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Court of Appeals
Division I
State of Washington

No. 72047-3

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

SUZANNE MANCHESTER,

Defendant - Appellant,

v.

CECO CONCRETE CONSTRUCTION, LLC,

Plaintiff - Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. James D. Cayce)

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. **Ceco Barely Refers the Payments to Bedrock that Completely Undercut Each and Every Cause of Action of Ceco against Manchester**

Ceco Concrete Construction, LLC (“Ceco”) barely mentions the set of facts which completely undermine each and every cause of action alleged by Ceco in this proceeding. Suzanne Manchester (“Manchester”) provided the Trial Court with the supporting detail, including cancelled checks, and a summary of the very substantial amount of funds of Manchester and/or her spouse Alan Manchester as well as a summary of those funds put into the bank account of Bedrock Floors, Inc. (“Bedrock”). Such deposits represent a total defense to all of the causes of action of Ceco because in the ultimate sense, each and every cause of action of Ceco against Manchester is based upon some harm being accrued by Ceco as a result of the banking activity of Bedrock. From a purely conceptional standpoint, and just for the sake of discussion, even if Ceco could prove that Manchester made the most egregious, glaring, and obvious payments out of the Bedrock Floors, Inc. (“Bedrock”) bank account to herself, Ceco could not prevail upon any legal theory, including those alleged in this proceeding, if Manchester had turned around and put funds back into the Bedrock

bank account in an amount equal to or greater than the aforementioned disbursements. The obvious reason for this conclusion is that if Manchester put more funds into Bedrock than she allegedly took of Bedrock, then there is no harm to Ceco whatsoever. The corollary of this is that if Manchester put in more funds to Bedrock than she took out, again speaking only hypothetically, Manchester's actions have only helped Bedrock, and by extension, Ceco.

Very tellingly, Ceco chose to barely mention the following facts concerning the fund analysis of Bedrock as of May, 2010, which was the approximate date that Alan Manchester commenced his employment with Ceco:

In Bedrock's bank account:	\$19,172.51
Accounts Receivable Bedrock collected over the following months that were in no way related to Ceco:	\$77,800.33
Various amounts coming into Bedrock as shareholder loans from Manchester:	\$73,478.00
CECO payments to Bedrock which were part of the overall compensation package of Mr. Manchester for 20 months at \$4,000.00 per month:	<u>\$80,000.00</u>
TOTAL:	<u>\$250,450.84</u>

(Dkt. 41D, ¶¶ 2,3,13 & 14)

Ceco has identified by dollar amounts the sum of approximately \$100,000.00, and alludes to “thousands” of other dollars that it claims were wrongful disbursements to or for the benefit of Manchester, but without documenting any of these additional “thousands”. Manchester described to the Trial Court and to this Court in her Opening Brief how those payments were consistent with the manner in which Bedrock operated prior to Alan Manchester’s employment with Ceco, and how Bedrock chose to operate during the employment of Alan Manchester by Bedrock. (Dkt. 41D, ¶11)

Some of the pertinent facts are that after selling Alan Manchester and Manchester on the whole pitch of Alan Manchester becoming an employee of Ceco, rather than continuing as an employee of Bedrock (which proposition included Manchester allowing the transfer of all of the business operation assets to Ceco for next to nothing in terms of consideration) Ceco ended up demanding that Bedrock continue to operate rather than shut down when Alan Manchester, as the key man of Bedrock, left Bedrock to join Ceco. A former Ceco employee Gregory Tadie (“Tadie”) described in his Declaration (Dkt. 57, ¶ 3) that Ceco demanded that Bedrock continue to act as the contractor and allow Ceco to act as Bedrock’s sub-

