trial Court's Reversal of His Prior Oral Ruling on Scoby's Consumer Protection Act Claim.

On May 7, 2010, the parties appeared before the trial judge for entry of judgment and FFCL. The trial judge did not hear any further argument from counsel, he simply announced that he was changing his prior ruling and was now finding that Scoby had proved a CPA violation:

> Ms. Lam, according to the Court's instructions, prepared alternate sets of Findings of Fact and Conclusions of Law based upon colloquy with the court which indicated that the Court might consider going one way or the other with regard to the consumer protection claims."
>
> "And this morning, after reviewing all that information that's been presented to the Court, what I'm going to do is as follows:
>
> ***I am going to go ahead and enter Findings of Fact and Conclusions of Law in favor of Ms. Scoby under version A. And with regard to the consumer protection violation and that the private dispute test has been met.***

RP VII, 2 (emphasis added).

Previously the trial judge had ruled orally that Scoby had failed to prove the third, fourth and fifth elements of the *Hangman Ridge* test. RP V, 23-24. At the May 7 hearing, the trial judge explained why he changed his mind as to the third element, but he said nothing at all about the fourth and fifth elements of injury and causation. He gave no explanation as to how the unfair and deceptive act that he had found ("using superior knowledge and skill to take advantage of the other person in terms of price," RP VII, 2) had caused Scoby to suffer any injury, since she never did pay BFP the contractually agreed upon price and the Court did not

order her to pay this price.

Having found that Scoby *had* established a CPA violation, the trial judge also awarded Scoby her attorneys' fees under the CPA. RP VII, 3. The court awarded Scoby $$28,516.07 in attorneys' fees and costs.

(2) <u>The Trial Court's Reversal of His Prior Oral Ruling Regarding the Personal Liability of the Jessens</u>.

Adopting Scoby's proposed FFCL on the issue of alleged failure to properly wind up the LLC doing business as BFP, the trial judge also reversed his prior oral ruling on the issue of the Jessen's personal liability and found them personally liable for BFP's CPA violation. RP VII, 3. Although he had flatly asserted at the last hearing that "no wrongdoing has been shown on the part of the Jessens," RP V, 19, he now found that the Jessens "knowingly approved of Benjamin Franklin Plumbing's deceptive acts" and were "therefore liable for the CPA penalties." CP 33, CL No. 50.

(3) <u>The Trial Court's Elimination of The Permit Fee From BFP's Quantum Meruit Recovery</u>.

By adopting Scoby's proposed FFCL, the trial judge also eliminated the permit fee from BFP's quantum meruit recovery on the grounds that BFP had never presented any evidence of what the amount of that permit fee was. This had the effect of reducing BFP's recovery to exactly $3,350. CP 22-23, CL Nos. 13-15; RP V, 16-17.

D. <u>STANDARDS OF APPELLATE REVIEW</u>

A trial court's determination as to whether conduct constitutes an unfair or deceptive act under the CPA is reviewed de novo. *Robinson v. Avis Rent-a-Car*, 106 Wn. App. 104, 114, 22 P.3d 818 (2001); *Leingang v.*

Pierce County Medical Bureau, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

An appellate court reviews *de novo* the question of whether the trial court's conclusions of law are supported by its findings of fact. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982); *Ives v. Ramsden*, 142 Wn. App. 369, 382, 174 P.3d 1231 (2008).

An appellate court reviews a trial court's finding of fact to determine if it is supported by substantial evidence. *Rainier View Court Homeowners Ass'n v. Zenker,* 157 Wn. App. 710, 719, 238 P.3d 1217 (2010. Under that standard there must be a sufficient quantum of evidence to satisfy a reasonable person that the declared fact is true. *Wilson v. Employment Security Dept.*, 87 Wn. App. 197, 201, 940 P.2d 269 (1997).

"A trial court's interpretation of the construction lien statute is a question of law that the Court of Appeals reviews de novo." *Pacific Industries, Inc. v. Singh*, 120 Wn. App. 1, 6, 86 P.3d 778 (2003).

E. <u>INTRODUCTION TO THE ARGUMENT</u>

Unfortunately, there are some cases where the bias of the trial judge is made painfully evident. Our system of law is predicated on the belief that the law is equally applicable to all people. In a bench trial such as this one, when a judge manipulates the legal rules by making drastic changes in his prior rulings, just so he can ensure a victory for the party that he wants to see win, even though under the law that party should not win, there is a grievous injury inflicted upon the entire justice system. Lawyers and parties cannot help but lose respect for judges who put their fingers on

the scales of justice in order to determine the outcome.

In this case the trial judge engaged in "result oriented" justice. His first oral ruling fairly recognized that an 81 year old woman, the defendant in a lien foreclosure action and the plaintiff on her counterclaim for a CPA violation, had utterly failed to prove her contentions. He found that she had (1) failed to prove a CPA violation for several reasons; (2) failed to prove a basis for imposing personal liability upon two individuals who owned and operated the plumbing company that she had done business with; and (3) failed to prove that a second plumbing company was a mere alter ego continuation of the first thereby failing to establish a basis for imposing liability upon the second company.

At the same time, the trial judge expressly found that the first plumbing company had breached its contractual promise to the woman by failing to completely perform the work it had contracted to do. Accordingly the judge denied the plumbing company any recovery for the elderly woman's failure to pay it the amount it charged her, but he did order her to pay the plumbing company a lesser sum in *quantum meruit* in recognition that the company had done some work for her, and had conferred a benefit on her property.

At this point the record shows that the trial judge was eager to award the elderly woman her attorneys' fees. But when the parties submitted briefing and made post-trial argument on the many issues which affected a determination of which party was the prevailing party and who was entitled to fees, the Court realized that its first oral decision did not

provide a legally justifiable basis for awarding attorneys' fees to her.

So in order to be able to achieve the desired result of awarding the elderly woman her attorneys' fees, the trial judge altered his decision in several respects, even though the new decision was inconsistent with both the evidence and the law. He changed his ruling on the CPA claim, finding that in fact she had established a CPA violation. He changed his ruling on her claim that the individual third party defendants were personally liable for their company's wrongful act – now a CPA violation. He changed his *quantum meruit* award to the first plumbing company so that he could avoid the result that the company recovered more on its lien foreclosure claim at trial than it had been offered in settlement pretrial. And on the basis of these many reversals of his prior oral rulings, the trial judge had a legal basis – or so he thought – for awarding the elderly woman her attorneys' fees as he had originally wanted to do.

To maintain public confidence in the judiciary, these kinds of judicial contortions, made to justify a victory for a party that has the trial judge's empathy, must be reversed. No matter how likeable or sympathetic a particular party may seem, that cannot justify ignoring the evidence and the law. This Court should reverse the judgment below and issue an opinion which strongly disapproves of such judicial disregard for the equal application of the law to all parties.

F. ARGUMENT

The Consumer Protection Act Claim

To prevail in a CPA action a plaintiff must prove five distinct

elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) proximate causation. *Hangman Ridge*, 105 Wn.2d at 780.

1. THE TRIAL COURT ERRED IN CONCLUDING THAT SCOBY HAD PROVED THE COMMISSION OF AN UNFAIR DECEPTIVE ACT.

a. The Record Does Not Support The Legal Conclusion That BFP's Plumber Increased the Price Charged to Scoby for a Repair Job. It Shows That The Job Changed from a Repair to a Replacement Job, A Job With a Different and Higher Price.

The trial judge's description of the "unfair" act that BFP supposedly perpetrated against Scoby and Todd is vague and hard to discern. He ruled that "an unfair deceptive act or practice has been shown," but that it was "not related to the advertising, but rather to the predatory practice of attacking the customer rather than serving the customer." CP 29, CL 37. Standing alone this description would be difficult for any appellate court to review, but it is accompanied by the following elaboration:

> This case has shown ***a technique*** of using the superior technical knowledge of the contractor ***to increase the price of the service***. This is what the Court earlier called overreaching. And it did not really matter whether the customer was someone who was elderly or young, the effect was the same.

CP 29, CL 38. But the evidence in the record and the findings of fact simply do not support this conclusion of law, for several reasons.

First, the record shows that neither Alex Shelton, the plumber who interacted with Scoby, nor the plumber who interacted with Todd, increased the price for the same service. In Scoby's case, it was

undisputed that the type of service changed from a repair to a replacement. Gary Jessen testified that the documents showed that the job changed from a repair to a replacement when Shelton discovered that he could not unplug Scoby's sewer line by using a snake to attempt to remove the obstructions. RP I, 43. When Shelton changed the job to one of replacing a section of the sewer line, there was no price "*increase*" for the repair job.[13] As Jessen said, "this job didn't double in price, it was a different job." RP III, 146. It started out as a repair job but when it was discovered that a repair was not possible it changed to a replacement job; "replacing a side sewer is different than doing a clean out and repairing a short section." RP III, 146.

b. The Record Here Is Identical to the Record Found Legally Insufficient in *Robinson v. Avis Rent a Car*, Where This Court Held That the Plaintiffs' Testimony, That The Charges May Well Have Been Explained to Them, Precluded Any Finding of any Unfair Deceptive Act.

The trial judge's determination that the plumber employed a "price gouging" technique is particularly insupportable since Scoby herself first said *she could not remember* what Shelton told her but that *he might have gone over the pricing changes with her*, and then she acknowledged that Shelton told her that he had "intended to repair" the existing line but "found out that didn't work, and so then they had to put in new." RP I, 92.

The case of *Robinson v. Avis-Rent-a-Car*, 106 Wn. App. 104, 22 P.3d 818 (2001) is directly on point. The testimony in that case was virtually

[13] Moreover, both Jessens testified that Scoby was never charged anything at all for the unsuccessful attempt to clear the existing sewer line and their testimony was never disputed. RP II, 70 (Gary); RP III, 134-135 (Rodney).

identical to the testimony given by Mrs. Scoby in this case. In *Robinson* the contention was that Avis had deceptively charged an airport concession fee without disclosing it to its customers. However, the plaintiffs who brought suit under the CPA were unable to prove that they had *not* been told about the concession fee. For example, plaintiff Kiel testified, "I do not recall if they told me at that time or not"; when asked if he had any reason to believe they did not tell him he said, "I don't recall"; and then *just like Mrs. Scoby did* when she testified, Kiel conceded he may very well have been told:

> [Counsel:] They may have told you and you just don't recall it, that's a possibility?
>
> [Kiel:] Uh-huh.

106 Wn. App. at 118. On this record this Court held that the evidence was not sufficient to even raise a genuine issue of fact as to whether any unfair or deceptive act was ever committed. *Id.*[14]

Scoby's testimony was virtually identical to Kiel's. She conceded the plumber "might have" gone over with her "the changes [in the work to be performed] and the pricing." RP I, 92. She said she did not recall her conversation with the plumber clearly, and then she admitted that the plumber *did* tell her that the nature of the job was changing from a repair to a replacement when he told her that the attempted repair "didn't work, and so then [he] had to put in new [sewer line]." RP I, 92. Here, as in *Robinson*, the record cannot support the conclusion that there was any

[14] This Court also held the plaintiffs failed to establish the causation element of a CPA claim. *Id.* at 119.

deception or any unfair price charging going on.

c. **The Plaintiff and Her Witnesses (i) Conceded That The Plumber May Have Been Truthful When He Said A Repair Could Not Be Done and a Replacement Was Necessary; (ii) Asserted That The Price BFP Charged Scoby Was "A Good One"; and (iii) Acknowledged That Scoby's Complaint was *Not* About the Price Charged.**

Moreover, there was no contention that Shelton was lying when he told Scoby and her daughter Kristjanson that he had found it was not possible to repair the existing line, since Kristjanson *conceded* that she had no way of knowing whether replacement was necessary and that representation might well have been the truth. RP IV, 37. So it would not have been possible to find that Scoby was deceived into thinking that replacement of part of the sewer line was necessary.

The illogic of identifying price gouging as the unfair act is further illustrated by the testimony of Kristjanson, who admitted to being the one who put stop orders on the checks her mother had written to pay BFP. RP IV, 29 47-48. Kristjanson admitted that her mother's complaint was not about the price charged for the replacement job: "My complaint was not about the price. My complaint was the amount of work that was done versus the amount of work that was contracted to be done." RP IV, 52.

