

676440

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NO. 676440

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

STRUCTURAL CONCRETE, INC., ET AL

Appellants,

v.

BAY VIEW ELECTRIC, LLC,

ORIGINAL

Respondent.

**RESPONDENT BAY VIEW ELECTRIC, LLC BRIEF**

Submitted by: Gary T. Jones, WSBA #5217  
Jones & Smith  
PO Box 1245  
Mount Vernon, WA 98273  
Telephone: (360) 336-6608  
Facsimile: (360) 336-2094

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Attorney for Respondent Bay View Electric, LLC

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## I. INTRODUCTION

In this case, the Appellant, David Flake, (“Flake” hereafter) accompanied by his attorney Robert Bartlett attended a court ordered arbitration. [CP 103-104] The 20<sup>th</sup> paragraph of Subcontractor Agreement [CP 111-115] between Mr. Flake and Bay View Electric, LLC (“Bay View” hereafter) required arbitration:

“In case contractor and subcontractor fail to agree in relation to any matters under this contract, these matters shall be referred to the board of arbitration...” [CP 114]

When the parties arrived at the arbitration on March 30, 2010 they agreed to allow Scott Holte to mediate their case while retaining the right to make a final decision as arbitrator. [CP 84, 86, and 87]

Per Memorandum of Settlement the mediator acting as scrivener wrote down the Settlement. [CP 88] When Mr. Flake did not pay within sixty (60) days the discounted amount allowed by the Settlement, the respondent moved to enforce the Settlement pursuant to CR 2A and RCW 2.44.010. [CP 79-82]

## II. ASSIGNMENT OF ERROR

Appellant Flake assigns error to the trial court: “entering the Order on Motion to Enforce Settlement and its accompanying Judgment, both filed August 23, 2011.”

Respondent Bay View asks the court to affirm the trial court Order [CP 9-10] and Judgment [CP 7-8]. Bay View contends that the Order and Judgment are consistent with the law and the facts.

Flake’s Brief declares three issues to be “Issues Pertaining to Assignments of Error” although there is a single Assignment of Error referring to the Order and Judgment.

No. 1: Flake contends that the MEMORANDUM OF SETTLEMENT [CP 88] prepared by Scott Holte as mediator [CP 86 Section 6(b)] and signed by counsel and the parties lacks consideration for Flake’s promise to pay for time and materials ordered from Bay View per the Subcontractor Agreement 7/15/08. [CP 111-115 inclusive]

Flake contends that if Bay View is barred from suing him by Chapter 19.28 RCW, the Electrical Contractor Registration Act, then there is no consideration for the Judgment or for the payment promised in the Memorandum of Settlement. Essentially Flake contends that he made an illusory promise in the Settlement rather than presenting to the arbitrator grounds for dismissal of the Bay View claim.

No. 2: Flake contends that Bay View did not perform the procedural prerequisites of RCW 19.28.081 to "... commence or maintain any suit or action..." leading to entry of judgment. The trial court did receive and rely upon a letter under seal of the Department of Labor and Industries that showed General Electrical Contractor License BAYVIEL954NK effective August 12, 2005 to August 13, 2011, except for a one day "Lapse in License" 8/12/2007 to 8/13/2007. [CP 99]

The work in question was done under a City of Everett Electrical Permit EO807065 dated 7/16/2008 issued to Bay View as contractor. [CP 95] Bay View notes that RCW 19.28.081 says in part:

"no city or town requiring by ordinance or regulation a permit for inspection or installation of such electrical work, shall issue such permit to any person, firm, or corporation not holding such a license."