contractor on three projects, specifically the Kahuku, Arizona Memorial, and Schofield Barracks projects, (“the Three Projects”). This meant that instead of being able to wind down the company, and disburse the substantial funds that Bedrock had in the bank at the time, together with what Bedrock would collect over the ensuing months on projects completely unrelated to Ceco, Bedrock had to continue to operate as a contractor in Hawaii and to continue to incur all of the expenses and liabilities of acting as the contractor on the Three Projects. But for the demand from Ceco upon Manchester that Bedrock continue to act as the contractor on The Three Projects, both the funds in Bedrock’s bank account and the accounts receivable collected would have been available for disbursement to Manchester through the normal winding down process of Bedrock. Instead, Ceco forced Bedrock to continue to incur costs to operate as a contractor on the Three Projects. The mantra that Ceco kept saying to Alan Manchester (nicknamed “Buzz”), and therefore to Manchester, when it demanded the cooperation of Bedrock to act as the contractor on the Three Projects, was that “Buzz was not to be hurt” by that process. (Dkt. 57, ¶ 5) The use of the term “Buzz” was used inclusively to refer also to Manchester and Bedrock, since it would make no sense for Alan Manchester to not

suffer loss but for Bedrock and/or Manchester to suffer loss by Bedrock continuing to act as the contractor on the Three Projects. That particular concept of “Buzz was not to be hurt” is laughable now since Ceco has completely changed its tune to doing whatever it can to “hurt” Mr. Manchester.

Perhaps the most clear cut funds put into Bedrock by or for Manchester were the amounts stated above that were characterized as shareholder loans from Manchester in the amount of \$73,478.00, and the \$80,000.00 which Ceco paid to Bedrock as part of Alan Manchester’s compensation package. The total of those two items alone come to \$153,478.00, which amount is far in excess of any and all disbursements to which Ceco objects in this proceeding. Ceco does not dispute the \$80,000.00 which it paid to Bedrock because Ceco knows exactly what those payments were and what they were for. As to the \$73,478.00 in shareholder loans, Ceco seeks to quibble about Manchester’s characterization of those as shareholder loans, but that is a red herring. Regardless of whether those funds were paid in as additional capital, shareholder loans, or even gifts from Manchester, they are funds which Manchester was entitled to the benefit of without any question. If Ceco wants to in fact dispute Manchester’s

entitlement, that means that there is a fundamental disputed issue of material fact as to whether those funds should be treated as exonerating payments by Manchester.

B. Ceco's Description Of The Facts Is Materially Inaccurate And Demonstrates The Existence Of Disputed Issues Of Material Fact.

Ceco did not purchase the operations of Bedrock. If Ceco had in fact purchased the operations of Bedrock, the circumstances under which this litigation arose would never have occurred. Manchester agreed to simply hand over to Ceco, without charge, the existing contracts and the future work of Bedrock, and caused all of the cement mason employees, including her own husband, to terminate their employment with Bedrock and for those persons to become employees with Ceco. The only thing that Bedrock was paid for by Ceco was its tools and equipment at their used item values, but the total payment received by Bedrock from Ceco for handing over all of its operational assets to Ceco was a far cry from the value of Bedrock as a business. This transaction could only be justified in light of the employment agreement that Ceco had entered into with Manchester's husband Alan Manchester, which agreement was to employ Alan Manchester until he retired, he then being 61 years old. Like many of the promises of Ceco

to Manchester, Bedrock, and Alan Manchester, Ceco ran roughshod over man of its key commitments to such persons.

In the arbitration proceeding between Ceco and Bedrock, the arbitrator held that Bedrock was a fiduciary towards Ceco, despite the fact that Bedrock had simply signed Ceco's subcontract forms which were presented to Bedrock on the Three Projects. Those contracts were priced between Bedrock and Ceco at the same price per square or lineal foot as Bedrock charged the general contractors, and could be described as zero markup contracts, although as mentioned previously, Bedrock was not supposed to be out of pocket one dime for the Three Projects.

C. Ceco's Response Brief Only Confirms That There Are Genuine Issues of Disputed Material Fact With Respect To Ceco's Claim Of Corporate Disregard Doctrine

After citing cases concerning the corporate disregard doctrine, Ceco's response merely assumes certain factual matters are undisputed rather than acknowledging that there are disputed issues of material fact. As stated previously, Ceco's arguments in this case are based upon its own assumptions and assertions that certain expenses were "personal" rather than possibly for a business purpose, and certainly ignores all of the funds that Manchester, Bedrock itself, and Alan Manchester put into the corporate account. There is no evidence or

allegation that Manchester somehow deceived Ceco into thinking there was no corporate entity as Ceco was well aware that Manchester was the sole stockholder, director, and officer of the corporation, and that her spouse Alan Manchester was an employee holding the title of Project Manager.