Finally, the trial judge's determination that the plumber unfairly increased the price for the work done flies in the face of the fact that one of Scoby's own witnesses, Robert Wadleigh, a witness whom the judge expressly found to be credible, conceded on cross-examination that he thought the $6,655 price charged by BFP was "a good one"; when asked

whether that price was consistent with what he expected other plumbers would charge for the same service, he replied "Absolutely." RP II, 94-95.

In sum, the record contains *no* evidence that plumber Shelton, an employee of BFP, employed any "technique" of using "superior technical knowledge . . . to increase the price of the service." CP 29, CL 38. Because the trial court's conclusion of law that BFP engaged in an unfair or deceptive practice is not supported by the court's findings of fact, it cannot be sustained. *In re Farina*, 94 Wn. App. 441, 450, 972 P.2d 531 (1999); *Timberlane Mobile Home park v. Washington State Human Rights Comm'n*, 122 Wn. App. 896, 900, 95 P.3d 1288 (2004). Accordingly, the determination that BFP violated the CPA must be reversed.

2. THE TRIAL COURT ERRED IN CONCLUDING THAT SCOBY HAD PROVED THE REQUIRED ELEMENT OF PUBLIC INTEREST IMPACT. THE COMPLAINTS OF SCOBY AND TODD WERE ENTIRELY DIFFERENT, AND IN TODD'S CASE THE PRICE CHARGED WAS *DECREASED*, NOT INCREASED. MOREOVER BFP WAS NOT EVEN INVOLVED IN THE TODD TRANSACTION.

"Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest." *Hangman Ridge,* 105 Wn.2d at 790. "[I]t is the likelihood that additional plaintiffs have been or will be injured ***in exactly the same fashion*** that changes a factual pattern from a private dispute to one that affects the public interest." *Id.* (emphasis added).

In the present case, the evidence produced at trial does not support the legal conclusion that there is a reasonable likelihood that any of the defendants will cause other customers "to be injured in exactly the same

fashion" that Scoby and Todd were allegedly injured. Indeed, Scoby and Todd were *not* treated in the same fashion; and they had *completely different* types of complaints.

Whereas Scoby's daughter made it clear that her mother's complaint was *not* about the price charged, Todd made it clear that her complaint *was* about price. Whereas Scoby's complaint was that the replacement job was never finished, because the plumber only replaced 14 feet of the line instead of the agreed upon 21-25 feet, Todd never complained that her sink repair job was not finished, and had no contention that it was not competently performed. Finally, while Todd's complaint *was* that the price charged was too high, she never contended that the price charged for her sink repair was *increased.* She simply complained that she was a young mother, with a newborn infant, who was stuck with a sink that did not work; she wanted it repaired quickly, the Outtoday Service plumber Chuck was there, and so she agreed to pay the price he quoted even though she thought it was too high.

Instead of showing that Chuck *increased* the price charged for sink repair, it shows that he *decreased* it in response to Todd's price complaint. The price was first *decreased* from $1,100 to $1050 by providing Todd with a $50 discount coupon; it was then decreased again to $990 by giving her a further ten percent discount. RP II, 140, 146, 155. Todd said she thought the price was too much, but she acknowledged that after talking it over with her husband she agreed to pay it, and she did in fact pay it. RP II, 140. The trial judge found that Todd "felt in the end she was over

charged." CP 14, FF 23. This finding is supported by the record, but *there is no finding that* the plumber ever increased the price of the repair job; nor is there any finding that this plumber ever used any "superior technical knowledge;" nor was the company ever paid a penny for this plumber's work.

Since the nature of the Scoby complaint and the Todd complaint are entirely different, Scoby utterly failed to prove that there was a "likelihood that additional plaintiffs have been or will be injured in exactly the same fashion" that Scoby was injured. Scoby presented *no evidence whatsoever* that any other BFP customer ever complained that BFP failed to perform all of the work that it had contracted to perform. The trial court made no finding of fact that Scoby and Todd had been injured in exactly the same fashion, and he made no finding of fact that it was likely that any future customer would be harmed by BFP in the same manner that Scoby had been harmed.

Moreover, even if there was the requisite similarity between the transactions with Scoby and Todd, only one of those transactions involved BFP. Scoby asserted a CPA claim against BFP. The Todd transaction was not between Todd and BFP; it was between Todd and Outtoday Service. CP 14, FF 23. The Court found that on December 2, 2008, "the date Michelle Todd contracted with Outtoday to repair her sink," Outtoday "was fully operational." CP 18, FF 39. Outtoday was the d/b/a of a new and different LLC called Profit Two, LLC. CP 19, FF 39. The trial court

found that "Outtoday LLC [sic][15] . . . was not involved with the Scoby claim." CP 19, CL 2. Since Outtoday was the d/b/a of Profit Two, LLC, the transaction between Outtoday and Todd cannot be used to establish a pattern of conduct by a different company, BFP, the d/b/a of Plumb Serve LLC. Thus, evidence involving the conduct of Outtoday -- a different entity -- cannot be used to establish the public interest element of a CPA claim against BFP. And yet that is what the trial court did in finding a "pattern" based in part on the incident between Outtoday and Todd. RP VI, 2.[16]

For all of these reasons, the conclusion of law that Scoby satisfied the public interest element of a private CPA claim is not supportable, and the finding of a CPA violation and the award of attorneys' fees to Scoby under the CPA must be reversed.

3. THE TRIAL COURT ERRED IN CONCLUDING THAT SCOBY HAD PROVED THE REQUIRED ELEMENT OF AN INJURY SUFFERED IN HER BUSINESS OR PROPERTY.

Before the decision in *Hangman Ridge*, private plaintiffs raising CPA claims were required to prove only three elements in order to establish their claim. *Hangman*, 105 Wn.2d at 784. The *Hangman* Court added two more required elements. While the first two elements ((1) unfair act (2) in trade or commerce) remained the same, the third element (public

[15] The trial court erred in naming the new company Outtoday LLC in Conclusion of Law No. 2. But the Court's earlier finding of fact correctly states that Outtoday Service was the d/b/a of Profit Two, LLC. CP 17, FF 39. The basic determination that Outtoday Service was not involved with the Scoby claim is entirely correct and undisputed.

[16] "The first example is the interaction with Mrs. Scoby related to her sewer line. The other one is the testimony from Ms. Todd related to her sink."

interest) was modified, and the fourth and fifth elements were added:

> The fourth element requires a showing of injury to plaintiff in his or her business or property. The fifth element requires that a causal link be established between the unfair or deceptive act complained of and the injury suffered.

Hangman, 105 Wn.2d at 784-85.

Prior to *Hangman,* injury to the plaintiff's business or property had not been a required separate element. *Id.* Neither had causation. The *Hangman* Court held that "[o]nly a person 'injured in his business or property *by* a violation of" the CPA could establish a CPA claim. *Id.*

In *Hangman* the plaintiffs applied for a loan and the lender insisted on a security interest in real property owned by the plaintiffs. The deed conveying the subject property and the closing documents were prepared by a Safeco Title Insurance escrow agent who was not an attorney. The plaintiffs claimed that Safeco committed an unfair act when the escrow agent who prepared the closing documents failed to inform them that there might be tax consequences to the real property conveyance, and did not advise them that they might wish to consult an attorney or obtain tax advice. *Id.* at 781. Although the Supreme Court rejected the contention that this was an unfair or deceptive act, it went on to discuss the other four elements of the plaintiffs' CPA claim. *Id.* at 793. The Court concluded that the plaintiffs had failed to establish either injury or causation:

> ***The fourth element, that of injury, was not established.*** Plaintiffs contended they were injured by a tax liability, yet they offered no verification that the liability existed ***or that they ever actually paid it.*** The trial court so concluded.
>
> Finally, the causation element is missing. The trial court

> found as a fact that the plaintiffs' damages, if any, were not proximately caused by defendant's acts. Even assuming the injury complained of had been established, there is no plausible link between the actions of the closing agent and the alleged tax liability owed by the plaintiffs.

Hangman, 105 Wn.2d at 794 (emphasis added).

In the present case, as in *Hangman*, the plaintiff failed to prove both the injury element and the causation element. The trial court identified a practice of "using the superior technical knowledge of the contractor to increase the price of the service." CP 29, CL 38. But even assuming the evidence supports the legal conclusion that this was an unfair or deceptive act, this act did not cause plaintiff Scoby to suffer any injury to her business or property. As it turned out, any increase in the contract price of BFP's plumbing service ended up causing no harm to Scoby because (1) she never paid anything for the plumbing services BFP rendered, and (2) the Court never ordered her to pay the price that BFP charged her. Instead, the trial court ordered a *quantum meruit* recovery for BFP, and thus ordered Scoby to pay BFP $3,350, or roughly *half* of what BFP had billed her for, finding that was the "reasonable value of its services." CP 23, CL 15. Since BFP's supposed price gouging technique did not cause Scoby to suffer any injury, the determination that she proved a CPA violation, the award of CPA attorneys' fees to her, must both be set aside.

4. THE TRIAL COURT ERRED IN CONCLUDING THAT SCOBY HAD PROVED THE REQUIRED ELEMENT OF PROXIMATE CAUSATION OF THE ALLEGED INJURY BY THE UNFAIR ACT. THE COURT ATTRIBUTED INJURY TO OTHER ACTS OF BFP WHICH THE COURT NEVER FOUND TO BE UNFAIR OR DECEPTIVE ACTS.

Proof of causation is an essential element of a CPA Action. *Schnall v.*

AT & T Wireless Services, 168 Wn.2d 125, 144, 225 P.3d 929 (2010). The fifth element of the *Hangman* test requires private CPA plaintiffs "to establish a causal link between *the* unfair or deceptive act complained of and the injury suffered." *Schnall*, at 144; *Hangman*, at 785. A link between some *other* act of the defendant and the injury suffered is not sufficient. Washington courts have not hesitated to reject CPA claims when proof of causation is lacking. *See, e.g., Nuttall v. Dowell*, 31 Wn. App. 98, 111, 639 P.2d 832 (1982) ("we hold a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it.")

Struggling to find all five elements of a CPA claim established, the Superior Court suddenly slipped a new card into the deck when it proceeded to analyze the elements of injury and causation. The trial judge suddenly focused on BFP's failure to repair her driveway with an asphalt patch, and on BFP's filing of a statutory lien and a lawsuit. Although it never identified these acts as unfair acts under the CPA, these acts were suddenly the cause of Scoby's injury, and thus established the basis for the fourth and fifth elements of a CPA claim:

> Mrs. Scoby received incomplete work from Plumb Serve/Benjamin Franklin Plumbing, leaving her with an open gravel patch and loose sewer caps that had to be fixed by another contractor. Then, when she sought an accounting and explanation, Benjamin Franklin Plumbing filed a lien against the Scoby property and filed suit to foreclose the lien, creating a slander on her title and putting her at risk to lose her home. To remove the lien, Mrs. Scoby is forced to expend substantial sums of money either defending a foreclosure or paying off the excessive lien.

CP 31-32, CL 46.

But Scoby's contract with BFP expressly provided that BFP would *not* repair the asphalt driveway that it had to partially dig up in order to replace a section of her sewer line. Directly above Viola Scoby's signature the written contract clearly states: "Customer to have asphalt patch done." CP 692, (Appendix E). Scoby never claimed that it was an "unfair practice" for a plumbing company to contract to do a sewer line replacement which left some restoration work to be done by some other company. The Superior Court never found that this was an unfair act, and given that BFP's replacement job passed municipal inspection it would have been even more unjustifiable if it had. And yet the Superior Court purported to find that *this* act was the proximate cause of injury to Scoby's property.

Similarly, the Superior Court held that Scoby was injured by BFP's filing of a lien, which put a cloud on her property title. But neither BFP's act of filing a lien, or of filing suit to foreclose on the lien, was ever found to be "an unfair act." Moreover, since seeking judicial redress for a grievance is protected activity under the First Amendment, no court could ever find that such acts are "unfair" acts giving rise to CPA liability. The courts cannot make it a tortious or illegal act to file a suit and go to court. Nor can a court make an act like filing a lien -- which is a statutory prerequisite to starting a lien foreclosure suit -- an illegal or "unfair" act. The Superior Court skipped lightly over the complete disconnect between the identified unfair act of price gouging, and the "injuries" of a dug up

asphalt driveway and a lawsuit, which clearly were not proximately caused by the supposed price gouging. As to the lawsuit, the act of Scoby's own daughter in stopping payment on her mother's two checks is the most proximate cause of Mrs. Scoby's supposed "injury" to Scoby's previously clear title to her property.[17] Had payment not been cancelled, BFP would have had no reason to file either a lien or a lien foreclosure suit, and no cloud would ever have been cast on the title to her property.

