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COURT OF APPEALS

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

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MARGARET P. DALY and "JOHN DOE" DALY, wife and husband, dba
MARGARETANGELO INTERIORS, and COLONIAL AMERICAN
CASUALTY & SURETY COMPANY, a Maryland corporation,

Appellants/Defendants,

vs.

FLOOR EXPRESS, INC.,

Respondent/Plaintiff

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Assignment of Error

It was error for the Trial Court to dismiss the claims of a general contractor against a subcontractor in privity of contract with the general, but not with the owner, for breach of contract by performance of defective work on the basis that the general contractor lacked standing to complain about its subcontractor's defective performance and on the basis that the owner of a project is a necessary and indispensable party to any action involving defective work on the project.

Issues Pertaining to Assignment of Error

A. Is a general contractor entitled to the benefit of its bargain, that is: proper work by a subcontractor, such that it suffers a remediable injury when its subcontractor performs defective work; hence, does a general contractor have standing to pursue a breach of contract action against a subcontractor, with whom it is in privity of contract, when the subcontractor fails to perform as promised and when the subcontractor's work is defective?

B. Is the owner the proper party to assert any claim for defective work against a subcontractor even though the owner lacks privity of contract with the subcontractor?

C. Is the owner a necessary and indispensable party to any action between a general contractor and a subcontractor involving defective work performed by the subcontractor?

D. Are liquidating pass-through agreements (under which parties to a contract agree to settle or suspend claims based on one of them pursuing a mutual “pass-through” claim against a party up or down the chain of contractual privity) proper and enforceable?

E. Is a dismissal on the eve of trial of a case *sua sponte*, based on unpled and unproved affirmative defenses, proper?

II. STATEMENT OF THE CASE

Appellant Margaret Daly appeals from a ruling (and from a failure to reconsider the ruling) of the Trial Court. Specifically, the Court erroneously dismissed Margaret Daly’s counterclaims on the eve of trial

based on unpled affirmative defenses raised by Plaintiff, Floor Express, for the first time in a hearing on Margaret Daly's Motions in Limine.

This case began when Respondent, Floor Express, filed a Complaint against Margaret Daly seeking payment of the unpaid contract balance Floor Express claimed was due on its subcontract with Margaret Daly. (CP 7-10.) Margaret Daly had withheld payment based on a back-charge against Floor Express when Floor Express's work failed. (CP 15-18; CP 78-81.) The cost to cure Floor Express's defective work exceeds the amount otherwise due to Floor Express, resulting in a substantial net amount owing to Margaret Daly. (CP 78-81; CP 595-603.)

In October 2002, Margaret Daly was hired by Providence Mother Joseph Care Center in Olympia to design and remodel some dining areas for an extended care facility. (CP 7-10; CP 15-18.) Margaret Daly met with Andy Schandl, an owner of Floor Express, to discuss flooring for the project. Ms. Daly told Mr. Schandl that the flooring would be used in an extended care facility's dining areas, that there would be wheelchairs, walkers and spillage on the floor, and that the floor would need to be mopped three times a day. Mr. Schandl recommended a product that he said would give the look of a hardwood floor but would work for the

facility. Mr. Schandl stated that the product was suited to a heavy commercial use and was easy to clean. (CP 78-81.)

Floor Express provided Ms. Daly with separate proposals for each of the rooms included in the project. In each proposal, Floor Express promised to perform the installation of the flooring "*in a workmanlike manner according to standard practices*". Ms. Daly paid the amounts of the first three proposals as they became due. By the time the fourth signed proposal had been installed, Ms. Daly and her client, Mother Joseph's, were having concerns about the floors. As a result, Ms. Daly did not pay the amount of the fourth proposal and the fifth proposal was canceled the same day that it was signed. (CP 78-81.)

Ms. Daly contacted Floor Express many times regarding the concerns with the flooring but those concerns were never adequately addressed by Floor Express. In December of 2003, Ms. Daly sought out the professional opinion of Terry Weinheimer, a certified floor inspector. Mr. Weinheimer reported that there were unacceptably wide gaps between some of the boards, some of the boards were not adequately offset, and the flooring had expanded and locked in at the wall in other places. (CP 78-81.) According to Mr. Weinheimer, the major reason for the floor

problems was that the floor was installed without an adequate vapor barrier. A vapor barrier should have been installed and turned up the walls at the base to deter vapor emissions. The manufacturer's instructions require the use of a vapor barrier. Because this was not done, the installation of the floor was below industry standards. Mr. Weinheimer reported that gaping and moving of the floor will continue to occur and become worse due to the improper installation of the floor and that the only proper way to correct the floor is to fully replace it. (CP 71-77; 78-81; CP 595-603.)