The same certification of licensing record shown in CP 99 was applicable to the Electrical Permit. Bay View's license was relied upon by the City of Everett. The City inspectors approved Bay View's work. [CP 95-98]

The complaint in Snohomish County Superior Court alleged that Bay View was an electrical contractor under License No. BAYVIEL954NK. [CP 121, Page 1, lines 23-25]

No. 3: Flake contends that because Bay View failed to inform the Department of Labor and Industries that its electrical administrator was

not an owner or an employee of Bay View that Bay View's license is void. RCW 19.28.061(1) and RCW 19.28.061(5)(a). This assignment of error does not explain why the trial court should disregard the designated Department of Labor and Industries licensing authority certification. [CP 99] The assignment of error does reconcile the requested relief with the administrative process. Electrical contractor licensing revocation or suspension is governed by RCW 19.28.341, adopting Administrative Procedures Act Chapter 34.05 RCW including Rights of Appeal.

Appellants third contention also fails to address the enforcement powers delegated to Electrical Inspectors in each jurisdiction by RCW 19.28.321. Flake grants himself the power to determine who qualifies for a license without exhausting the administrative process and without apparent authority to override the licensing and inspection work of the Department of Labor and Industries.

### **III. STATEMENT OF THE CASE**

Flake's statement of the case avoids the actual grounds for the trial court's order enforcing settlement and granting judgment to Bay View. The parties' Subcontractor Agreement [CP 114, paragraph 20] says:

“In case contractor and subcontractor fail to agree in relation to any matters under this contract these matters shall be referred to a board of arbitration...”

The Stipulated Order [CP 103-104] on Bay View's Motion to Compel Arbitration under paragraph 20 [CP 105-116] of the contract was signed by David Flake on December 22, 2010. There he acknowledged the appointment of sole arbitrator Scott Holte – Washington Arbitration & Mediation Service – to decide the disputed issues.

After agreeing to grant Scott Holte greater latitude in the conduct of the arbitration [CP 86] Confirmation of Proactive Arbitration Agreement, the Memorandum of Settlement resulted from mediation. [CP 88] In the mediation the parties agreed that the Settlement would constitute a stipulation pursuant to CR 2A and RCW 2.44.010(a)(8).

A provision of the Memorandum of Settlement [paragraph 3, CP 88] says:

“The parties will work together to formalize this agreement with appropriate documentation, including the Stipulated Judgment as set forth above;”

This provision adds to the impression and reinforces the intent of Flake and Bay View to resolve all issues in the Memorandum of Settlement. Bay View agreed to compromise the time for payment by sixty (60) days and agreed to compromise the amount of payment by approximately \$40,000.00 in consideration of the promised cash payment.

Nothing in the four corners of the Memorandum of Settlement preserves a right to re-litigate the matters confided to the arbiter. Signature by Flake and his counsel was a waiver of the license issue. Bay

View contended to the trial court and the trial court accepted the proposition that Flake waived its right to contest the terms of Settlement. Flake accepted time provided by skilled laborers and materials for which he did not pay. The 2211 West Casino Road project was completed. The City of Everett electrical inspector's final approval was given February 27, 2009. [CP 98] The building was immediately occupied by a tenant who pays rent to Flake.

The Department of Labor and Industries shows Bay View as a continuously licensed electrical contractor of the State of Washington during the period 7/15/2008 to 2/27/2009 [CP 99]. Nevertheless Flake's brief assumes that the trial court must accept his evidence as if Flake were a public official administering electrical licensing.

Bay View's complaint page 1, I, lines 23 – 25 [CP 121] contains the following allegation:

“That BAY VIEW ELECTRIC, LLC is a Washington limited liability company engaged in the business of electrical contracting under Washington License No. BAYVIEL954NK” CP 121.

On June 14, 2011 after the challenge to Bay View Electric's licensing was made by Flake, James P. Reynolds electrical licensing supervisor of the specialty compliance division of the Washington State Department of Labor and Industries certified that Bay View Electric, LLC is presently an active (01) General Electrical Contractor within the State of Washington.

[CP 99] In addition the certification addressed “to whom it may concern” stated:

”...that the Licensing and Certification Unit has made a diligent search of said records from January 1990 to present and those records reflect the following:

“Bay View Electric LLC – PO Box 986 – Burlington, WA – 98233

(01) general electrical contractor license #BAYVIEL954NK.