Recently, the Supreme Court clarified the type of proximate cause a CPA plaintiff must prove in a case which involved an unfair act analogous to the alleged "price gouging" that the trial court found in the present case. In *Indoor Billboard v. Integra Telecom*, 162 Wn.2d 59, 170 P.3d 10 (2007), a customer sued Integra under the CPA claiming that Integra had engaged in a deceptive billing practice. Integra had sent the customer bills for local phone services which had included a monthly charge called a PICC (a "prescribed interexchange carrier charge"). Under FCC regulations only certain types of local exchange carriers (LECs) were allowed to charge their customers a monthly PICC and it turned out that Integra was not qualified to make such a charge.

Indoor Billboard argued that since it had paid the monthly PICC, it clearly had suffered a financial injury, and that injury was proximately

[17] Compare *Nuttall v. Dowell,* 31 Wn. App. at 105 where it was noted that the trial court seemed to have found that while the defendant made a misrepresentation as to the location of a property boundary, and that such misrepresentation was an unfair or deceptive act, "the causal connection between [the defendant's] misrepresentation and plaintiff's injury had been broken by Nuttall's own independent investigation" of the location of the boundary.

caused by Integra's deceptive billing and misrepresentations about why it was entitled to collect a PICC from Indoor Billboard. But the Supreme Court *refused* to endorse this approach and required something *more* than merely proof that Indoor had paid the deceptive charges:

> Indoor Billboard urges us to adopt a per se rule and hold that payment of Integra's invoice is per se sufficient to establish the proximate cause of plaintiff's damages. We reject Indoor Billboard's per se rule because mere payment of an invoice may not establish a causal connection between the unfair or deceptive act or practice and plaintiff's damages.

Indoor Billboard, 162 Wn. 2d at 84.

There was evidence that Integra's sales representative had told Indoor that it was not subject to FCC regulation, and that Indoor's vice-president had done some independent investigation and had learned that Integra's charging of the PICC was *not* federally mandated and that the FCC did not regulate Integra. Despite being on notice that there was something fishy about Integra's billing a PICC to Indoor, Indoor paid Integra's monthly invoices for a period of time. According to Indoor's vice-president, he continued to approve payment even though he had doubts about the propriety of the PICC because Indoor had just begun to buy phone services from Integra and he "[didn't] like to start things off on a sour note." 162 Wn.2d at 67. Then, long after it had paid the improper PICC fees, Indoor brought suit under the CPA and sought to recover the money it had paid for these fees. Thus, there was some evidence to suggest that Integra's deceptive billing was not the proximate cause of the payment of the PICC fees because Indoor's vice-president seemingly learned of the

deception and yet decided to pay the fees anyway. Because there was a genuine issue of fact as to whether the deceptive conduct was the proximate cause of Indoor's financial injury, the case was remanded for further proceedings.[18]

In *Indoor Billboard* the Supreme Court noted that "proximate cause" is defined in WPI 310.07 as a "cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without such would not have happened." *Indoor*, 162 Wn.2d at 81-82. In the present case, it is clear that the price increase which accompanied the change from a repair to a replacement was *not* the proximate cause of Scoby's injuries. Scoby never paid a dime to BFP, so any unfair increase in price clearly caused her no injury. Scoby's daughter Kristjanson made it crystal clear that Scoby's "complaint was not about the price. My complaint was the amount of work that was done versus the amount of work that was contracted to be done." RP IV, 52. But the failure to replace 25 feet of line, and the replacement of only 21 feet is *not* the unfair

[18] Similarly, in *Holiday Resort Community Association v. Echo Lake Associates,* 134 Wn. App, 210, 135 P.3d 499 (2006), this Court recognized that there was an issue of fact as to proximate cause which precluded entry of judgment in favor of tenants who had paid increased rents. An association of mobile home park owners had drafted a model rental agreement, and the Holiday Resort Mobile Home Park used that model lease. Under the lease's provisions, which were subsequently found to be illegal, Holiday increased its tenants' rents twice in one year. The tenants sought recovery of the payments they made on the second illegal rent increase in a CPA action against the drafter of the model lease. This Court recognized that there was an issue as to whether the action of the landlord, in deciding to increase rent a second time, broke the causal chain that began with the association's act of drafting a model lease for use by all its members. If the tenants' injuries were proximately caused by the landlord, and not be the association, there could be no recovery under the CPA against the association. Similarly, if Scoby's injuries were caused by her daughter's stop payment orders, there can be no recovery against BFP.

or deceptive act identified by the trial court. Nor could it serve as the predicate unfair act, since it would not satisfy the third element of public interest impact. Moreover, the failure to replace 25 feet of the line was not the unbroken cause of the lien and the lien foreclosure action. The causative effects of the conduct of BFP's plumber Shelton were broken by the actions of Scoby when her daughter stopped payment on the checks that had been given to BFP. Rather than negotiate with BFP, rather than mailing BFP copies of the photos showing that only 14 feet of sewerline had been replaced, Scoby precipitated the eventual filing of a lien by cancelling all payment to BFP. Thus any resulting "injury" caused to her property by the recording of a lien was essentially self-inflicted. *See Gordon v. Hultin*, 146 Wash. 61, 261 P. 785 (1927).[19] In any event such an "injury" was not proximately caused by a "technique" of raising the price of plumbing services by employing superior technical knowledge.

In sum, even assuming that BFP's "price gouging technique" somehow was an unfair act, it was not the proximate cause of the injuries which the Superior Court identified as having been inflicted upon Scoby's property. Therefore, the failure to establish the fifth element of a CPA claim also dictates that this Court should set aside the determination that BFP and the Jessens violated the CPA, as well as Scoby's award of attorneys' fees under the CPA.

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[19] "The owner is not entitled to recover costs and attorneys' fees in such foreclosures which he (the owner) has unnecessarily caused to be taxed by his unnecessary resistance to such foreclosures."

The Lien Foreclosure Claim and Related Attorneys' Fees Issues

5. THE SUPERIOR COURT ERRED WHEN IT HELD IT HAD NO DISCRETION TO AWARD ATTORNEYS' FEES UNDER RCW 60.04.181(3) IN A LIEN FORECLOSURE ACTION BECAUSE THE CONTRACTOR HAD PREVAILED UNDER A *QUANTUM MERUIT* THEORY.

a. Statutory Provisions

RCW 60.04.021 provides that any person who does work which improves someone else's real property can secure a lien on that property for the "contract price" of the work they performed.[20] RCW 60.04.011(2) defines the statutory term "contract price" as follows:

> "Contract price" means the amount agreed upon by the contracting parties, ***or*** if no amount is agreed upon, then ***the customary and reasonable charge therefor.***

(Emphasis added).

Pursuant to RCW 60.04.181(3), the trial court has the discretion to award attorneys' fees to the party who prevails in a lien foreclosure action:

> ***The court may allow the prevailing party in the action***, whether plaintiff or defendant, as part of the costs of the action, ***the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred*** by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. . . .

(Emphasis added).

Finally, RCW 60.04.900 provides:

> RCW . . . 60.04.011 through 60.04.261 ***are to be liberally***

[20] The statute provides: "Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property, shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner."

> ***construed to provide security for all parties intended to be protected*** by their provision.

(Emphasis added).

b. <u>The Trial Court's Reliance Upon *DBM v. United States Fidelity* As a Basis for Refusing to Recognize BFP as The Prevailing Party Is Misplaced. That Case Is Inapplicable Here Since It Involved The Proper Construction of a Lien Bond Statute. In This Case There was No Lien Bond, No Surety for a Bond, and No Attempt to Collect On a Bond</u>.

BFP brought an action pursuant to RCW 60.04 to foreclose on its claimed lien and sought costs and attorneys fees pursuant to the lien statute. CP 684-85, ¶¶ 2.4, 2.5 & 3.2. The Superior Court ruled that BFP was not entitled to recovery of the agreed upon written contract price of $6,655.98 CP 689-691 (Appendix D) because BFP failed to fully perform that contract. But the Court did award BFP damages of $3,350 under a *quantum meruit* theory because BFP did replace a section of Scoby's sewer line and thus did do work which conferred a benefit upon Scoby. CP 23-24, CL Nos. 13-15; RP V, 16-17.

Despite the fact that BFP recovered damages on its lien claim, the Superior Court ruled: "An award of *quantum meruit* damages does not make [BFP] the prevailing party under the contract or the lien statute, as such attorney's fees are not awarded." CP 24, CL No. 16. The Superior Court acknowledged that statutorily the term "contract price" is defined as "the amount agreed upon by the contracting parties, or if no amount is agree upon, then the customary and reasonable charge therefore." CP 24, CL No. 18, quoting RCW 60.04.011(2). Inexplicably, the Superior Court concluded that the *quantum meruit* damages of $3,350 which it awarded

BFP did *not* constitute "the customary or reasonable charge" for the work which BFP had performed. CP 24, CL Mo. 19. Citing to case law which it claimed held that lien statutes must be "strictly construed," the Superior Court ruled that BFP did not have a valid lien.

> A lien statute is strictly construed to determine whether the lien attaches. *DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.,* 142 Wn. App. 35, 170 P.3d 592 (2007). Under the plain language of RCW 60.04.021 and 60.04.011(2), Plaintiff does not have a valid lien. Plaintiff filed suit to foreclose its claim of lien in the amount of $6,655.98, which it alleged was the contract price. A valid lien can only attach if it is for the amount agreed upon by the parties or the customary or reasonable charge therefore. The sum of $6,655.98 is neither the amount agreed upon by the parties nor the customary and reasonable charge therefore. Plaintiff breached the contract and the reasonable value of Plaintiff's work is $3,350 (almost half the amount liened by Plaintiff).

CP 24, CL No. 19.

But the case the Superior Court relied upon is not on point. *DBM Consulting* involved an issue of the proper "interpretation of RCW 60.04.161, the lien bond statute." *DBM*, 142 Wn. App. at 38-39. That statute governs lien bonds, and specifies when a contractor can recover against a surety who has posted a bond to guarantee payment of a claimed lien.[21]

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[21] In *DBM*, the contractor filed a lien for money it claimed it was owed by the landowner for engineering consulting services which DBM performed. DBM also filed suit against the landowner for breach of contract, unjust enrichment, and foreclosure of its lien. The landowner obtained a bond from a surety to cover the possibility of a judgment against it on the lien, and then sold the property. DBM's suit against the landowner went to trial and DBM recovered a judgment on its breach of contract claim, but it never pursued its claim for foreclosure of the lien and never obtained any ruling on that claim. *DBM,* 142 Wn. App. at 38. After judgment was entered, DBM demanded payment from the surety of the amount of the lien bond, but *the surety refused to pay it* arguing that under the applicable statute, foreclosure on the lien was a necessary prerequisite to surety liability

This case does *not* involve a property owner who obtained a lien bond, and does *not* involve a claim against a surety. The *present case has nothing to do with RCW 60.04.161* and accordingly the *DBM* decision is not pertinent to any issue in this case. The trial judge erred in ruling that *DBM* justified a ruling that BFP did not have a valid lien.

c. In This Case, There Was No Dispute As To Whether the Type of Services Performed – Sewer Line Replacement – Qualified for Mechanic's Lien Protection Under RCW 60.04.021. Therefore, the Line of Cases Requiring Strict Construction of RCW 60.04.021 to Make Sure That The Type of Work Performed Was A Type Which Qualified for Lien Protection Is Inapplicable.

Even though *DBM* involves a statutory construction issue which is of no significance to this case, nevertheless the Superior Court seized upon some language in the *DBM* opinion which discussed the Legislature's purpose in enacting a mechanics lien statute and the need to confine the statute to cases where the services performed qualified for a mechanic's lien. In explaining why its interpretation of the one confusing sentence in RCW 60.04.161 was logical, the *DBM* Court made reference to the well settled principle that lien statutes were not intended to cover all contractor services that relate to property. In order to make sure that a contractor is entitled to a statutory lien, it is settled that courts "strictly construe" the

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on the lien bond. The key sentence in the lien bond statute, RCW 60.04.161, read:

> *The condition of the bond shall be to guarantee payment of any judgment upon the lien* in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien.