Mr. Weinheimer also told Ms. Daly that the flooring was not suitable for use in an extended care facility. The floor was designed for residential or light commercial use, not for the moderate to heavy use that is standard in an extended care facility. The floor will be easily damaged by wheelchairs, walkers and dropped objects. The manufacturer's instructions state that only wheelchairs with soft rollers should be used on the floor. Additionally, the instructions clearly prohibit wet mopping, which is a necessity in an extended care facility. (CP 71-77; 78-81.)

Floor Express brought this lawsuit claiming to be owed \$6,740.84 for the installed flooring and for the cost of restocking the flooring that

was canceled by Ms. Daly on the day it was ordered. (CP 7-10.) Margaret Daly has countersued for the cost of replacing the flooring and removing and replacing cabinetry that was installed over the floor. (CP 15-18.)

Margaret Daly's claims for damages resulting from the breach of contract and misrepresentation by Floor Express total \$50,655.42. (CP 15-18; 71-77; 78-81; 196-200; 595-603.) In Answer to Margaret Daly's counterclaim, Floor Express pled only two affirmative defenses: "estoppel" and "express consent." Floor Express did not plead any of the other affirmative defenses listed in CR 8. (CP 255-256).

Daly and Mother Joseph's entered a joint prosecution and defense agreement. That agreement provided that Daly would prosecute a breach of contract claim against Floor Express seeking all damages caused by Floor Expresses breaches at her own expense, and share any recovery with Mother Joseph's according to a formula agreed upon between Mother Joseph's and Daly. Daly also indemnified Mother Joseph's from any other claims arising through her, and Mother Joseph's indemnified Daly from any claims by third parties associated with the floors. (CP 223-225; 327-345; 426-435; 585-603; RP 12/2/05, p 16, l. 21 - p 18, line 24; p 20, line 2 - p 21, line 18.)

The matter proceeded through litigation. Daly served Floor Express with interrogatories, but Floor Express served none on her. Daly identified an expert to testify regarding the installation error, Floor Express did not do so. Discovery closed, and on the eve of the first trial in February, 2005, Floor Express had no expert witness to rebut Daly's expert's opinion that the floors were installed incorrectly. Thus, Daly would have been entitled to a directed verdict on the issue of defective installation, since Floor Express had no evidence whatsoever to contradict Daly's expert. (CP 53-54; 57-57; 306-319; 406-407; 580-581; RP 12/2/05, p34, lines 6-19.)

The Trial Court, *sua sponte*, continued the first trial date, although Daly was first set and was prepared to try the case. Thereafter, Floor Express petitioned to re-open discovery so that it could name an expert on the issue of installation defects, and have that expert inspect the floors. Daly objected on the basis that discovery was closed and that re-opening discovery would be substantially prejudicial to her position. The Trial Court ordered discovery reopened, allowed Floor Express to identify a

new expert, and allowed this new expert to inspect the floors. (CP 444-445; 500-545; 578-579; RP 12/2/05, p 29, lines 14-23; p 48 , l. 20, - p 49, l. 10.)

Floor Express's newly-hired expert conducted an inspection of the floors and found that they were defective and improperly installed.

A new trial date of November 7, 2005 was set. (CP 245-246.) One week prior to the trial, on Thursday, November 3, Floor Express's attorney told the Trial Court, in a conference call with both attorneys, that he was not prepared to try the case. Nonetheless, the case proceeded to trial on November 7.

At the trial, Daly brought Motions in Limine, which had been served upon Floor Express as soon as the parties were informed they were going to trial. In particular, Daly did not want Floor Express to put on evidence or argument regarding the unpled affirmative defenses of release and waiver. The only affirmative defenses pled by Floor Express were "estoppel" and "express consent." (CP 255-256.)

The Trial Court asked Floor Express's attorney if he intended to present evidence and argument of "waiver" and "release". He stated that he did. The Trial Court asked him if he intended the affirmative defense

of “express consent” to include “waiver” and “release”. He stated that he did. Daly’s attorney objected that it was entirely unfair to allow the use of a Trojan horse affirmative defense, “express consent”, which is not even listed in CR 8, and which may apply only to torts (being a variety of assumption of risk), but not in a contract case. (RP 11/7, p 4, l. 15 - p 5, l. 13.) The Trial Court ruled that Floor Express could put in evidence and argument for both “waiver” and “release”. (RP 11/7, p , l. 21 - p 6, l. 14.).