Ceco has asserted that Manchester used the Bedrock corporate account as her personal account. The Manchesters had a personal bank account her husband, and that that the personal account was used for their purely personal expenses. Consistent with that statement, Manchester has testified that she continued to operate Bedrock in the same manner in which she had operated it before Alan Manchester became an employee of Ceco. Manchester has also provided evidence that she operated Bedrock in a manner intended to be as tax advantaged as possible, (which is what any prudent business person would do) which meant having the Corporation pay for as many of the expenses of Bedrock as possible for Bedrock's operating as a business away from its tax home in Seattle, Washington. (Dkt. 55, ¶ 9) Furthermore, Manchester has provided evidence to the Court that she, together with her husband Alan Manchester, had their own personal account from which they paid what they considered to be their personal expenses. In

fact, Ceko has in its possession, by virtue of having issued a subpoena, copies of the bank statements and cancelled checks for the personal bank account of Alan and Suzanne Manchester for the period of April, 2010 through May, 2012. The existence and the contents of those bank statements and cancelled checks establish that there was a distinction drawn between the corporate financial activities of Bedrock and the personal financial activity of Alan and Suzanne Manchester as individuals.

In order to avoid admitting that there is a disputed issue of material fact, Ceko claims that the distinction between personal and business deductions was apparent “on their face”. As this Court well knows and as the Trial Court should have known, business deductions can come in various categories of expenses. The mere that fact that Ceko alleges these expenses to be “personal” does not establish that they are in fact a personal expense. Manchester disputed that fact as to almost all of the expenses which Ceko claimed to have been personal, and as to the exceptions that Manchester could not remember or explain a business purpose, these transactions were minimal and more than made up for by the funds Manchester put back into Bedrock. As the testimony of Bedrock’s CPA stated, it is commonplace for closely held

companies to have an imperfect record of keeping corporate expenses perfectly distinct from personal living expenses. As the CPA stated, one of the roles of the CPA is to then sort through what was deductible and what was not, and to treat such transactions appropriately under the tax laws. (Dkt. 41 F, ¶¶ 3, 4 & 5)

D. Ceco's Reply Brief Concerning Its Fraudulent Transfer Causes Of Action Merely Assumes Around The Disputed Issues Of Material Fact

As stated previously, Ceco's pleadings are entirely based upon its assumption that on the face of the transfers that they are personal and therefore Bedrock receive no "reasonably equivalent value". As stated previously in some depth it is highly disputed and very much a disputed issue of material fact as to whether or not the contested expenses paid out of the Bedrock checking account were business related or were strictly personal. Ceco does not dispute, nor could it reasonably dispute, that before each of these transactions with third parties, there was in fact a reasonably "equivalent value" exchanged with the payment recipient, whether it be for meals, payment of rent, utility payments, food, supplies, or other items or services. The question, and very much a disputed issue of material fact, is whether or not those expenses have any reasonable relation to the business

operations of Bedrock. Manchester says that many of those expenses do have a reasonable relation. Ceco denies that fact. As to the relatively few transactions which Manchester acknowledges were of a personal nature, again, those expenses are overwhelmingly made up for by the contribution of clearly personal funds by Manchester and Alan Manchester.

Ceco cites the case of *Clearwater v. Skyline Constr. Co. Inc.*, 67 Wn. App. 305, 835 P.2d 257 (1992), for the proposition that if there was no reasonably equivalent value, a transfer is constructively fraudulent if any one of three conditions exist. Ceco cites those conditions as: 1, a debtor was engaged or about to engage in the business or a transaction for which its remaining assets were unreasonably small; 2, the debtor intended to incur, or believed or reasonably should have believed that would incur, debts beyond its ability to pay as they became due; or 3, the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. Rather than engage in any analysis of those three requirements, Ceco asserts that they are “undisputed” (Resp Br. Page 20). First, there has been no evidence or even a suggestion by Ceco that the assets of Bedrock were unreasonably small when Bedrock (in May 2010)