Effective date of license August 12, 2005

Expiration date of license August 13, 2011

Owner/principal(s) Tyson O’Neil

Current Status: Active

Lapses in license: 08/12/2007 to 08/13/2007

Assigned administrator: Tyson O’Neil”

In his certification Mr. Reynolds identifies himself as the one responsible for the records of licensure kept for General and Specialty electrical / telecommunication contractors within the State of Washington. As custodian of the seal of the Department of Labor and Industries he is authorized to use the seal and did apply that seal to the record. [CP 99]. The trial court accepted this record as proof of the license required for jurisdiction over enforcement. RCW 19.28.061. Mr. Flake, having independently investigated, reached a different conclusion and asks the court to disregard the administrator’s official certification of the license held by Bay View.

#### IV. AUTHORITY & ARGUMENT

Bay View contends that the Settlement is a fairly arrived at resolution of a dispute accurately recorded by Scott Holte, the arbitrator/mediator who assisted the parties in reaching a settlement and wrote down their agreement. This factual and legal situation is not materially different from the case decided in Washington Asphalt Company vs. Harold Kaeser Company 51 Wash 2d 89, 316 P.2d 126 (1957) enforcing a stipulated judgment.

Flake's contentions require the trial court to engage in an after the fact evaluation of state electrical contractor licensing. The administrator of that licensing has sided with Bay View by certifying that the only lapse in the license occurred approximately a year prior to any work being done for Flake and eleven (11) months prior to the permit that was issued by the City of Everett to Bay View. [CP 99, CP 96-98] The evidence also shows that the City of Everett accepted the work and completed the project on February 27, 2009, thereby confirming that the work was done in compliance with the state electrical code. RCW 19.28.331. The combination of verification of Bay View's license and the verification that Bay View did the work make the argument that there is no consideration for the settlement more difficult than Flake's brief acknowledges.

It is agreed that Settlement Agreements are contracts subject to interpretation in light of the language used and the circumstances

surrounding their making. *Reid v. Stottlemeyer* 35 Wn.App 169, 665 P.2d 1383 (1983). In *Stottlemeyer* the court was asked to relieve a party who claimed pain from injury after the insurance settlement. In a like manner the court should affirm the Memorandum of Settlement here notwithstanding the belated challenge to Bay View's license.

The Appellant's synopsis and argument do not state the standard of review for the court. There are two potential standards of review. One defers to the trial court's interpretation of the contract in light of the language used and the circumstances surrounding the contract. The alternative standard reviews the trial court's decision de novo and without deference as it would a decision to grant summary judgment.

Bay View contends that its proof is in keeping with enforcement of the Memorandum of Settlement and the Judgment signed by Judge Cowsert. Flake contends that it has proof arising subsequent to the Memorandum of Settlement that denies the trial court's jurisdiction to proceed. If the court does not affirm the trial court's decision then Bay View contends that a hearing on the merits is required using the standard of review applicable to a CR 56 summary judgment motion.

In *Brinkerhoff v. Campbell* 99 Wash. 2d 692, 697, 994 P.2d 911 (2000) the court determined that a written settlement agreement may be disputed as to its existence, material terms or defenses to its enforcement. Procedurally parties to personal injury claim settlements and dissolution

equitable division of property have established by case law that a trial court should proceed in cases where a party moves to enforce a CR 2A agreement as if considering a motion for summary judgment. McGuire vs. Bates 169 Wash.2d 185, 234 P.3d 205 (2010). When a genuine issue of material fact about the settlement agreement was found by the court in Brinkerhoff the court held that the trial court abuses its discretion if it enforces the settlement agreement without first resolving such issues by holding an evidentiary hearing. In this case no evidentiary hearing was held and materials submitted by Bay View in support of its motion under CR 2A and RCW 2.44 were deemed unnecessary by the court which presumably exercised its right to decide as a matter of law and fact that the relief requested by Bay View was appropriate. [CP10, line 1]

Flake's contentions assume that the licensing statutes are enforced without a hearing. The statute itself RCW 19.28.341 governs the revocation or suspension of licenses and states the grounds. Nothing in the statute gives anyone other than the Department of Labor and Industries the power in case of serious noncompliance with the provisions of RCW 19.28 to revoke or suspend a license.