Floor Express then said it had some motions to argue. None had been noted. (RP 11/7, p 6, l. 15 - p 8, l. 13.) Nonetheless, at 9:37 a.m., Floor Express’s attorney handed Daly’s attorney a “trial brief”, which cited no authority, and was supported by no sworn affidavits, advancing for the first time the theory that Mother Joseph’s was a necessary party and that Daly, the general contractor, had no standing to sue its subcontractor for breach, since the bad floor injured Mother Joseph’s, and not Daly. (CP 296-302; RP 11/17, p. 28, l. 13 - p. 29, l. 1.)

Daly’s attorney objected that this was nothing more than a summary judgment motion, brought at least a month after the deadline for hearing dispositive motions, brought without any notice whatsoever, and without any citation to authority or sworn testimony to support the

contention that Daly had no damages. Furthermore, no affirmative defense stating that a necessary party was not in the suit had been pled by Floor Express. The motion was both procedurally and substantively completely incorrect. (RP 11/17, p. 28, l. 13 - p. 29, l. 1) Nonetheless, the Trial Court heard the motion. (RP 11/17, p. 6, l. 15, *passim*.)

The Court ruled that, as a matter of law, in any breach of contract claim involving alleged defects in construction, the owner of the project is a necessary party even if there is no dispute between the owner and the general contractor as to defects. In fact, the Trial Court ruled that the Owner is the only proper party to assert a claim for defective work on a construction project, regardless of the contractual relationships and privity of contract involved. The dismissal of Margaret Daly's counterclaims was both procedurally and substantively improper, and the dismissal effectively denied Margaret Daly a proper and fair opportunity to present her claims and defenses at trial. RP 11/17, p. 30, l. 6., *passim*.)

Margaret Daly had previously accepted her liability to Owner and memorialized that position by entering a Joint Prosecution Agreement with the Owner. (RP 11/7/05, p. 31, l. 17; p. 32, l. 16; p. 39, ll. 3-25; p. 40, l. 19; p. 41, l. 1; p. 45, ll. 3; p. 46, l. 10; p. 48, ll. 22-p. 49; l. 17; RP

12/2/05; p. 16, l. 15; p. 17, l. 24; p. 21, l. 7; p. 22, l. 9; p. 23, l. 23; p. 25, l. 2; p. 30, l. 24; p. 31, l. 19) That Agreement is a liquidating agreement, establishing the liabilities on the Prime Contract but leaving the exact amount of damages to be calculated based on the outcome of the pass-through action. (RP 11/7/05, p. 24, l. 17; p. 25, l. 10; p. 26, ll. 16-20; p. 29, ll. 21-24).

The Court's ruling was based on the Court's deep confusion about the rights of owners to sue subcontractors with whom they are not in privity of contract. Owners cannot sue subcontractors for economic losses, such as the cost to cure, because they lack privity. (RP 11/7/05; p. 12, l. 15; p. 13, l. 8; p. 21, l. 21; p. 23, l. 4; p. 44, l. 5; p. 45, l. 11; RP 12/2/05, p. 14, l. 4; p. 15, l. 8; p. 20, l. 16; p. 21, l. 9; p. 37, l. 22; p. 40, l. 15; p. 40, l. 14; p. 41, l. 12). They collect from the subcontractor only derivatively, by collecting from the contractor the amount the contractor collects from the subcontractor. While Owners are sometimes parties to the collection action, they are not necessary parties because the Contractor/Subcontractor collection action only involves the subcontract.

The Trial Court said she thought the owner was a necessary party, and that the joint defense and prosecution did not contain an assignment of

the owner's claim to the general contractor. Daly's attorney argued that this was not a lien foreclosure action, which was the only type of action in which the owner would be a necessary party in a lawsuit regarding a payment dispute between a general contractor and a subcontractor. (RP 11/7/05, p 9, l. 8 - p 11m l. 5.) Daly's attorney reminded the Trial Court that in this state, under Berschauer Phillips vs. Seattle School District, 124 Wn.2d 816 at 821, 881 P.2d 986 (1994), a party had no claim to economic damages from another party unless it was in privity of contract with that party, and that since Mother Joseph's had no contract with Floor Express, it had no claim directly against Floor Express which it could assign to Daly. (RP 11/7/05, p 12, l. 15 - p 13 l. 8.) Further, Daly's attorney argued that the joint defense and prosecution agreement was a liquidating agreement between the owner and the general under which they resolved their claims based upon the reciprocal promises set forth therein, and that if Mother Joseph's damages were at issue, they were being sought by Daly on Mother Joseph's behalf in an ordinary pass-through agreement arrangement, which is quite common in construction litigation. (RP 11/7/05, p 24, l. 17 - p 25, l. 10; p 26, ll. 16 - 20)

The Trial Court did not accept any of the arguments and ruled that the joint defense and prosecution agreement was not supported by consideration (not even an argument made by Floor Express's counsel) (RP 11/7/05, p 51, ll. 2-5), and that it failed to recite that Mother Joseph's had assigned its claims against Floor Express to Daly. (RP 11/7/05, p 43, ll. 7-17.) The Judge gave Daly two weeks to get the necessary assignment, or she would dismiss all of Daly's counterclaims.