continued to operate for the Three Projects. Second, as to the requirement that the debtor “intended to incur or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due,” Manchester provided the Trial Court with evidence that the expenses which Bedrock paid out toward the Three Projects were for operating Bedrock during that same time frame and which expenses were more than equal to any funds that Bedrock would owe to Ceco on the subcontracts. If there was any question as to that intent or what Manchester knew or should have known, such should have been questions of fact that would need to be determined by a trial, rather than determined upon Summary Judgment. Lastly, the third element relates to transfers when the debtor “was insolvent at the time of the transfer or became insolvent as a result of the transfer”. The unprecedented nature of this case is that the “transfers” to which Ceco objects are actually a multitude of payments to third parties rather than a single or small group of transfers. In reality, Bedrock continued to operate just like it had prior to Alan Manchester commenced work for Ceco and, without the flow of new jobs and new revenues, the money of Bedrock eventually ran out over the course of almost two years. The fact of a company eventually running out of money when it has to

continue to operate without new contracts to generate profit and recover overhead should not come as a surprise to anybody with common sense. The challenge, which Ceco has not in any way met or even attempted to meet, is to determine *when* Bedrock became insolvent. Wherein the typical fraudulent conveyance case is usually very clear that a transfer is made while insolvent, such as a corporate insider simply writing a check without consideration to a brother or sister just before the company closed, it is clear and obvious that such is a fraudulent transfer. However in this case, we have a company continue to operate and spend money for its operating expenses (regardless of whether Ceco would acknowledge that they are deductible business expenses) and over the course of almost two year period, the money eventually runs out. Ceco has provided no analysis as to when Bedrock became insolvent, and it is guaranteed that the Trial Court made no such in depth analysis when Ceco failed to do so. Instead, Ceco has effectively made the assumption of insolvency from the very beginning of the employment of Alan Manchester with Ceco in approximately May 2010. This Court is referred to the table contained on pages 32 and 33 of Appellant's Opening Brief, which

table is itself a reproduction of what Ceco provided the Trial Court in its Summary Judgment Motion. That table is reproduced here:

Bedrock Checks Signed by Manchesters			
Amount	Recipient	Date	Purpose (All cites to Manchester Dep)
\$2,400	S. Manchester	9/28/10	No explanation. Ex. 5, 29:20-30:1.
\$2,500	Cash	9/30/10	No explanation. Ex 5, 30:2-7.
\$2,100	Cash	2/3/11	No explanation. Ex. 5, 30:8-11.
\$2,465.55	Cash	2/22/11	No explanation. Ex. 5, 30:12-17.
\$2,700	S. Manchester	6/23/11	No explanation. Ex. 5, 30:18-25.
\$450	A. Manchester	2/22/11	Check signed by A. Manchester himself. Ex. 6, 35:5-17.
\$3,000	S. Manchester	11/7/11	No explanation. Ex. 5, 31:1-6.
\$300	S. Manchester	3/15/12	No explanation. Ex 5, 31:7-18.
\$108.10	Paul Kim, MD	7/13/10	Personal Doctor. Ex. 7, 39:4-13.
\$300	Freedom Recovery	8/4/10	Daughter H. Moon's Medical Expense. Ex. 8, 40:24-42:13 (Multiple payments)
\$750	Macy's	1/19/12	Payment on Macy's Credit Card. Ex.9, 43:18-44:12 (Multiple payments)
\$3,000	Hsueh Ching Takano Smith	5/10-12/11	Monthly rent for Hawaii condo. Ex. 12, 47:14-48:19 (Multiple payments)
\$1,800	ERA	'10-'11	Payment for son's apartment. He would provide Manchester with cash and she would write a check to landlord. Ex. 13, 48:24-49:13 (Multiple payments)
Multiple Amounts	John Brohard	'10-'12	Work on Black Diamond personal Residence. Ex. 16, 53:24-54:17.
Multiple Amounts	Time Warner Cable	'10-'12	Hawaii Cable TV. Ex. 22, 62:2-8.
\$735	AT&P Landscape Serv.	4/11/11	Black Diamond Personal Residence Landscaping. Ex 27, 65:25-66:10.
\$600	Tony Phan	3/7/12	Black Diamond Personal Lawn Care. Ex. 27, 66:11-18.
\$3,000	Chase Bank	1/11/12	Manchester's personal account. Ex. 33, 70:24-71:12, 94:1-11.