(Italics added). The Court of Appeals agreed with the surety that while the statute was "certainly not a model of clarity," a judgment on the lien foreclosure claim was a prerequisite for surety liability on the bond. *Id.* at 39-40.

statutory provision – RCW 60.04.021 -- which describes what types of services qualify for a lien.

> While parties may contract with property owners for work related to the property and sue upon the breach of those service contracts, ***the legislature has identified only particular types of services that may support a mechanic's lien on the improvement of the property***. See RCW 60.04.011, .021. ***Not all services that relate to property qualify for a lien, and a lien statute is strictly construed to determining whether the lien attaches.*** *Pac. Indus., Inc. v. Singh*, 120 Wn. App. 1, 6, 86 P.3d 778 (2003). This, the legislature intended to provide the benefit of a lien only to certain parties.

(Emphasis added).

In *DBM* the landowner "most certainly did not concede that all the services performed by DBM would give rise to a lien." *Id.* at 41. The landowner was ultimately found to have breached a contractual promise to pay DBM for its services. But there was never any resolution of the dispute as to whether DBM performed the type of services which, under RCW 60.04.021, qualified for a mechanic's lien. Therefore the trial court never made any determination as to whether DBM was entitled to a mechanic's lien against the landowner's property. Since a surety's liability on a lien bond depends upon the property owner first being found liable in an action to foreclose on a mechanic's lien, the failure to determine whether the services performed by DBM qualified for a lien was fatal to DBM's claim against the surety:

> DBM's interpretation of the lien bond statute would obviate the need to ever adjudicate a lien because the lienholder would simply obtain a judgment on the claim that gave rise to the lien – but not all claims give rise to valid liens. ***DBM could and should have obtained a judgment*** upon

> the lien from the trial court in its action against [the landowner] ***proving that the services provided were professional services that resulted in an improvement to the property as required by the mechanic's lien statute.*** RCW 60.04.021. No such judgment was ever obtained, and the failure to do so is fatal to DBM's claim against [the surety].
>
> DBM argues that it was unnecessary to obtain a judgment upon the lien not only because the statute does not require it, but also because its contract with Soos Creek states that DBM would be providing professional services relating to the property, so the judgment for DBM necessarily implies that the lien for professional services is valid. ***But not all professional services give rise to a lien – RCW 60.04.021 requires that professional services must result in an improvement to the property in order to give rise to a lien.*** The parties never litigated the lienability of DBM's services, so it is speculative whether the entire breach of contract judgment is based on services that would have supported a lien under RCW 60.04.021.

DBM, 142 Wn. App. at 41 (emphasis added).

RCW 60.04.021 provides that "any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement . . . " In the present case, there was never any contention that sewer line replacement does not qualify for mechanic's lien protection under this statute. A new sewer line is obviously an improvement to real property. *See, e.g., Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 502, 210 P.3d 308 (2009) ("The improvements performed by RV included . . . installing sewer lines . . ."),[22] Even under the strictest statutory construction of RCW 60.04.021, the services performed by BFP qualify for a lien. Thus, the

[22] The term "improvement" is statutorily defined as "constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property . . ." RCW 60.04.011(7).

line of cases that call for strict construction of the scope of the statute which creates lien protection for contractors who perform services "for the improvement of real property,"[23] do not support the Superior Court's decision in this case. There are no cases which call for strictly construing the mechanic's lien statutes so that they are inapplicable to cases where *quantum meruit* recovery is obtained for the value of services performed which lead to the improvement of real property. On the contrary, there are cases which provide direct support for the conclusion that the lien statutes *do* apply to such claims.

6. THE TRIAL COURT ERRED IN RULING THAT THE TERM CONTRACT PRICE DOES NOT INCLUDE *QUANTUM MERUIT* RECOVERY. RCW 60.04.011(2) DEFINES CONTRACT PRICE IN WORDS THAT ARE SYNONYMOUS WITH *QUANTUM MERUIT* RECOVERY.

The statutory definition of the term "contract price" was brought to the attention of the trial court. It was pointed out that when there was no agreed upon price for the provision of services, labor and equipment which created an improvement to real property, the statute's alternative definition of "contract price" was "the customary and reasonable charge therefor." RCW 60.04.011(2). The Superior Court awarded BFP damages in *quantum meruit* and explicitly ruled that *quantum meruit* damages are "measured by ***the reasonable value of its services*** to the other party to the

[23] *See, e.g., Pacific Industries, Inc. v. Singh*, 120 Wn. App. at 8 (holding that contract negotiation and contract execution services did not qualify for lien protection under the statute because they were administrative tasks that did not improve the subject property, were not "labor" as that term is statutorily defined in RCW 60.04.011(7), and were not performed at the property site); *TPST Soil Recylcers v. W.F. Andersen Construction*, 91 Wn. App. 297, 957 P.2d 265 (1998) (removal of contaminated soil does not qualify for lien protection because such services do not create "improvement" to the real property).

extent that a benefit was conferred to the other party." RP V, 16-17 (emphasis added). The Court expressly found that it could calculate "the reasonable value of [BFP's] services as required by quantum meruit analysis," and awarded $3,350 on that basis. CP 23, CL 15.

Having found that $3,350 was the reasonable value of BFP's services, the Superior Court inexplicably refused to find that this was the equivalent of the statutory definition of "contract price" which encompassed the "customary and reasonable charge" for the services rendered. Moreover, one of the defendant's own witnesses testified that this price was consistent with what he expected other plumbing companies would have charged for the same work. RP II, 94.

The Supreme Court has expressly held that "*quantum meruit*" is "the method of recovering ***the reasonable value of services provided*** under a contract implied in fact." *Young v. Young,* 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (emphasis added). And in an earlier case, in a lien foreclosure case which, like the present case, involved a plumbing company that had not been paid for its installation of plumbing fixtures, the Supreme Court affirmed a *quantum meruit* award to the plumbing company. *Powell v. Kier*, 44 Wn.2d 174, 265 P.2d 1059 (1954). The *Powell* Court noted that "[t]he trial court found that ***the reasonable value of the labor and materials*** on the upper story [of the building under construction] on a quantum meruit basis, was $4,100.32 plus tax." *Id.* at 175 (emphasis added). Thus, there is a virtual identity between the case law definition of *quantum meruit* recovery and the statutory definition of

the term "contract price." Moreover, *Young* and *Powell* are both directly on point since both involved a recovery of money on a *quantum meruit* theory for having made improvements to a landowner's real property in a situation where there was no actual contract under which the property owner agreed to pay for such improvements.

Accordingly, in the present case the Superior Court erred when it refused to acknowledge that the lien foreclosure statutes expressly provide a Superior Court with the discretion to award attorneys' fees to a party who recovers on a *quantum meruit* basis.[24] In fact, at least two cases expressly hold that the Superior Court acted within its discretion when it awarded attorneys' fees for work done to establish the right to compensation for "extra work" that was not contracted for, and for which the contractor obtained quantum meruit recovery. *See Modern Builders v. Manke*, 27 Wn. App. 86, 97, 615 P.2d 322, *rev. denied,* 94 Wn.2d 1023

[24] In both *Manke* and *CKP* the amounts sought by the contractors were well in excess of $10,000 and thus the award of attorneys' fees was merely discretionary, not mandatory. In *Manke* the trial court mistakenly thought that an award of attorneys' fees was mandatory, and because this was error the case was remanded with directions to exercise discretion. In the present case the trial court mistakenly believed that it had no discretion at all, and that an award of attorneys' fees was prohibited.

When a trial court fails to recognize that it has the discretionary power to do some act, the usual remedy is to remand to give the court below the opportunity to exercise the discretion it did not realize that it had. In the present case, appellants submit that under a different set of statutes, RCW 4.84.250 *et seq*, they are automatically entitled to an award of attorneys' fees. *See* Argument, Section 7, *infra.* Under that theory, no remand would be necessary and this Court can simply rule that appellants are entitled to an award of fees, both for services rendered in the trial court and in this court.

However, if this Court decides that a remand *is* necessary to permit the exercise of statutory discretion, appellants then request that the case be remanded to a new and different Superior Court judge, because the record of this case clearly establishes that the trial judge in this case is unfairly biased against the appellants and cannot serve as a neutral decision maker.

(1980) (remanded for trial court to "exercise its discretion in determining whether or not to award attorneys' fees" for recovery of any "extra work" for which quantum meruit recovery was granted); *CKP, Inc. v. GRS Construction Co.*, 63 Wn. App. 601, 615, 621 821 P.2d 63 (1991) (although prejudgment interest could not be awarded for *quantum meruit* recovery, attorneys' fees "incurred in proving extras over contract price may be allowed")

The defendant, Viola Scoby, in her response to BFP's suit, maintained that BFP should not recover anything; she sought to have BFP's suit dismissed with prejudice and to have BFP's lien against her property removed. CP 664-65, 638.

7. THE TRIAL COURT ERRED WHEN IT REMOVED THE AMOUNT OF THE SALES TAX FROM THE *QUANTUM MERUIT* RECOVERY IT HAD AWARDED. WHEN SALES TAX IS INCLUDED, BFP BECOMES THE PREVAILING PARTY ENTITLED TO FEES UNDER 4.84.250 *ET SEQ.* AND THE *KINGSTON LUMBER* CASE.

When the trial court initially announced its oral decision it said: "this Court awards $3,350 ***plus tax, permit and interest*** from the date the job was completed." RP V, 16-17 (emphasis added). Later, when the Court entered its written decision, it changed the amount awarded by *removing* the sales tax, permit costs, and the interest from its award. CP 23. CL No. 15 ("the Court awards $3,350 from the date the job was completed.")

The trial court did orally provide an explanation for its decision to remove prejudgment interest from the *quantum meruit* award, stating that an award of prejudgment interest was not proper where the amount in

dispute was an unliquidated amount, and the amount of *quantum meruit* recovery was not a liquidated amount. RP VI, 4. Appellants do not contest that decision to retract the award of interest as it is fully supported by case law.[25] The trial court never gave any explanation, however, as to why he decided to eliminate the cost of the sales tax owed to the State from the amount of the *quantum meruit* recovery. It just removed it.

It is not hard to see what motivated the court, however. Shortly after the trial court's initial oral decision, BFP's counsel had informed the trial court of the exchange of settlement offers between Scoby and BFP, and had briefed the applicability of RCW 4.84.250 et seq. Thus, by the time the final written decision and judgment was entered, the trial judge was aware that Scoby had offered BFP the sum of $3,350 to settle BFP's claim. CP 464-65 (Appendix A). Under RCW 4.84.250 *et seq.*, in an action for less than $10,000, a reasonable amount to be fixed by the court as attorneys' fees "shall be taxed and allowed to the prevailing party as part of the costs of the action . . ." RCW 4.84.250. Under RCW 4.84.260, the plaintiff is "deemed" to be the prevailing party when the plaintiff's recovery is "more than the amount offered in settlement." The sum of $3,350 ***plus sales tax*** is obviously more than the sum of $3,350, and therefore BFP's recovery, if it included sales tax, would have been more than the amount offered in settlement." Thus, unless the trial court reduced the initial award made orally by eliminating all of the "tax, permit and interest" which it had previously awarded to BFP, BFP was going to

[25] *See Manke*, 27 Wn. App. at 96; *CKP, Inc.*, 63 Wn. App. at 615.

be the prevailing party entitled to an award of attorneys' fees. By the time the written decision was entered, the case of *Kingston Lumber*, *supra*, had also been cited to the trial court, and thus it knew that under the holding of that case, in a lien foreclosure action, harmonization of RCW 60.04.181(3) and the statutes in RCW 4.84.250 *et seq*. dictate that when the amount in controversy is less than ten thousand dollars – as it was in this case – an award of attorneys' fees to the prevailing party is no longer discretionary; it is mandatory. *Kingston Lumber*, 52 Wn. App. at 867. By eliminating all the sales tax, and the permit cost, and all interest, the trial judge was able to jigger the amount of *quantum meruit* recovery and thereby prevent BFP from being the prevailing party, thus avoiding the mandatory duty to award BFP its attorneys' fees on the lien foreclosure claim.