Thereafter Daly's counsel contacted Mother Joseph's Corporate Counsel, and an addendum was entered which made clear that Mother Joseph's was relying on Daly to keep Mother Joseph's out of the litigation, and to recover all damages it had suffered from Floor Express. This addendum clearly showed that Mother Joseph's had ratified the suit by Daly against Floor Express and assigned all claims Mother Joseph's had against Floor Express, if any existed as a matter of law. These documents were submitted along with a lengthy brief, and certain other motions. (CP 327-345; 370-388; 395-398; 399; 426-435; 436-439; 595-603.)

A hearing was set for December 2. Daly's attorney again objected to the procedural irregularity in having to face summary judgment without notice on the day of trial and to the substantive defects in that motion. It

was clear that Mother Joseph's had ratified the Daly counterclaim; that Mother Joseph's had no claim for economic damages directly against Floor Express (although an assignment of any such rights was included in the addendum the Trial Court required); that Daly and Mother Joseph's had entered a pass-through agreement which obligated Daly to recover Mother Joseph's losses from Floor Express. (RP 11/7/05; p. 26, ll. 16-20; p. 31, l. 4; p. 32, ll. 10; RP 12/2/05; p. 29, l. 24; p. 30, l. 15)

Nonetheless, at the end of the hearing the trial judge stated that she would not enunciate her reasoning, but that she was ordering that Mother Joseph's was a necessary party and had to be joined with two weeks, or all of Daly's counterclaims would be dismissed. Daly could not join Mother Joseph's under the liquidating agreement without breaching that agreement. (RP 12/2/05, p43, ll. 4-16.)

Thus, the Trial Court granted Floor Express's surprise, unnoted and improper motion in limine and denied Margaret Daly's properly noted and substantively proper motions in limine.

III. SUMMARY OF ARGUMENT

A. General Contractors can Enforce their Subcontracts.

Margaret Daly's argument rests on basic and fundamental

principles of contract law: A party to a contract is entitled to the benefit of its bargain, and is entitled to bring suit for breach of contract if that benefit is not received. (RP 11/7/05; p. 10, ll. 9-14; p. 40, l. 19; p. 41, l. 1; p. 42, l. 22; p. 49, l. 7; RP 12/2/05; p. 14, l. 11; p. 15, l. 8; p. 17, l. 3; p. 20, l. 18; p. 21, l. 16; p. 22, l. 9).

In response, Floor Express insists that claims cannot be passed through the chain of contract in the construction industry. Therefore, if a subcontractor fails to perform, and an owner does not get what it bought from its general contractor as a result, under the rule urged by Floor Express, neither the general contractor nor the owner could have any redress, unless the owner was actively suing the general contractor. This principle would insulate subcontractors for liability for bad subcontract work and would unnecessarily complicate and multiply construction claims. The Owner has no bargain with the subcontractor, so the Owner cannot sue the subcontractor for the benefit of any bargain. If a general contractor cannot sue a subcontractor for breach of contract, no one can, and subcontracts become meaningless. This outcome is legally unsound, undesirable, and fundamentally destructive to commercial intercourse.

The contract sued upon was between Daly and Floor Express. The general contractor is entitled to receive the benefit of its bargain in that contract, and to sue to receive that benefit if the subcontractor refuses to perform. The general contractor bargained for good workmanship and materials. Floor Express failed to provide good workmanship and materials. Margaret Daly is entitled to sue Floor Express.

Further, even if, as Floor Express asserts, an aggrieved owner is a necessary element of a general contractor's breach of contract claim against a subcontractor, that element exists here. Mother Joseph's was complaining about Floor Express's defective work. In the face of the owner's complaint, even if made informally rather than through litigation, the general contractor is entitled to seek redress from the subcontractor at fault. This is especially the case when the owner and the general contractor agree to a liquidating and joint prosecution agreement, as Ms. Daly and Mother Joseph's did here.

B. The Measure of Damages for Breach of Construction Contract Is the Cost to Cure.

The Washington Supreme Court has adopted the Restatement rule for computing damages for breach of construction contract. The measure of damages is the cost of remedying defects, excepting cases where that

cost is clearly disproportionate to value of benefit which the remedy would confer on injured party. Eastlake Const. Co., Inc. v. Hess, 102 Wn.2d 30, 46-49, 686 P.2d 465 (1984).