As the Court can see, many of the expenditures which Ceco now contest date in 2010, including the now contested charges of the rent of Bedrock on its lease of the Hawaii condo from May, 2010. The obvious question raised by these facts is: when did Bedrock become insolvent? Ceco would apparently argue that it became insolvent on May, 2010, when Bedrock started doing business with Ceco under the subcontracts. Manchester has argued that the insolvency of Bedrock was not created until the Arbitrator's ruling on the Ceco v Bedrock Arbitration proceeding in April, 2013, which date was many months after the last of the Bedrock funds were disbursed from its bank account.

Ceco attempts to prop up its case by claiming that Manchester provided no evidence of reasonable equivalent value. Considering that Manchester in advance of her deposition, informed Bedrock in writing that her clarity of thinking and memory were impaired, the fact that Manchester could not recall about three years later under the pressure of a deposition what particular checks were for does not constitute compelling evidence.

Ceco acknowledges in its Response Brief that there was in fact a disputed issue of fact with respect to the testimony of Manchester regarding her running various expenses through the Bedrock checking account when Ceco makes the statement “because she *implausibly* considered them business expenses” (Rep. Br. Page 21). Instead, Ceco simply assumes that they were not business related expenses. Certainly, Ceco’s statement in its Response Brief “that issue has already been adjudicated in Ceco’s favor” merely again assumes the outcome of this Appeal, since this proceeding is the adjudication of that matter.

One distinction that needs to be drawn is the great difference between what the Arbitrator was reviewing in terms of costs to charge to Ceco versus what Bedrock was entitled to incur and pay in its normal operating procedure which it continued to follow after Alan Manchester became employed by Ceco. The fact is that Bedrock did not seek to charge Ceco with those costs that Bedrock incurred which were related to the way in which Bedrock chose to operate, which included being generous with employees and covering much of the expenses the Manchesters were incurring to be working away from their tax home. Ceco tries to assert in its Response Brief that Bedrock incurring and

deducting living expenses away from its tax home would have violated US tax law, but there is absolutely nothing on the record to support such assertion. Indeed, Ceco's counsel stated at the oral argument on the Summary Judgment Motion that "this is not a tax case" (RP, page 9). Now that Ceco has apparently recognized the significance of Manchester's and Bedrock's reliance upon the guidance received from the Company's CPA, Ceco resorts to completely unsubstantiated and unsupported assertions.

There is a distinction between the expenses related to performing the Three Projects and "keeping Bedrocks doors open" compared to the normal and regular business operational expenses of Bedrock. Manchester has been clear in testimony provided to the Trial Court that she chose to continue to operate Bedrock in the manner it had operated prior to Alan Manchester's employment with Ceco. And certainly, it was within Manchester's right to operate Bedrock in that manner. Bedrock had plenty of money in the bank, had substantial accounts receivables, and Manchester and Alan Manchester poured even more money of their own into Bedrock during the entire period in dispute. As it was, Ceco opposed Bedrock's claim of a even \$500 per month of office rent for the portion of the Hawaiian condominium that

Bedrock rented during the period of time in question. One can only imagine what Ceco's response would have been had Bedrock attempted to claim as an offset the entirety of the rent Bedrock paid for the time in question. Since Bedrock's name was on the lease, and Bedrock continued to operate, is it not incumbent upon Bedrock to pay its rent in full each month and every month? Of course it is.

Ceco argues in footnote 5 on page 22 of its Response Brief that it did not move for Summary Judgment on the basis of RCW19.40.051(b). If Ceco acknowledges that it did not file for Summary Judgment on the cause of action based on that statute, Manchester has no further need to address that cause of action.