"The department shall notify the holder of the license or certificate of the revocation or suspension by certified mail. The revocation or suspension is effective twenty days after the holder receives the notice. Any revocation or suspension is subject to review by an appeal to the board. The filing of an appeal stays the effect of the revocation or suspension until the board makes its decision. ... The

hearing shall be conducted in accordance with Chapter 34.05 RCW.” RCW 19.28.341(1).

This regulatory scheme does not admit the validity of an owner seeking to avoid payment on contract work suspending or revoking a license of an electrical contractor. Yet, that is exactly the position taken by Flake. His brief suggests that the revocation of a license is automatic and that the burden of upholding the settlement signed by counsel and by Mr. Flake still rests exclusively with Bay View. This is not consistent with the regulatory scheme established by the legislature although the evidence brought forward does create ambiguity as to the means of enforcement of the electrical administrator provisions of RCW 19.28.061 cited by Flake.

Flake admits that Tyson O’Neill, principal owner and electrical administrator since April 15, 2009 is validly conducting business. He disputes the period during which he claims that no electrical administrator was on duty. The presence of other master electricians, qualified journeymen and the qualified owner, Tyson O’Neill are all facts not in evidence.

Flake’s contention that the contractor’s license is void ninety (90) days after its electrical administrator ceases to be associated with Bay View begs the question who decides. Flake wants to be the sole decision maker. The statute gives the certification by James Reynolds primacy. It also gives procedural protections to Bay View for preservation of its

license. RCW 19.28.341. This late assertion of Bay View's lack of qualifications suggests that Mr. Flake is motivated not by desire to protect the public or by any serious concerns about the value of the time and material received but rather by desire not to pay for labor and materials received that improved his real property.

The contention that the contractor did not hold a valid license at the time that it performed the work is completely contradicted by CP 99. At any time after August 13, 2007, when a one day suspension was imposed, Bay View had a right to commence or maintain any suit or action in any court of this state pertaining to work or business by submitting the same evidence it submitted in support of the CR 2A motion that it had an unexpired, unrevoked and unsuspended license issued under the provisions of Chapter 19.28 RCW.

Flake contends that settlement agreements are analyzed as contracts. The dissolution cases of *Baird vs. Baird* 6 Wn.App 587, 494 P.2d 1387 (1972) and *In Re Marriage of Ferree* 71 Wn.App 75, 43, 856 P.2d 706 (1993) plus *In Re Patterson* 93 Wn.App 579, 584, 969 P.2d 1106 (1999) form the foundation for the decision in *Brinkerhoff v. Campbell* cited above and in particular the discussion at 99 Wn.App pages 696 and 697. These cases are more properly considered as disputes about the disclosures made and the circumstances surrounding the settlement agreement. Flake instead asserts a statutory, jurisdictional bar to the

action. Bay View contends that it met the requirements of licensing and that the attempt to inquire further must use the process established by the legislature and by the Board of Electrical Certification as a predicate to denying the relief requested by Bay View.

Ordinarily, and as applied in the *Patterson* 93 Wn.App 579: at 589

“The trial court did not abuse its discretion when it declined to find mistake of fact based on Patterson’s misunderstanding of CR 2A.

CR 2A is a defense that may be asserted to block summary enforcement of an agreement resolving all or part of a case. When a genuine dispute over the existence of the agreement or of a material term is established by the party resisting enforcement, the moving party may prevail either by showing the disputed agreement was made on the record or by showing it was reduced to writing and signed by the party or attorney denying the agreement.

Patterson failed to establish a genuine dispute over the existence of the agreement or a material term. As such, he could not assert CR 2A to resist enforcement of the agreement. The trial court did not abuse its discretion in enforcing the agreement.”