The Restatement (Second) of Contracts, § 344, states that “Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee: (a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.” Restatement (Second) of Contracts, § 344. Margaret Daly was entitled to the benefit of her bargain with Floor Express, and the cost to cure is the proper measure of damages for Floor Express’s breach of contract.

C. Secret Motions for Summary Judgment Heard and Granted In Limine are Not Proper.

A motion brought without proper notice and without citation to some arguably applicable legal standard is improper and must be denied out of hand. Davenport v. Davenport, 4 Wn.App. 733, 734, 483 P.2d 869 (1971). Floor Express did not plead the affirmative defenses it urged the Trial Court to accept, which the Trial Court did accept, as the basis for dismissing Margaret Daly’s claims and defenses.

In one blow, on an un-noted motion, best described as a 12(b)(6) motion, Floor Express, in a brief filed the morning of the first day of trial, and containing no authority at all, persuaded the Trial Court to dismiss all of Daly's claims and most of her affirmative defenses, based on unpled affirmative defenses. This entire episode has been a deviation from standard practice, and is rife with errors of law.

This summary dismissal, made on an unnoted motion on the first day of trial, without any authority, not only denied Mother Joseph's the refund to which it is entitled, but also denied Margaret Daly her affirmative defenses against Floor Express. By following such irregular procedures, dismissing claims and defenses based upon an unnoted motion to dismiss filed after the time provided for such a motion, unsupported by any law or evidence, the Trial Court departed the accepted and usual course of judicial proceedings and acted arbitrarily and capriciously, committing reversible error.

The Trial Court committed obvious error and probable error which completely altered the status quo and hamstrung Daly on the very eve of trial. A trial at this juncture would have been fruitless, and would have resulted in a certain appeal. It makes better sense to correct the errors

below now, and to let the parties proceed to their long awaited jury trial where all the claims of the parties can be resolved on the merits. The Trial Court's erroneous ruling should be reversed.

IV. ARGUMENT

A. **A general contractor has standing to pursue a breach of contract action against a subcontractor.**

The three-part test for standing to sue is (1) injury in fact to the plaintiff (2) caused by the defendant (3) that can be remedied, in whole or in part, by the requested Court action. Bras v. California Public Utilities, 59 F.3rd 869 (9th Cir. 1995).

Floor Express's failure to perform as promised is an actionable injury-in-fact. It is a breach of contract. That failure is the failure of Floor Express, providing causation. Black letter contract law provides the remedy – the cost to cure the defective work, which would place Margaret Daly in the position she would have been in had Floor Express performed by allowing her to provide her customer, Mother Joseph's, with the value Margaret Daly promised to provide.

Floor Express asserts that Margaret Daly was not harmed by Floor Express's breach and, therefore, lacks standing because she lacks an injury in fact. That is, Floor Express asserts that because it hurt Margaret Daly's

customer, rather than Margaret Daly herself, Margaret Daly lacks standing. This is incorrect. Floor Express promised to provide Margaret Daly with a suitable floor. Floor Express failed to do so. This failure is a failure to perform a promise made to Margaret Daly. That breach of promise is, by definition, a breach of contract. A breach of contract is, by definition, an actionable injury under general principles of contract law.

Further, it is simply inaccurate to recite, as Floor Express has done, that Mother Joseph's does not assert claims against Daly. Daly's exposure to this claim is undeniably a real injury under any standard. Mother Joseph's is on record saying it does indeed assert claims against Daly and Margaret Daly is liable to Mother Joseph's for any defect in the floor she provided to Mother Joseph, even if that work was performed by her subcontractor Floor Express. (RP 11/7/05; p. 19, l. 20; p. 20, l. 1; p. 44, ll. 11-12; p. 45, l. 15; p. 46, l. 10; p. 48, l. 22; p. 49, l. 17; RP 12/2/05; p. 10, ll. 5-10).

Daly faces liability to Mother Joseph's for the bad floors. For purposes of this appeal, and for purposes of the ruling below, the truth of Daly's allegation that Floor Express had incorrectly installed defective goods which were failing is presumed. Wright v. Jeckle, 104 Wn.App.

478 at 481, 16 P.3d 1268, (2001). Daly is in privity of contract with both Mother Joseph's and Floor Express. Mother Joseph's and Floor Express lack privity. A contract can be enforced only against those party to it. State v. Antoine, 82 Wn.2d 440, 444, 511 P.2d 1351 (1973). Thus, it cannot reduce or diminish the legal rights of those not party to it. Gall v. McDonald Industries, 84 Wn.App. 194, 201-2, 926 P.2d 934 (1996). Thus, Margaret Daly is the only party that can pursue economic losses against Floor Express. (RP 12/2/05; p. 20, ll. 7-21; p. 34, l. 20-24) Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816 at 821, 881 P.2d 986 (1994).