Ceco claims falsely that once Ceco "assumed Bedrock's business" in May, 2010, Bedrock "no longer had any assets". That assertion clearly is false, or at least constitutes a disputed issue of material fact, since Manchester provided the Trial Court with substantial information concerning the funds Bedrock held in the bank and the substantial account receivables which Bedrock had as of May, 2010. Consequently, Bedrock had plenty of assets in May, 2010.

Ceco also falsely claims that Ceco was Bedrock's only creditor. The trial should have taken and this Appeals Court can take judicial

notice that if a business is going to continue and operate in any jurisdiction, it is going to continue to have expenses and incur the costs of staying open, and each of those individuals or other entities represents a creditor of the company. Bedrock, like just about every company, had rent to pay, utilities, bookkeeping expenses, entertainment expenses, supplies, and any number of other categories of expenses that are needed to run a business. It is false by Ceco to claim that the only necessary activity of Bedrock was to:

... receive payments from the prime contractors on the Projects and pass them onto Ceco, less any legitimate administrative costs it incurred. (Resp. Br. Page 23)

In fact, due to the requirement from Ceco to Bedrock that it continue as the contractor with the general contractors on the Projects, Bedrock was required to and did in fact fully perform the Three Projects and was liable if it failed to do so. The fact that Ceco provided the labor to perform the Projects did not in anyway remove or eliminate Bedrock's contractual obligation to continue to perform on the Three Projects. The assertion by Ceco otherwise is simply a convenient fiction that has no basis in truth, reality, legality, or common sense.

E. Ceco’s Response Brief Concerning Its Breach Of Fiduciary Duty Causes Of Action Only Begs The Question As To Disputed Issues Of Material Fact

Ceco provided the Trial Court no analysis as to the “solvency” of Bedrock, nor does Ceco attempt to create a solvency analysis now at the Appellate level.

Certain facts are indisputable. First, when Bedrock commenced work on subcontracts with Ceco on the Projects, Bedrock had considerable cash and accounts receivables, all of which funds and receivables had nothing to do with anything to which Ceco would be entitled. Over approximately the following two years, the cash and collected accounts receivables of Bedrock were eventually depleted. Not that there would be any great surprise in that eventuality since Bedrock was continuing to incur expenses to operate but was charging the general contractors the same rate to be paid by Bedrock to Ceco.¹

Ceco cites the case of *Hein v. Forney*, 164 Wash. 309, 2 P.2d 741 (1931) for the following proposition:

[T]he equitable interests of the shareholders and creditors are altered by the insolvency; and the directors or managing agents, who originally stood in a fiduciary relation to the company, become placed in a fiduciary relation to its creditors...

¹ The Ceco-Bedrock subcontracts did contain language suggesting a very small amount of funds could be kept by Bedrock from the gross proceeds received from the General Contractors on the Three Projects, but Ceco disputed this interpretation.

(Resp. Br. Page 25)

However, the *Hein* case still begs two questions, first as to the determination of the actual solvency or insolvency of Bedrock, and the second as to when such insolvency occurred. When the arbitrator made the Award on April 8, 2013 to disallow some of Bedrock's expenses against Ceco, Bedrock became insolvent. However, all of the transactions which Ceco now has characterized as a breach of fiduciary duty took place months if not years before the insolvency of Bedrock. Without any analysis whatsoever being provided by Ceco, the Trial Court merely had to assume, at the insistence of Ceco, that Bedrock was insolvent, or at least ignore the disputed issue of fact.

Ceco attempts to merely brush away the protection that Manchester was entitled to under the Business Judgment Rule. To accomplish this feat, Ceco utilizes a classic bootstrap analysis, which is to assume that Manchester was operating in bad faith or with an improper purpose in her transactions. Ceco ignores the most pertinent testimony of the CPA, which testimony was cited verbatim in Appellant's Opening Brief. In short, Manchester was relying in good faith upon the CPA's advice to run expenses through the business in order to maximize their deductibility. Ceco claimed, without authority,

that because Manchester received the CPA's advice through her spouse Alan Manchester, that she was not entitled to the Business Judgment Rule. Such a position is not only without legal authority but also defies common sense. Corporate officers and directors delegate tasks all the time and rely upon information provided by subordinates. If Ceco's argument was correct that an officer or director could only rely upon the Business Judgment Rule if they personally heard the information from the CPA or from some other authoritative source, the intended beneficial and shielding effect of the Business Judgment Rule would be largely eliminated.