The trial court's decision to eliminate any quantum meruit recovery for the amount of sales tax owed (in this case $268 or 8% of $3,350) was a clear abuse of discretion as the Supreme Court's decision in the *Powell* case demonstrates. In that case – an action to foreclose a statutory lien by a plumbing company that installed plumbing fixtures in the defendant's building – the trial court affirmed an award of *quantum meruit* to the plumbing company. Moreover, as the opinion discloses, the amount awarded by the trial court explicitly included "$4,100.32 ***plus tax***." *Powell v. Kier,* 44 Wn.2d at 175 (emphasis added). The amount of tax was included in *Powell* because the value of the services rendered included the sales tax cost. A property owner who gets the benefit of an improvement to his real property normally pays the contractor who does

the work, a price for his labor and materials and *in addition* also pays the sales tax on the contractor's invoice. *See Pomeroy v. Anderson,* 32 Wn. App. 781, 649 P.2d 855 (1982) (holding that even though contract language was ambiguous, under Washington sales tax statute the cost of paying sales tax was an obligation that the building owner was responsible for paying, not something the contractor remodeling the building was obligated to pay). While the contractor is obligated to *collect* the sales tax from the customer, and to *pass it on* to the State, it is the customer (the buyer of the contractor's services) who is legally obligated to pay the tax.[26] When a property owner gets the benefit of the improvement *without* having to pay the sales tax, a benefit has been conferred upon the property owner. Since the measure of *quantum meruit* recovery is the amount of the benefit conferred upon the landowner, when a landowner like Scoby pays *nothing* for the improvement made to her land, the amount of sales tax that she did not pay is also part of the value of the benefit she received, because it is her obligation to pay both the contract price and the sales tax. *Pomeroy*, 32 Wn. App. at 783 ("RCW 82.08.050 creat[es] a conclusive presumption that a contract price does not include sales tax" and therefore customer must pay the tax in addition to the contract price). The measure of the value of the improvement to Scoby's property includes all of the costs of the project, including labor, materials, *and* the cost of paying all

[26] See RCW 82.08.050: "(1) The tax imposed in this chapter must be paid by the buyer to the seller. Each seller must collect from the buyer the full amount of the tax payable with respect to each taxable sale . . .; (2) The tax required by this chapter, to be collected by the seller, is deemed to be held in trust by the seller until paid to the department. . . ."

applicable taxes (and permit fees) since she was legally obligated to pay that as well. Since the cost of sales tax is part of the "reasonable value" of the benefit conferred upon her property, it is part of the recovery that must be awarded to BFP in *quantum meruit.*

Here, ignoring the contrary decision in *Powell*, with no justification advanced whatsoever, the trial court retracted the award of sales tax. This was an abuse of discretion. Inclusion of the amount of sales tax makes BFP the prevailing party under RCW 4.84.250 *et seq* and under *Kingston Lumber,* BFP is therefore entitled to an award of reasonable attorneys' fees. In the trial court BFP asked for an award of $ 32,956 for 117.7 hours of work at their counsel's customary hourly rate of $280 per hour. CP 478-79.[27] BFP also asked for an award of litigation costs in the amount of $924.50. This Court should remand so that the judgment can be amended to show BFP as the prevailing party on the lien foreclosure claim, and so that these amounts of attorneys' fees and litigation costs can be included in the judgment in favor of BFP on the lien foreclosure claim.

8. THE SUPERIOR COURT FURTHER ERRED BY REMOVING THE COST OF THE PERMIT FEE FROM ITS *QUANTUM MERUIT* AWARD. SCOBY'S OWN EXPERT KEVIN FLYNN ACKNOWLEDGED THAT THE REASONABLE VALUE OF THE WORK PERFORMED INCLUDED BOTH THE PERMIT FEE AND SALES TAX.

The Superior Court also reduced its oral quantum meruit award to BFP

[27] While some of these hours were no doubt spent on defending against Scoby's CPA counterclaim, that does not mean that any reduction for these hours is called for. *See CKP, Inc.*, 63 Wn. App. at 621-22 ("[T]he defense of the counterclaims was inextricably intertwined with CKP's establishment of its lien rights. Thus CKP was properly allowed fees incurred in the defense of counterclaims.")

by removing any reference to the permit fee which BFP had to pay. As noted above, elimination of this part of the award was necessary if the trial court was going to eliminate BFP's entitlement to an award of attorneys' fees under RCW 4.84.250 *et seq.*

The reduction of the *quantum meruit* award by elimination of the permit fee (as well as by elimination of the sales tax) is particularly unjustifiable given that Kevin Flynn, Scoby's *own expert witness,* testified that the work BFP did had a value of "$3,350 ***plus tax and permit***." RP II, 110 (emphasis added). On behalf of his plumbing company, Flynn also provided a *written* price quote for the work that BFP did perform, and this written bid stated on its face: "Raymark Plumbing & Sewer quotes the price of $3,350 ***plus tax and permit*** to perform the following work . . ." CP 674. The trial court specifically found that Flynn was a credible witness and that he had established "$3,350 plus tax and permit" as a fair contract price. CP 17, FF 35. Since even the defendant's own expert included the permit fee in his calculation of the value of the services performed, the trial court had no plausible basis for eliminating the permit fee from the final *quantum meruit* to BFP.

The trial court said he didn't know what the exact amount of the permit fee was. But for purposes of prevailing party status and the ensuing entitlement to an award of attorneys' fees it doesn't matter. Whatever the exact amount was, it was some amount, ***and even if it was but a penny*** it would suffice to put BFP in the position of being a prevailing party under RCW 4.84.260 because recovery of $3,350.01 is

more than Scoby's settlement offer of $3,350.00.

9. THE TRIAL COURT'S FINDING THAT THE JESSENS HAD PERSONAL KNOWLEDGE OF THE DECEPTIVE ACTS OF FORMER BFP EMPLOYEE SHELTON IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

After trial had concluded, and after finding that no CPA violation had been proven, the trial judge stated categorically, "no personal liability has been proven because no wrongdoing has been shown on the part of the Jessens." RP V, 19. But two months later, having decided that Scoby had proved a CPA violation and having further decided to award her attorneys' fees for having prevailed on her CPA claim, the trial judge faced the reality that since BFP was in bankruptcy, unless something else changed the award of attorneys' fees to Scoby would never be paid. So the trial court proceeded to reverse its earlier pronouncement as to the Jessens' personal liability as well.

Referring to the Consent Decree which it admitted over hearsay objections solely for the purpose of establishing "the existence of a judgment," CP 19, CL 3, the trial court suddenly started referring to "misrepresentations," either direct or implied, that a repair was necessary, even though no one ever testified that any work that either plumber ever did was not necessary. Even though the trial judge never made any fact finding that any such misrepresentation was ever made by any BFP employee, the trial judge then proceeded to fault the Jessens for other acts, like filing a lien without doing an inspection of their property first, even though he never identified that act as an unfair and deceptive act:

> Rodney Jessen and Gary Jessen are subject to the continuing and ongoing injunctions of the Consent Decree that enjoin Plaintiff and the Jessens from "misrepresenting, directly or by implication, the need [sic] [or] basis for repair estimates" and "[m]isrepresenting, directly or by implication, that repairs are necessary or needed, as opposed to simply recommended, unless Defendants have a reasonable basis for doing so." Consent Decree, Section 3.3 (h) & (i). ***The Jessens have knowledge these misrepresentations are considered unfair and deceptive acts.***
>
> Rodney Jessen and Gary Jessen ***knowingly approved*** of Benjamin Franklin's deceptive acts and therefore are liable for the CPA penalties. Gary Jessen knew Defendant Scoby's family had raised objections to the price charged when the sewer replacement was less than listed in the contract and that the family wanted Benjamin Franklin Plumbing to examine the repair. Rather than returning to the property, Gary Jessen filed the lien against Defendant Scoby's property less than a week after the work was completed and delivered it personally.

CP 33, CL 49-50 (emphasis added).

There is a striking disconnect between these judicial determinations as to what the Jessens knew and approved of, and what unfair deceptive practices the judge actually found. The trial judge never found that Shelton – or anyone else – ever made a misrepresentation to Scoby by falsely stating or implying that a "repair" was necessary when in fact it was not necessary.

While he did not ever find that Shelton did make a misrepresentation, the trial judge did assert that the record was devoid of any evidence that the contracted for partial sewer line replacement work was actually necessary:

> Particularly in this case ***there is no evidence in the record*** that the work contracted for had to be done. There was an initial contract price and a check written and then this price

> was deleted in favor of an immensely greater sum. However, ***no evidence was provided that the original obstruction could not be removed.*** This could easily have been provided to the Court . . .

CP 21-22, CL 10 (emphasis added).

Similarly, in Conclusion of Law 52, the court stated:

> As the Court mentioned, it is unclear whether the repair was successful or not. The Court has found no evidence in the record that the work contracted for had to be done. There was also no evidence that the original obstruction could not be removed for the initial contract price.

CP 33, CL 52.

But these assertions regarding an absence of evidence are palpably erroneous. In fact there *was* considerable evidence that a repair could not be done and that a replacement was necessary.

First, Scoby herself explicitly testified that the plumber (Shelton) told her that he could not unplug the existing line and that a replacement of part of the line was necessary to fix the problem: "He said that they intended to repair it first and found out that didn't work, and so then they had to put in new." RP II, 93. Moreover, Scoby's daughter conceded that Scoby had no reason to believe that this representation was not true. RP IV, 37 ("I really don't know if replacement was necessary.").

Second, a videotape of the sewer line was made and played for the court. RP II, 17. After viewing the videotape Gary Jessen explicitly testified that he believed Shelton had "found that there was a blockage down the line that couldn't be cleared" and that's why a section of the line had to be replaced. RP II, 6. Thus, two witnesses explicitly testified on the subject of the necessity for partial line replacement, one said it was

necessary, the other said she was told it was necessary and she did not contest the truth of this representation.

From his erroneous premise that the record was silent on this subject, the trial judge proceeded to compound his error by misallocating the burden of proof. The burden of proving a CPA violation was on Scoby, the party asserting that claim. If, as the judge believed, it was "unclear" whether a misrepresentation had been made by the plumber Shelton, then Scoby *failed* to carry her burden of proof. But the trial judge erroneously flipped the burden of proof. He concluded that because BFP had failed to prove the absence of a CPA violation (a burden no CPA defendant has) – that a misrepresentation had *not* been made -- that the Court was justified in imposing personal liability on the Jessens for somehow endorsing and approving a misrepresentation that *may* (in the judge's mind) have been made by Shelton. Thus, he imposed personal liability for the Jessens for allegedly endorsing a misrepresentation that may have been made by Shelton, even though Scoby's own daughter conceded that they had no way of knowing whether the plumber's statement regarding the need for partial replacement was true, and conceded that it might well have been true.

The trial judge's written decision identifies only one unfair deceptive act: He found that Scoby had proved that BFP's plumbers had employed "the technique of using the superior knowledge of the contractor to increase the price of the service." CP 29, CL 38. According to the trial court, plumbers Alex Shelton and "Chuck" used their "superior technical

knowledge" to increase the price of their services to fix Scoby's sewer line and Todd's sink. But the court did not find any other type of act was an unfair or deceptive act. He did *not* find that it was a deceptive act to tell Scoby that a partial sewer line replacement was necessary.

On the contrary assumption that a partial line replacement *was* necessary, in Conclusion of Law No. 50, the trial judge states that Gary Jessen *knew* that the Scoby family was complaining that less than 21-25 feet of it got replaced, contrary to what had been contractually agreed upon. Similarly, the trial judge states that Gary Jessen filed a lien against the Scoby property without first going to inspect the job done. But neither of these acts – replacing less line than promised and filing a lien without inspecting the property – was ever found to be an unfair act. The trial court failed to find that the identified unfair act (increasing the price) was something Gary Jessen knew about and approved of, failed to find that any misrepresentation was ever made, and yet proceeded to hold Gary Jessen personally liable for a CPA violation based on the fact that he knew about the complaint that less than 25 feet was replaced – an act which the trial court never identified as an unfair or deceptive act. It is as if the identified unfair act *changes* from Conclusion of Law 38 to Conclusion of Law 50. First the unfair act is using technical knowledge to make misrepresentations to Scoby. But by the time the Court reaches Conclusion of Law No. 50, the implication is that the unfair act is filing a lien against a customer who has a complaint that the plumber failed to do the whole job.