It is absurd to say that a general contractor does not have standing to sue a defaulting subcontractor without involving strangers to the contract. Lobak Partitions v. Atlas, 50 Wash. App. 493 at 497, 749 P. Wd 716 (1988). If a general contractor cannot enforce its subcontracts without the owner demanding such enforcement on suit, or threat of suit, then no general contractor could control the work at any project site unless the owner had pointed out defective work. In the construction context, a property owner is generally not a third-party beneficiary of a contract between the general contractor and a subcontractor. Warner v. Design and

Build Homes, 128 Wash. App. 34, 43,114 P.3d 664 (2005).

B. The Owner is not the proper party to assert any claim for defective work against a subcontractor because the Owner lacks privity of contract with the subcontractor.

1. The General Contractor is the Proper Party to Assert a Claim for a Subcontractor's Breach of a Subcontract.

It is black letter law of contracts that the parties to a contract shall be bound by its terms. Zuver v. Airtouch Communications, Inc., 153 Wash.2d 293, 302, 103 P.3d 753 (2004). "Privity of contract" is a general principle, applying to all contracts. Further, privity is a two-way street. Parties to contracts are in contract with each other, and strangers to the contract are not in privity. Pass-through agreements allow parties in chain contracts to pursue claims up and down the chain of contract. Here, the Court ruled that parties to serial contracts can pursue claims up the chain of contract, but not down the chain of contract. This ruling fails to respect the general principles that contract claims cannot be pursued without privity and that economic losses cannot be pursued except as contract claims.

A contract can be enforced only against those party to it, and cannot reduce or diminish the legal rights of those not party to it. State v. Antoine, 82 Wash.2d 440, 444, 511 P.2d 1351 (1973); Gall v. McDonald

Industries, 84 Wn.App. 194, 201-2, 926 P.2d 934 (1996).

Except for third-party beneficiaries, contracts can be enforced only by or against parties to them. State v. Antoine, 82 Wash. 2d 440 at 444; 511 P.2d 1351 (1973). In the construction context, the prevailing rule is that a property owner is generally not a third-party beneficiary of a contract between the general contractor and a subcontractor. Warner v. Design and Build Homes, 128 Wash. App. 34, 43, 114 P.3d 664 (2005) *citing* Tarin's, Inc. v. Tinley, 129 N.M. 185, 191, 3 P.3d 680 (N.M.Ct.App.1999); Thomson v. Espey Huston & Assocs., Inc., 899 S.W.2d 415, 419 (Tex.App.1995). The Court in Warner stated:

Such contracts [between a principal contractor and subcontractors] are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted. The installation of plumbing fixtures or the construction of cement floors by a subcontractor is not a discharge of the principal contractor's duty to the owner to deliver a finished building containing those items; and if after their installation the undelivered building is destroyed by fire, the principal contractor must replace them for the owner, even though he must pay the subcontractor in full and has no right that the latter shall replace them. It seems, therefore, that the owner has no right against the subcontractor, in the absence of clear words to the contrary. The owner is neither a creditor beneficiary nor a donee beneficiary; the benefit that he receives from performance must be regarded as merely incidental.

Warner v. Design and Build Homes, 128 Wash. App. at 43.

The Court should disregard Respondent's argument concerning Mother Joseph's status as the real party in interest because it is not supported by law or fact. The Trial Court incorrectly determined that Margaret Daly was not the real party in interest and ordered her to join Mother Joseph's Care Center, a non-party to the contract, or have her own claims dismissed. (RP. 12/2/05; p. 44, ll. 11-16). It is undisputed that Margaret Daly, not Mother Joseph's, is the party in privity of contract with Floor Express, the Plaintiff in this matter. It is also undisputed that Margaret Daly is also in contract with Mother Joseph's, and that Floor Express has no contract directly with Mother Joseph. (RP 12/2/05; p. 40, l. 14; p. 41, l. 12) Finally, it is undisputable, as a matter of law, that Margaret Daly is liable to Mother Joseph's for any defect in the floor she provided to Mother Joseph, even if that work was performed by her subcontractor Floor Express. (RP 11/7/05; p. 19, l. 20; p. 20, l. 1; p. 44, ll. 11-12; p. 45, l. 15; p. 46, l. 10; p. 48, l. 22; p. 49, l. 17; RP 12/2/05; p. 10, ll. 5-10)

Under ordinary circumstances, a stranger to a contract may not sue. A third party may enforce a contract to which he is not in privity only if the contracting parties intended to secure to him personally the benefits of the provisions of

the contract. A contract which only creates a general obligation to pay the costs of performing a particular undertaking does not show an intention to make such contract for the benefit of a third person who may have furnished necessary materials to some project.