F. Ceco Provides No New Arguments In Its Response Brief Concerning Its Unjust Enrichment Cause Of Action

After citing some black letter law and providing this Court with some conclusory statements, Ceco's analysis concerning the unjust enrichment claim, Ceco asserts that the fact that Manchester poured in more money into Bedrock's account than Ceco claims she took is "irrelevant". However, that assertion is flatly contradicted by Ceco's own statement of the black letter law for the elements of unjust enrichment, which state as follows:

1. The defendant receives a benefit;
2. The received benefit is at the Plaintiff's expense; and

3. The circumstances make it unjust for the defendant to retain the benefit without payment.

If Manchester put in more money than Ceko claims she received, then a priori Manchester did not receive a benefit. If Manchester did not receive a benefit, then the non-existent benefit was not at Plaintiff's expense. Lastly, if there was no benefit, the circumstances of the situation do in fact make the non-existent benefit irrelevant. In any event, because the actual circumstances in question are Manchester poured in far more money than she allegedly received, there is only a *benefit* received by Ceko, not a detriment suffered.

G. Ceko's Arguments Concerning The Award of Attorney's Fees By The Trial Court Are Without Merit

Manchester has shown that the Trial Court's determination that Manchester had a fiduciary duty towards Ceko was improper. Because Ceko's application for an award for attorney's fees was based upon the alleged breach of fiduciary duty, Ceko's award of attorneys at the Trial Court was improper.

Ceko alleges a new basis for attorney's fees based upon the corporate disregard claim. Ceko cites two cases, *DGHI Enters. v. Pacific Cities, Inc.*, 91 Wn. App. 109, 956 P.2d 324 (1998) and *Burns v. Norwesco Marine, Inc.* 13 Wn. App. 414, 535 P.2d 860 (1975).

However, both the *DGHI* and *Burns* cases are inapplicable here. The *DGHI* involved a lessor bringing suit against shareholders of a corporate lessee. The *DGHI* Court stated at page 116 as follows:

The premise for awarding fees here was that DGHI attempted to pierce PCSI's corporate veil and hold the individual shareholders liable on the lease, which includes an attorney fee provision. DGHI prayed for fees in its complaint. Therefore, had the attempt to pierce the corporate veil been successful, DGHI would have been entitled to collect from the individual defendants. See *Culinary Workers*, 91 Wash.2d at 371-72, 588 P.2d. 1334. The lease's promises operate bilaterally, as it must by statute. Thus, because DGHI would have been entitled to fees, the reciprocal policy of RCW 4.84.330 entitles the defendants to fees.

The attorney's fees clause to which Ceco refers in its Response Brief is contained in the subcontracts between Bedrock and Ceco on the Three Projects. However, this case was not with respect to the enforcement of the subcontracts but upon completely different causes of action. Consequently, the holding of *DGHI* is inapplicable here.

As for the *Burns* case, the ruling is completely analagous to the *DGHI* case. In *Burns*, the Court held the signor of a promissory note liable for attorney's fees under the attorney's fees clause contained in the very promissory note that the plaintiff was trying to enforce against the defendant under the theory of

piercing the corporate veil. Again, the causes of action of Ceco in this proceeding are not to enforce the subcontracts but based upon other legal theories that are either created by case law or statute.

II. CONCLUSION

Manchester has shown how the Trial Court erred in entering Summary Judgment in favor of Ceco. Manchester respectfully requests that the Court reverse the Trial Court's rulings and remand the case for further proceeding.

DATED this 2nd day of February, 2015.

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DECLARATION OF SERVICE

I declare that on this 2nd day of February, 2015 I caused to be served the foregoing document on counsel for Respondent Ceco Concrete Construction, LLC, at the following address:

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Dated: February 2, 2015
Place: Bellevue, Washington