Appellants have already argued that the record does not support the legal conclusion that any such unfair deceptive act was ever committed by either plumber. See Argument § 1, *infra* at pp. 41-45. But even assuming for the sake of argument that such an unfair deceptive act was proved, there is absolutely *nothing* in the record to support the factual finding that Gary and Rodney Jessen knew that these two plumbers were employing this "technique" and that they "approved" of it.

a. <u>Gary Jessen</u>

Gary Jessen was not present at the Scoby home when the contract was negotiated or when the work was performed. RP I, 35[28], 72[29]. There was no testimony that Gary ever spoke to "Chuck." There *was* testimony that Gary did speak to Shelton, but no testimony as to what Shelton told him or what Gary learned from him. RP I, 66. The only "knowledge" of the Scoby transaction that Gary was shown to have of the Scoby transaction was after-the-fact knowledge of the prices charged for the services rendered based upon a review of written contract documents. Gary Jessen testified that he didn't know anything at all about the Scoby matter until he learned that Scoby had stopped payment on her checks. RP I, 35.

The trial judge's determination that Gary Jessen knew of misrepresentations made by the plumber Shelton is directly contradictory to the position taken at trial by Scoby herself. In support of its lien claim BFP called only two witnesses – Gary Jessen and Viola Scoby – and then

[28] His "first acquaintanceship with this property, this project and the problems associated with it was when checks were returned."
[29] "I was not involved in the pricing of this job."

rested. Scoby then moved for a dismissal of BFP's lien claim on the grounds that there was insufficient proof to support the claim because Gary Jessen had no knowledge of what work was done, whether the prices charged were correct, or whether it was explained to Mrs. Scoby so that she understood what she was contracting for and why:

> MR. KILLEBREW: Your Honor, if the plaintiff has rested, we'd like to move, at this time, to dismiss the contract and lien claim . . .
>
> You have heard some interesting forensic accounting from Mr. [Gary] Jessen . . . But you've also heard from him that he was not present for the work, that he did not witness the work being done or checked the work. He doesn't – he therefore ***lacks any foundation for knowing*** whether the work done was correctly charged, or – therefore the process by which these prices were charged and updated. He wasn't there to negotiate with Mrs. Scoby, he wasn't there to get her consent.

RP I, 85-86 (emphasis added).

In the face of Scoby's concession that Gary Jessen didn't know anything about what happened at Scoby's house, the trial court found that Gary Jessen "knowingly approved" of a deceptive act committed by the BFP plumber. The mere fact that Gary Jessen filled out the paperwork for a notice of lien on Scoby's property because she failed to pay BFP anything at all for the work done does not show any kind of post-hoc knowing approval of any preceding deception which the trial judge thinks was perpetrated, or suspects may have been perpetrated, by Shelton. Moreover, long after Gary Jessen filed the lien, he personally viewed the videotape of the sewer line which showed the section of the line which Shelton had replaced as well as the rest of the line which he did not

replace. Gary Jessen testified that the video showed that Shelton would have been justified in telling Scoby that she should replace the *entire* line.[30] Thus, Gary Jessen continued to believe that Shelton's representation to Scoby that a portion of the line needed to be replaced was entirely fair.

The trial judge never found that the failure to inspect the property after receiving the Scoby complaint was itself an unfair act. But even if the trial court had made such a determination, it still would not provide a basis for finding Gary Jessen *personally* liable. There was no testimony that either Scoby or her daughter ever asked Gary Jessen to do that. Gary Jessen testified that he was *not* asked to do that. RP II, 49. In sum, the trial court's finding of personal knowing approval of deception practiced by Gary Jessen is not supported by substantial evidence.

b. <u>Rodney Jessen</u>

Rodney Jessen, the majority owner of BFP, was considerably *less* involved with the day to day operation of BFP than his son Gary. He testified that he supervised his son in the area of placing advertising for the company. RP III, 116. When asked, "are you involved in individual customer issues or further back than that," he replied his involvement was "further back than that." RP III, 117. '

[30] After BFP had been permitted to reopen its case, Gary Jessen provided more testimony. Based on his review of the videotape which showed the work done by Shelton, Gary Jessen said this about Shelton: "[I]t looks to me like he sold her a little bit of work, the least amount of work that he could to fix her problem." RP II, 13. Jessen said that in his opinion, not only was it correct for Shelton to have said that a portion of the sewer line needed replacing, but that "actually the whole line could have been replaced" and Shelton would have been justified if he had told Scoby that. RP II, 14.

Q. So say, with Mrs. Scoby's case, were you aware of the issues in her matter before there was litigation?

A. Nope.

RP III, 117. He further testified that he was not involved in collections, and that was handled by his son. RP III, 180.

There was no testimony whatsoever that Rodney Jessen ever had anything to do with the Scoby transaction or the Scoby complaint. At trial he was shown an exhibit that documented 2 conversations that took place between Fred Fossio, another BFP employee, and Scoby's daughter Kristjanson. RP III, 170-172. While Rodney Jessen testified about the brief notes that Fossio made of his conversations with Kristjanson, he said he himself had "no idea" what they discussed, and that he did *not* have any discussion with Mr. Fossio about these conversations. RP III, 185-186.

In sum, the only thing the record shows about Rodney Jessen's personal knowledge of the Scoby transaction is that at the trial of this case he was shown a document someone else made about a conversation someone else had with Scoby's mother roughly two years earlier. This does not amount to substantial evidence to support the finding that he gave his "knowing approval" to Shelton's supposedly deceptive act.

10. THE TRIAL JUDGE VIOLATED THE JESSENS' DUE PROCESS RIGHTS BY DEPRIVING THEM OF ANY OPPORTUNITY TO BE HEARD IN RESPONSE TO THE NEW EVIDENCE THE COURT ADMITTED MORE THAN TWO MONTHS AFTER TRIAL HAD ENDED.

a. <u>A Completely New Post-Trial Basis for Imposing Personal Liability On The Jessens</u>.

More than two weeks after the trial had ended, and more than a week

after he had rendered his oral decision which had included a forceful *rejection* of Scoby's theory that the Jessens should be held personally liable for the deceptive conduct of some other employee of the plumbing company, the trial judge told Scoby's counsel he was "not so certain" that he had been correct to reject personal liability. RP VI, 5. He directed Scoby's counsel to "go ahead and prepare those final orders with Findings of Fact and Conclusions of law consistent with the finding of personal liability." RP VI, 5. He said he wanted to take another look at that, and he wanted to rethink what Scoby had and had not proved. RP VI, 5.

Scoby's counsel did as he was instructed. He prepared such a set of Findings and Conclusions. He also submitted post-trial briefing which discussed in some detail the filing of a bankruptcy petition on behalf of BFP. Scoby put copies of pleadings filed in the bankruptcy case before the court by attaching them to his post-trial pleadings. CP 328-331. He attached the bankruptcy petition signed by Rodney Jessen. CP 331. He attached the notice of business closure filed in the bankruptcy court by Rodney Jessen and the Debt Schedules and the Declaration Concerning Debtor Schedules signed by Rodney Jessen. CP 348, 351.

On the basis of these documents, which showed certain debts for equipment leases entered into by BFP, Scoby argued that both Jessens had failed to properly wind up the affairs of BFP, which had been administratively dissolved on February 2, 2009. Scoby's proposed FFCL, which the trial judge ultimately approved, contained several facts derived from the documents pertaining to the bankruptcy, documents which had

never even been mentioned, much less admitted, at the trial. The Conclusions of Law stated in pertinent part:

> The Jessens have no explanation for why they filed a Chapter 7 bankruptcy (total liquidation) for a company they had closed in 2008 and let administratively dissolve on February 2, 2009 (about 8 months prior to its bankruptcy filing).
>
> A dissolved corporation may not carry on any business except to wind up and liquidate its business and affairs. RCW 25.15.285(3). The totality of the circumstances indicates Benjamin Franklin Plumbing carried on business after it closed and was administratively dissolved. The bankruptcy petition references Defendant Scoby's ;awsuit and lists Alpine Financial and Ford Leasing as creditors. Although Benjamin Franklin Plumbing had been administratively dissolved on February 2, 2009, the equipment leases for sewer cameras and related equipment leased from Alpine Financial were not rejected until an order was signed by Honorable Karen Overstreet and entered on the court docket on November 30, 2009. During this time period, the Jessens were operating Outtoday. Additionally, the bankruptcy petition includes a statement dated October 8, 2009 from Rodney Jessen that Benjamin Franklin Plumbing leases four vans to Profit 3, LLC for $3,000/month, which it pays directly to its creditor, Ford Leasing. This statement contradicts Mr. Jessen's testimony that all vehicles were returned to the lessor because the lessee did not want to transfer the vehicles from one corporation to the next.
>
> The leases and vans should have been returned to the creditors after Benjamin Franklin Plumbing had closed and definitely by the time it was administratively dissolved. It is not credible that the equipment and vehicles were not being used, because during this time period, the Jessens were also operating Outtoday, a successor corporation, providing the same services as Benjamin Franklin Plumbing provided. The sequence and timing of the closure, dissolution, bankruptcy filing and continued business operation after the dissolution support a finding the Jessens did not properly wind up Benjamin Franklin Plumbing.

CP 26-27, CL 27-29. Based on this "evidence," -- all of which was

derived from documents on file in the bankruptcy case -- the trial judge found that under RCW 25.15.300[31] and *Chadwick Farms Owners Ass'n v. FHC,* 166 Wn.2d 178, 207 P.3d 1251 (2009), Gary and Rodney Jessen were both[32] personally liable for the debts of Benjamin Franklin Plumbing (specifically the attorneys' fees award the court was making to Scoby for her prosecution of her now successful CPA claim). CP 27, CL 26, 30-31.

b. Allowing Scoby to "Reopen" and To Offer New Evidence While Simultaneously refusing to Allow The Jessens to Refute or Contest the New Evidence.

At the final hearing when the findings of fact, conclusions of law, and the judgment were entered, counsel for the Jessens objected strenuously that the bankruptcy documents could not be considered as evidence because they had never been even mentioned, much less offered and admitted at trial. The trial judge brushed off this objection by ruling that he would "treat" the submission of extra record documents as a motion to reopen the record and offer the documents as trial exhibits, a motion he then granted. Jessens counsel then stated he believed the Court was not properly understanding what the bankruptcy court documents actually showed, and he objected to there being consider without giving the Jessens

[31] This statute provides in pertinent part: "A limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the limited liability company . . . Any person winding up a limited liability company's affairs who has complied with this section is not personally liable to the claimants of the dissolved limited liability company by reason of such person's actions in winding up the limited liability company."

[32] Even assuming it was proper to consider the bankruptcy court documents that were not offered until trial was long over, they do not document *any* action by Gary Jessen. Rodney Jessen's signatures appear on these documents, Gary Jessen's signature does not.

an opportunity to be heard. The judge responded that since the documents were all Rodney Jessen's statements of his own position made to the bankruptcy court, there was no need for the court to hear anything further:

> MR. JONES: Could I have, for the record, your Honor's opinion with regard to the submission of new evidence? I would like that on the record for appeal. ***Did you consider all of the evidence that was submitted to you outside of the record***?
>
> THE COURT: I don't know what you are actually talking about, actually.
>
> MR. JONES: ***The bankruptcy petition that you just mentioned, there was attached to the memorandum submitted to this Court on or about April 21, a number of documents that were not admitted into trial, including the bankruptcy petition***. I just want to know if the Court considered those documents.
>
> THE COURT: The only document I was considering was the bankruptcy petition.
>
> MR. JONES: And that was not an exhibit admitted at trial.
>
> THE COURT: And in terms of this matter, ***I will just treat counsel's submission of the bankruptcy petition and the request for judicial notice as a motion to reopen the record, which I've granted. And those documents are admitted into the record.***
>
> MR. JONES: ***Over any ability to discuss them from the plaintiff's position with regard to the defendants, the opportunity to be heard***?
>
> THE COURT: It's your client's statement of his own position. ***What do you need to explain that further***?
>
> MR. JONES: Well, your Honor, I think that one of the problems that the Court may have is perhaps a misunderstanding of some of the bankruptcy terms and that was my concern. I wished to have had an opportunity – but I –
>
> THE COURT: I didn't see any technical terminology

> problems in what was cited to me.
>
> MR. JONES: rejection of leases primarily.
>
> THE COURT: Rejection of leases, that's not what I was looking at. What I was looking at was the transaction itself. If a company is leasing equipment to another company, that's doing business. It's not that complicated.[33]

RP VII, 4.

c. <u>Due Process Requires That A Litigant Be Given An Opportunity to be Heard Before He is Ordered to pay Money or His Property is Otherwise Taken</u>.