Lobak Partitions v. Atlas, 50 Wn. App. 493 at 497, 749 P. Wd 716 (1988).

Margaret Daly is the real party in interest. She faces liability to Mother Joseph's for the bad floors. She is in privity of contract with both Mother Joseph's and Floor Express. Thus, she is the only party that can pursue economic losses against Floor Express. (RP 12/2/05; p. 20, ll. 7-21; p. 34, l. 20-24) Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816 at 821, 881 P.2d 986 (1994).

2. Even if the Owner, not the General Contractor, is the Real Party in Interest, this Matter is Proper Because the Owner has Authorized and Ratified it.

The Trial Court also erred in ruling that Margaret Daly's counterclaims would be dismissed unless Mother Joseph Care Center was joined in the action as the "real party in interest." Even if Mother Joseph's were the real party in interest, Mother Joseph's has ratified Daly's claims made upon Mother Joseph's and Daly's joint behalf. Rule 17 contemplates just such a ratification. See Rinke v. Johns-Manville Corp., 47 Wn.App. 222, 734 P.2d 533 (1987). The joint defense agreement

entered into by Mother Joseph's and Margaret Daly constitutes sufficient ratification under CR 17(a). A clear, plain, and timely expression by the real party in interest of its desire to acquiesce in and support the original action constitutes ratification for purposes of CR 17(a). In re Estate of Crane, 9 Wn.App. 853, 515 P.2d 552 (1973). By refusing to recognize ratification, the Trial Court committed clear error of law. By dismissing Daly's claims the Trial Court, while committing probable error, completely changed the status quo to the extreme prejudice of Daly. By doing so on these irregular procedures, the Trial Court abandoned the usual and accepted course.

Mother Joseph Care Center, if that entity is indeed the real party in interest, has ratified the counterclaim being pursued by Margaret Daly. "CR 17(a) is intended to protect the defendant from prejudice by insuring that a claim is prosecuted by the proper party. Dismissal under the rule is appropriate only when the Trial Court has allowed the plaintiff a reasonable time to bring the real party in interest into the suit and joinder, substitution, **or ratification** cannot be effected." Rinke v. Johns-Manville Corp., 47 Wn.App. 222, 734 P.2d 533 (1987) [emphasis added].

[M]odern rules of procedure are intended to allow the court to reach the merits, not to dispose of cases on technical niceties. CR 21, for example, allows liberal joinder and deletion of parties in order to reach the merits of a case: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Rinke v. Johns-Manville Corp., 47 Wn.App at 227. Mother Joseph's has ratified the action brought by Margaret Daly and has acquiesced in and supported it. (RP 12/2/05; p. 27, l. 14; p. 28, l. 1; p. 42, ll. 519; Gormally Declaration). Floor Express's argument that dismissal is appropriate because the real party in interest is not present is not supported by the law or the facts in this case.

Once the real party in interest has ratified the commencement of the action, dismissal under CR 17(a) is inappropriate. "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for *ratification of commencement of the action by*, or joinder or substitution of, the real party in interest." Kommavongsa v. Haskell, 149 Wn.2d 288, 67 P.3d 1068 (2003) [emphasis added].

The joint defense agreement entered into by Mother Joseph's and Margaret Daly constitutes sufficient ratification under CR 17(a). A clear,

plain, and timely expression by the real party in interest of its desire to acquiesce in and support the original action constitutes ratification for purposes of CR 17(a). In re Estate of Crane, 9 Wn.App. 853, 515 P.2d 552 (1973). The purpose of CR 17(a) is to expedite litigation so as not to allow narrow constructions or technicalities to interfere with the merits of a legitimate controversy. Id. CR 17(a) can even be used to join the real party in interest after trial for the purpose of receiving judgment.

Betchard-Clayton, Inc. v. King, 41 Wash.App. 887, 895, 707 P.2d 1361 (1985).

[T]he test for relation back under CR 17(a) and CR 15(c) is not whether the wrong party filed the lawsuit out of mistake or inadvertence, or even based upon a calculated risk as to this court's ultimate decision in a case of first impression regarding public policy, but rather whether the defendant had notice of the lawsuit and accordingly was not prejudiced, *and whether the real party plaintiff in interest ratified the lawsuit* or sought to be substituted as plaintiff within a reasonable time after objection by the adversary.

Kommavongsa v. Haskell, 149 Wash.2d 288, 317, 67 P.3d 1068 (2003)

[emphasis added]. Mother Joseph's, to the extent it had interests at stake in the lawsuit, ratified the suit by Daly, as contemplated by CR 17(a), and the Trial Court's ruling to the contrary was error.