These quoted conclusions about the enforcement of settlement calling for \$135,000.00 to be paid for the half interest of property being partitioned is not substantially different in its contractual character from the Memorandum of Settlement reached by Flake and Bay View over the unpaid time and materials subcontract agreement. Flake attempts to override the process by asserting its own conclusion about the license of

Bay View without having followed the procedural steps necessary to show that the license was revoked or suspended.

Because this case involves a clear reference to arbitration of all matters arising under the Subcontractor Agreement the Court should consider application of Chapter 7.04A RCW. In this regard Bay View directs the Court's attention to RCW 7.04A.150(2):

“The arbitrator may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties or upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the arbitration proceeding and all other parties have an opportunity to respond.”

The contentions now made by Flake in the appeal of the trial court's Order and Judgment, come after several opportunities to challenge the license of Bay View. The first occurred before the parties entered into the Subcontractor Agreement at all. The owner had the right to consult the administrator of licensing and to gather such evidence as he considered relevant to the decision to employ Bay View.

If Flake found cause for questioning Bay View's license later a complaint to the Department of Labor and Industries is the proper course of action. By such complaint exhaustion of administrative remedies would be the accomplished. When suit was filed Flake had the right to assert any jurisdictional claim to dismiss the Bay View Complaint. CR 12(b)(6). [CP 119, 120] In this case the contract submits to arbitration all

matters arising between the parties. Flake had an opportunity on March 30, 2010 to move for dismissal of the case based on the licensing evidence provided they had given notice to Bay View that this was a motion they intended to make to dispose of the claim. RCW 7.04A.150. No such notice was given.

Furthermore, nothing in the arbitration statute RCW 7.04A.040 which preserves certain “non waivable” requirements identifies licensing contractors as non waivable. The Court should consider these reasonable opportunities that the process afforded Flake to resolve the licensing contentions on a fair clash of the evidence. When a party does not avail itself of such opportunity they waive their rights. In this case the grounds for the trial court Order and Judgment include waiver by Flake of its right to contest the licensing requirements applicable to the Subcontractor Agreement.

Recent Supreme Court of Washington case provides an example of contract principles applied to a settlement arising from an RCW 4.84.250 mandatory arbitration and offer to settle was accepted. *McGuire vs. Bates* 169 Wash.2d 185, 234 P.3d 205 (2010) held that an offer to settle “all claims” precluded homeowner in a contractor dispute from trial de novo for attorney fees. The court proceeded from the premise that “...the objective manifestations of the parties plainly show that they intended to settle all claims, ... including attorney fees...” *McGuire* ibid at 191. In

the case at bar the issue was not attorney fees but the license of Bay View as grounds for avoiding the contract for time and materials charges.

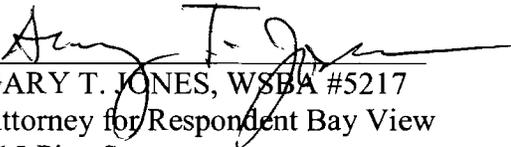
## V. CONCLUSION

If the court finds that the issues raised on appeal were not waived by Flake or that a material issue of fact or law has been demonstrated by Flake to strike down the objective manifestation of intent to resolve all claims between the parties in the Memorandum of Settlement, then the case should be remanded to the trial court for an evidentiary hearing on the relevant issues. The procedure for such a remand is laid out in the line of cases cited by Bay View including *Brinkerhoff supra, pp 9 & 10*.

The trial court had sufficient grounds for ordering enforcement of the Memorandum of Settlement and giving Judgment to Bay View. The license of Bay View was in place, unrevoked and not suspended before, during and after the work was done for Flake. The contractual nature of the Settlement and the adequacy of consideration for the Settlement based on time and materials or performance of Bay View is not in question. Bay View asks the court to affirm the trial court.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of January 2012.

JONES & SMITH

  
GARY T. JONES, WSBA #5217  
Attorney for Respondent Bay View  
415 Pine Street  
PO Box 1245  
Mount Vernon, WA 98273  
(360) 336-6608