It is well settled that before a litigant can be sanctioned monetarily, due process requires that he be given an opportunity to be heard. *Post v. City of Tacoma*, 167 Wn.2d 300, 314, 217 P.3d 1179 (2009) (where litigant seeks to oppose government assessment of monetary penalties "the fundamental requirement of due process requires the opportunity to be heard at a meaningful time and in a meaningful manner.") Indeed, "our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted to both sides." *In re Estates of Smaldino*, 151 Wn. App. 356, 368, 212 P.3d 579 (2010). "Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil." *Joint Anti-Facist Refugee*

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[33] Actually, it is more complicated than that, since the case law is clearly that a dissolved LLC *is* permitted to transact business if that business is part of the winding up process. Indeed, RCW 25.25.295(2)(a) explicitly states that even *after* a limited liability company has been administratively dissolved, it "may . . . ***preserve the limited liability company's business or property as a going concern for a reasonable time***, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, ***transfer the limited liability company's property***, settle disputes, ***and perform other necessary acts*** . . ." But because the court gave the Jessens no opportunity to be heard on the subject of either the leases or the bankruptcy petition, they had no chance to explain why these lease transactions *were* a proper part of the wind up process.

Committee v. McGrath, 341 U.S. 123, 177-179 (1951).

In the present case, the trial judge blatantly violated the due process rights of Rodney and Gary Jessen, allowing new evidence to be presented by their opponent long after trial was over, and then refusing to give them any opportunity to meet this new evidence by presenting their own explanation of what the new documentary evidence actually showed, and why it did *not* show that they had failed to properly wind up the business of the dissolved LLC. Denied any opportunity to defend themselves, they were then saddled with personal liability for the LLC's debt. For these reasons, even if this Court holds that the violation of the CPA was properly found and that Scoby is properly entitled to attorneys' fees for establishing that violation, that portion of the judgment which imposes personal liability on the Jessens for this debt should be vacated.

G. REQUEST FOR ATTORNEYS' FEES FOR WORK PERFORMED ON APPEAL.

Pursuant to RAP 18.1, appellant BFP requests that this Court direct respondent Scoby to pay BFP its reasonable attorneys' fees incurred as the cost of appellate representation. The statutory entitlement to an award of attorneys' fees as a result of being a prevailing party under RCW 60.04.181(3) and RCW 4.84.250 et seq. applies to appellate attorneys' services as well as to services rendered in the trial court. Here, as in *CKP*, the contractor should be granted an award of fees on appeal. *CKP*, 63 Wn. App. at 622-23.[34]

[34] The fees award in *CKP* was made under the predecessor lien foreclosure fees statute, RCW 60.04.130, which has since been replaced with RCW 60.04.181. The award in

H. CONCLUSION

For the reasons stated above appellants first ask this Court to vacate the judgment below and remand with directions to enter judgment in favor of the appellants and against Scoby on her CPA counterclaim claim against them, and to also vacate the award of attorneys' fees to Scoby which the trial court ordered pursuant to its erroneous determination that Scoby had established a CPA violation.

Regardless of what decision this Court makes regarding the viability of the determination that a CPA violation was established, appellants also ask this Court to vacate the decision that appellants Rodney and Gary Jessen are personally liable for the wrongful acts of BFP, and to vacate the monetary judgment against them as individuals.

With respect to appellants' own claim that they are entitled to an award of attorneys' fees, they ask this Court to hold either

(1) that they are necessarily entitled to an award of attorneys' fees in their favor, pursuant to RCW 60.04.181(3) operating in conjunction with RCW 4.84.250 et seq. which govern attorneys' fees awards in actions where the damages sought are less than ten thousand dollars, and which mandates an award of fees when the plaintiff in a lien foreclosure action recovers more than he was offered in settlement;

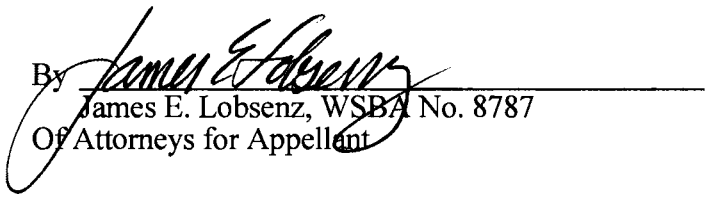
or, alternatively,

CKP was discretionary, but under *Kingston Lumber*, *supra*, because this case involved a lien claim of less than $10,000, the award of fees to party who prevails in action to enforce a lien is mandatory.

(2) to hold that the trial judge erred in ruling that he had no discretion to award them fees under RCW 60.04.181(3), and to remand to a different judge for that judge to exercise his or her discretion as to whether to award appellants their attorneys fees under RCW 60.04.181(3).

DATED this 27th day of January, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant

APPENDIX A

IN THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

PLUMB SERVE, LLC, a Washington limited liability company, d/b/a BENJAMIN FRANKLIN PLUMBING Plaintiffs, v. VIOLA M. SCOBY and "JOHN DOE" SCOBY, wife and husband and JOHN W. SCOBY and VIOLA M. SCOBY REVOCABLE TRUST of October 9, 1995, Defendants.	No. 08 2 04508 9 DEFENDANTS' OFFER OF SETTLEMENT

Defendant VIOLA SCOBY and VIOLA M. SCOBY REVOCABLE TRUST of October 9, 1995 offer to settle the plaintiff's claim against them for $3,350. This offer is subject to the provisions of RCW 4.84.250 to 4.84.280.

DATED this 10th day of October, 2008.

Galvin Realty Law Group, P.S.
Attorneys at Law
6100 – 219th Street SW, Suite 560
Mountlake Terrace, WA 98043
Telephone: (425) 248-2163
Facsimile: (425) 248-2168

SENT TO CLIENT 10/8/08 CC
( ) NO ACTION REQUIRED
(✓) PLEASE RESPOND TO THIS

GALVIN REALTY LAW GROUP, P.S.

Yen Lam

Yen Lam, WSBA #32989
Attorney for Defendants

Galvin Realty Law Group, P.S.
Attorneys at Law
6100 – 219th Street SW, Suite 560
Mountlake Terrace, WA 98043
Telephone: (425) 248-2163
Facsimile: (425) 248-2168

APPENDIX B

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

PLUMB SERVE, LLC, a Washington limited liability company, d/b/a BENJAMIN FRANKLIN PLUMBING, Plaintiffs, vs. VIOLA M. SCOBY and JOHN DOE SCOBY, wife and husband and JOHN W. SCOBY and VIOLA M. SCOBY REVOCABLE TRUST of October 9, 1995, Defendants.	NO. 08-2-04508-9 OFFER OF SETTLEMENT

COMES NOW the Plaintiff, PLUMB SERVE, LLC, by and through their attorneys of record, RICHARD LLEWELYN JONES P.S., and in accordance with the provisions of *RCW 4.84.250, et. seq.*, offers to settle the above-captioned matter upon Defendants payment of the sum of $4,000.00 to Plaintiff. This offer shall be deemed withdrawn unless accepted within 5 days from the date of service. Failure to accept this offer may result in Plaintiff being accessed costs and reasonable attorneys' fees if Defendants prevail at time of trial.

DATED this 17th day of February, 2009.

RICHARD LLEWELYN JONES, P.S.

Richard Llewelyn Jones, WSBA# 12904
Attorney for Plaintiffs

RICHARD LLEWELYN JONES, P.S.
ATTORNEY AT LAW
2050 – 112th Avenue N.E.
Suite 230
Bellevue, Washington 98004
(425) 462-7322

COPY

APPENDIX C

RECEIVED
APR 29 2009
RICHARD LLEWELYN JONES, P.S.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

PLUMB SERVE DBA	)	
	)	No. 08-2-04508-9
Plaintiff/Petitioner,	)	
Vs.	)	ARBITRATION AWARD
SCOBY, ET VIR., ET AL.,	)	
	)	
Defendant/Respondent.	)	

The issues in arbitration having been heard April 8, 2009, I make the following award:

For Defendant Scoby: $9,731.25

Reasonable attorney fees awarded to defendant as prevailing party.

Twenty days after the award has been filed with the County Clerk, if no party has sought a trial de novo, any party on six days notice to all other parties may present to the Presiding Judge or Court Commissioner a judgment on the Arbitration Award for entry as final judgment in this case.

Was any part of this award based on the failure of a party to participate:

( ) Yes (X) No

If yes, please identify the party and explain:

Dated: 4/28/09

Arbitrator: Ralph I. Freese

(File original with County Clerk; and provide copies to the Director of Arbitration and all other parties)

SENT TO CLIENT 4/30/09 cl
( ) NO ACTION REQUIRED
(X) PLEASE RESPOND TO THIS

APPENDIX D

659

Benjamin Franklin
THE PUNCTUAL PLUMBER.
If there's any delay, it's you we pay!.
1-866-454-5325
www.benfranklinplumbing.com

03 25 08 JOB # 219620 INVOICE #

NAME Viola Scott
ADDRESS 22902 [illegible] W
CITY Mt Lk Terrace STATE Wa ZIP 98043
PHONE 1 (425) 582-2312 PHONE 2 ( )
E-MAIL
VH-2013 $ @ 552.93 VH-2016 $810305
Club Rewards YES ☒ NO ☐

FILE

Plumbing Peace of Mind Starts Here! 1 Minimum Service Charge and Punctual Promise

I am ready to become a member and take advantage of the benefits immediately!

☒ I Would like to pay an annual fee today $ 239.40 CUSTOMER'S INITIALS

This invoice reflects a charge today of for the Club Rewards. $ 239.40 CUSTOMER'S INITIALS

☐ I decline the opportunity of Club Rewards at this time

Club Rewards Member Benefits
- One Professional Safety Inspection, Leak Check and Water Heater Tune-up for your plumbing, electrical hvac systems annually.
- 15% Discounts on Service and Repairs
- Priority Scheduling - If you ever need service, you immediately go to the front of the line when scheduling your appointment.

Initials to Authorize Minimum Service Charge

		Std Rate	Society Rate	
CUSTOMER'S INITIALS	EXPRESS!	$ 189	$ 0	____ AM/PM - ____ AM/PM
CUSTOMER'S INITIALS	RESERVED	$ 109	$ 0	____ AM/PM - ____ AM/PM
CUSTOMER'S INITIALS	STAND-BY	$ 49	$ 0	
CUSTOMER'S INITIALS	EMERGENCY	$ 189		Punctual Promise kept? YES ☐ NO ☐

Plumber's Arrival Time _____ AM / PM $ _____ TO CUSTOMER

Level	Service Description	Standard Rate	Club Rewards	
5	Faucet stem rebuild (vintage), toilet rebuild (vintage), up to 2.0" gate/ ball valve, hand dig (per yard), drywall/concrete remove & patch (2' x 2'), water heater rebuild, instant closet flange, dishwasher hook-up, winterize pipes, thaw pipes, leak search, dewatering, difficult access.	$605	$514	Yes / Qty ____ =$ ____ / No
4	Faucet stem rebuild (pres. bal.), toilet rebuild, up to 1.0" gate/ ball valve, water heater lower element, gas key shut-off, s/s appliance connector, waste & overflow, instant shower drain, .50"-1.25" gas leak, 1.5"- 4.0" cast iron or galv. drain leak, whole house plumbing inspection.	$429	$365	Yes / Qty ____ =$ ____ / No
3	Faucet stem rebuild (2 h), pop-up assembly, water measure device w/flapper, tank gasket, toilet pull and reset, water heater upper element, water heater electric thermostat, water heater limit switch, t & p valve, urinal repair any one, up to .75" boiler valve, .50"-1.25" water leak, 1.5"-4.0" pvc drain leak, RPD test.	$313	$266	Yes / Qty ____ =$ ____ / No
2	Faucet stem rebuild (1 h), hose spigot repair, dishwasher / disposal connector, basket strainer, hot or cold shut-off assembly, pipe extender, supply tube, tailpiece, sink trap, tub spout, thermocouple, check valve, spray hose, vacuum breaker, 14 point water heater tune-up, access panel, limited access.	$215	$183	Yes / Qty ____ =$ ____ / No
1	Aerator, nut & washer, caulking, pipe trim ring, c/o plug, tiptoe cartridge, fl drain strainer, hanger or support, minor adjustment, secondary assistance, 4 point toilet tune-up, special order part / fixture, diagnose, drain fitting 1 per, supply tube, tailpiece, toilet flapper / ball, toilet handle.	$135	$115	Yes / Qty ____ =$ ____ / No

Additional Install: 617 clean main line Qty 1 =$ 499.00 Yes / No
Additional Install: 635 Deep repair over 4 ft to install s/o Qty 1 =$ 225.00 Yes / No
Additional Install: Cable 2 tubs, 1 lavs, 1 4/5 line, 2 lavs Qty 6 =$ 350.00 Yes / No

23' - VIDEO ?
2 DAYS
14' LONG -
1 DAY
CLEAN-UP NXT MORN:
CABLE/CAMERA /
OUTSIDE HOSE BIB/$900-
40' PIPE
20-30 '
18' - '

HALF TIME SPENT AS WAS COMMITTED TO THE JOB
HALF THE PIPE - MEASURED REPAIR IS 12' LONG IN YARD.
NO VIDEO LEFT.
MATH DOESN'T ADD UP
BID FOR OUTSIDE HOSE BIB WAS $900/40' PIPE -

Payment Information:

☐ Cash $ ____
☒ Check # 2013 3552.93 $1684.68
Check # 2016 $3103.05
☐ Credit Card MC Visa AMEX Discover Other ____ $ ____
Card # ____
EXP MMYY Security Code ____ Auth # ____
☐ Third Party Finance Ref # ____ $ ____
Total Amount Paid $ ____

Total Amount Due Before Any Discounts 6525.12 $3094.00
Deductions that Apply Today
Coupons + club rewards $ 239.40
Other Discount ____ - 10% $ 652.51
Punctual Promise missed $ 6112.01
Total Savings Today $ 55
Tax SB 49 $ 270.37
Total Amount Due $ 3301.37
Returning to Complete Job Requires a Deposit 3552.93 $ 1684.68
TOTAL Club Rewards Savings TODAY! Total Amount Due on Completion of Work 7650 $ 1684.68
$ 655.98

Authorization to Proceed with Work
I have the authority to order the above work and hereby authorize you to proceed with the above work.
SIGNATURE X Viola Scott

Description of work and Plumber's Comments:
Louie # 818 4609
ID 38597
Performed all above said work completed, ditch and cleaned up

☒ All repairs have a FULL 2 year parts and labor warranty unless otherwise specified
☒ See additional notes page for further comments
Your Plumber Today Is:
☒ See additional notes page for warranty information

ACCEPTANCE OF WORK PERFORMED: I acknowledge satisfactory completion of the above described work and that the premises has been left in satisfactory condition. I understand that if my check does not clear, I am liable for the check and any charges from the bank. I agree to pay 1.75% per month for past due contracts (minimum charge $18). In the event that collection efforts are initiated against me, I shall pay for all associated fees at the posted rates as well as all collection fees and reasonable attorney fees. I agree that the amount set forth in the space marked "Total Amount Due" is the total agreed price I have agreed to.

PLUMBER'S ACKNOWLEDGEMENT: Prior to the customer entering into the contract, I have discussed the nature of the service and price and have given a copy of the contract to the customer. All work I have done has been performed with company guidelines in a workmanship manner, to building codes where applicable.

SIGNATURE X Viola M. Scott
SIGNATURE X

DANGER Your Water Pressure Today Is: PSI ____

NOTE: High water pressure can be harmful to your plumbing system and in some situations dangerous. It is one of the main reasons for continuous and frequent plumbing repairs. I can with the warranty of certain plumbing repairs and installation of the new plumbing fixtures.

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13300 SE 30th St #105
Bellevue, WA 98005
(425) 653-4085

License# BENJAFP851QZ

WARRANTIES, AND [illegible] except [illegible] exclusions [illegible] damages caused thereby [illegible] Products [illegible] valve breaks [illegible] water pressure [illegible] manufacture defects

WARRANTY EXCLUSIONS.
THE FOREGOING WARRANTY CONTAINS [illegible] EXPRESS OR IMPLIED WARRANTIES, EXCEPT OF TITLE [illegible] WARRANTIES [illegible] NOT SE SUBJECT [illegible] BREACH [illegible] TORT [illegible] LAW [illegible] TAXES, AC[illegible] AND CONT[illegible]

All warranty [illegible] performed du[illegible]

[illegible] with the state [illegible] breach of con[illegible] expiration date

THIS BOND D[illegible] FROM THE W[illegible]

[illegible] The [illegible] contractors [illegible]

FOR GREATE[illegible]

YOUR FIRST [illegible]

[illegible] same work

FOR A COMPLETE PACKAGE [illegible] ORIGINAL [illegible] PROJECT

[illegible]

CHAPTER 6: SO FOR CONTINUING [illegible] BEFORE YOU MAY FILE A LAWSUIT [illegible] BUILDER OF YOUR HOME FORTY-NINE DAYS [illegible] WRITTEN NOTICE TO THE SELLER OR BUILDER THE OPPRO[illegible] FOR PAY FOR THE DEFECTS YOU ARE [illegible] BUILDER OR SELLER THERE ARE STRICT DEADLINES [illegible] YOU [illegible] ARE TO YOU CAN'T BE [illegible]

TERMS & CONDITIONS OF SALE

WARRANTIES, AND LIMITATIONS ON WARRANTIES: Standard warranty is 2 years on labor and parts supplied by us. Seller warrants that all work performed and all parts and equipment which were installed in the servicing of the plumbing unit(s) were completed in a workmanlike manner and that said work shall be free from defects in materials and workmanship for a period of 365 days from date said work was performed (except for the exclusions listed below). Seller's obligation for defective products and/or workmanship or any damage caused thereby, and Buyer's exclusive remedy, shall be limited, at Seller's option, to the replacement of any defective parts or workmanship or the refund of amounts paid by Customer for said servie shall be conditions upon Seller receiving actual written notice of said defect within the 365 day period noted herein. Stoppages, worn out equipment or fixtures or not doing recommended repairs, owner supplied equipment. These exclusions may have a limited or no warranty. If parts have been replaced by us and not worked on by anyone else during warranty period or use of items that damage plumbing parts supplied by us. Warranty period may be different if noted herein. (Warranty excludes stoppages and customer supplied items). All warranty issues must be allowed to be inspected and approved by Benjamin Franklin Plumbing before any repair is made or warranty is voided. Warranty is not transferable. Not liable for damage caused by weather, valve breaks, high water pressure, normal maintenance items not reviewed by whomever, or manufacture defects.

WARRANTY EXCLUSIONS:
THE FOREGOING WARRANTIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER EXPRESS OR IMPLIED WARRANTIES (EXCEPT OF TITLE) FROM SELLER INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. SELLER SHALL NOT BE SUBJECT TO AND DISCLAIMS (1) ANY OTHER OBLIGATION OR LIABILITIES ARISING OUT OF BREACH OF CONTRACT OR OF WARRANTY; (2) ANY OBLIGATIONS WHATSOEVER ARISING FROM TORT CLAIMS INCLUDING NEGLIGENCE AND STRICT LIABILITY OR ARISING UNDER THEORIES OF LAW WITH RESPECT TO PRODUCTS SOLD OR SERVICES RENDERED BY SELLER OR ANY UNDERTAKINGS, ACTS OR OMISSIONS RELATED THERETO; AND (3) ALL CONSEQUENTIAL, INCIDENTAL AND CONTINGENT DAMAGES WHATSOEVER.

All warranty work will be performed during normal business hours. Any customer requiring warranty work not performed during regular business hours will be charged as service charge.

NOTICE TO CUSTOMER
(as required by Washington State RCW. 18.27.114)

This contractor is registered with the state of Washington, registration no. BENJAFP951OZ, and has posted with the state a bond or deposit of $12,000 for the purpose of satisfying claims against the contractor for breach of contract including negligent or improper work in the conduct of the contractor's business. The expiration date of this contractor's registration is 11/9/2009.

THIS BOND OR DEPOSIT MIGHT NOT BE SUFFICIENT TO COVER A CLAIM THAT MIGHT ARISE FROM THE WORK DONE UNDER YOUR CONTRACT.

This bond or deposit is not for your exclusive use because it covers all work performed by this contractor. The bond or deposit is intended to pay valid claims up to $12,000 that you and other customers, suppliers, subcontractors, or taxing authorities may have.

FOR GREATER PROTECTION, YOU MAY WITHHOLD A PERCENTAGE OF YOUR CONTRACT.

You may withhold a contractually defined percentage of your construction contract as retainage for a stated period of time to provide protection to you and help insure that your project will be completed as required by your contract.

YOUR PROPERTY MAY BE LIENED.

If supplier of materials used in your construction project or an employee or subcontractor of your contractor or subcontractors is not paid, your property may be liened to force payment and you could pay twice for the same work.

FOR ADDITIONAL PROTECTION, YOU MAY REQUEST THE CONTRACTOR TO PROVIDE YOU WITH ORIGINAL "LIEN RELEASE" DOCUMENTS FROM EACH SUPPLIER OR SUBCONTRACTOR ON YOUR PROJECT.

The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the state Department of Labor & Industries.

CHAPTER 64.50 RCW CONTAINS IMPORTANT REQUIRMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE SELLER OR BUILDER OF YOUR HOME. FORTY-FIVE DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE SELLER OR BUILDER THE OPPROTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE BUILDER OR SELLER THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

APPENDIX E

692

Benjamin Franklin
THE PUNCTUAL PLUMBER.
If there's any delay, it's you we pay!
1-866-454-5325

Additional Notes Form

Invoice Number 21670 Plumber Name Alex Slotten

FILE

Customer Name Viola Scaby Date 3/26/08

PROPOSED WORK

OPTION Proceed with work: YES INITIALS NO INITIALS

To replace 21-25 Linear feet of 4" Sewerline from edge of Garage out approx 25ft to remove damaged root section will install 2 way c/o and 2 locking ring & covers

Warranty: ☒ Standard 2 Year ☐ Other 6525.12 + tax 580.74 = $ 7105.86

OPTION Proceed with work: YES INITIALS NO INITIALS

~~CO~~ Customer to have asphalt patch done ~~X~~
X Viola Scaby

Warranty: ☐ Standard 2 Year ☐ Other $

OPTION Proceed with work: YES INITIALS NO INITIALS

Warranty: ☐ Standard 2 Year ☐ Other $

Additional Job Notes / Instructions

PLUMBER'S SIGNATURE CUSTOMER'S SIGNATURE

It makes good sense to consider all of your options when it comes to repairing or replacing a part, fixture or piece of equipment. Many times, replacing a defective unit will provide you with a greater benefit and peace-of-mind than repairing an older model.

Thank you very much for your business!

Please call if you have any questions about the work we have completed or estimated for you.
Estimates are valid for 30 days.

©2007 Chesterwood Home Services, Inc. All Rights Reserved

13300 SE 30th St Suite #105 Bellevue, WA 98005 (866) 454-5325 (425) 653-4085 License: BENJAFP951QZ

No. 65459-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PLUMB SERVE, LLC, a Washington limited liability corporation, d/b/a BENJAMIN FRANKLIN PLUMBING, Plaintiff, v. VIOLA M. SCOBY and "JOHN DOE" SCOBY, wife and husband; and JOHN W. SCOBY AND VIOLA M. SCOBY REVOCABLE TRUST of October 9, 1995; Defendants/ Counterclaim Plaintiffs/Respondents, v. PROFIT TWO, LLC, a Washington limited liability company, d/b/a PLUMB SERVE AND OUTTODAY SERVICE; RODNEY JESSEN, individually and as part of his marital community; and GARY JESSEN, individually and as part of his marital community; Counterclaim Defendants/Appellants.	CERTIFICATE OF SERVICE

2011 JAN 27 PM 4:47

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

JES002 0001 ma27e353ev 2011-01-27

ORIGINAL

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On January 27, 2011, I caused to be served via US MAIL, a true and correct copy of the following documents on:

Counsel For Plaintiff Richard Llewelyn Jones Attorney at Law 2050-112th Avenue, NE Bellevue, WA 98004 (via US Mail)	*Counsel for Counterclaim Plaintiffs/Respondents* Yen Lam Galvin Realty Law Group 6100 – 219th Street SW, Suite 560 Mountlake Terrace, WA 98043 (via US Mail)

Entitled exactly:

BRIEF OF APPELLANTS;

LILY T. LAEMMLE