C. **The Owner is not a necessary and indispensable party to an action for the subcontractor's breach of a subcontract.**

The Trial Court committed clear error by ruling that the owner was always a necessary party in a suit between a subcontractor and a general contractor. (RP 12/2/05, p . 31, l. 1 - p. 33 , l. 2.; p 43, ll. 4-16.)

In relevant part, CR 19 provides:

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might

be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Trial Court erred in ruling that the Owner, Mother Joseph's, was a necessary party to this litigation. (RP 12/2/05; p. 43, ll. 13-14). Carried to its logical extreme, the Court's ruling would make the owner a necessary party in every dispute between a general contractor and a subcontractor. A general contractor is entitled to enforce its contract with its subcontractors, and action or complaint by the owner is not a condition precedent to the general contractor's rights under a subcontract. (RP 12/2/05; p. 17, ll. 16-21; p. 26, ll. 10-25)

Further, Mother Joseph's is not a necessary party under CR 19. Mother Joseph's does not have an "interest in the litigation that the judgment cannot be determined without affecting that interest or leaving it unresolved." Harvey v. Board of County Comrs. 90 Wn.2d 473, 584 P.2d 391 (1978). The Court can afford complete relief to the existing parties without Mother Joseph's. To determine whether an absent party is indispensable, a court must consider whether "in equity and good

conscience" the action may proceed or must be dismissed under CR19(b) in light of the particular interests present in each case. Aungst v. Roberts Construction Co., Inc. 95 Wash.2d 439, 625 P.2d 167 (1981). In this case, there is no reason the action cannot proceed without Mother Joseph's.

D. Liquidating and pass-through agreements are proper and enforceable in Washington State.

Mother Joseph's and Daly had entered a joint defense and prosecution agreement, under which Margaret Daly was obligated to pursue a claim against Floor Express on behalf of Mother Joseph's and not join Mother Joseph's in the trial. (RP 11/7/05; p. 26, ll. 16-20; p. 31, l. 4; p. 32, ll. 10; RP 12/2/05; p. 29, l. 24; p. 30, l. 15) The Court effectively ordered Daly to breach her contract with Mother Joseph's or have her claim dismissed. (RP 12/2/05; p. 44, ll. 11-16).

The joint prosecution and defense agreement serves the salutary purpose of resolving claims between the owner and the general contractor without litigation on the prime contract. Such an agreement simplifies litigation by reducing the number of parties in litigation. Daly did not claim the floors were good. Daly agreed with Mother Joseph's that the floors were defective. Given this admission, why should Mother Joseph's face a trial when the party with whom it has a contract has admitted the

defect claim and is promising to recover the cost of cure from the responsible subcontractor? Judicial economy, benefitting all parties and the court, is served by such a liquidating agreement as was entered here.

Although the Court recognized that pass-through claims were quite ordinary when a subcontractor was pursuing a recovery through the general contractor against an owner, the Court did not believe the same contract principles applied when the owner and general contractor wished to pursue a claim against a subcontractor. (RP 12/2/05; p. 31, l. 13; p. 33, l. 23; p. 38, l. 22; p. 39, l. 24) The agreement Daly entered with the owner is just such a pass-through and liquidation agreement, and is completely unobjectionable. (RP 12/2/05; p. 29, l. 24; p. 30, l. 15)

The Trial Court's rule would preclude the practical application of pass-through agreements routinely used and relied on in the construction industry. Sometimes the chain of contract is very long. If it was necessary to have active litigation between every party in that chain, cases in Court would have unwieldy numbers of parties. Instead, the industry utilizes pass-through agreements.

Most frequently these are seen when a subcontractor contends it was damaged or delayed by an act of the owner. Then, the general

contractor agrees to pass that claim through against the owner. That is done in one of two ways: either the general assigns its contract rights to the subcontractor, and the subcontractor sues the owner under that assignment, or the general sues the owner on behalf of the subcontractor, and agrees to pass on the damages recovered from the owner, generally less a mark up and a cost of prosecution, to the subcontractor.

The Trial Court Judge recognized this common accommodation, but did not believe it worked in the other direction: an owner's claim being passed through a general contractor against a subcontractor. There is no legal justification for this distinction. Pass through claims work both up and down the chain of contract and greatly simplify the alignment of parties that actually have to come to Court. Just the two parties whose contractual interface is at issue in the claim need to be there. In this case that is the general contractor and its breaching subcontractor.

E. Sua Sponte Dismissal of a Case in Limine is Improper.

1. General Impropriety

On November 7, 2005, Margaret Daly brought a "Motion to Exclude Unplead Affirmative Defenses." The Trial Court denied Margaret Daly's motion, and ruled that Floor Express could assert the

unpled affirmative defenses of “waiver” and “release.” (RP 11/7/05; p. 2, l. 8; p. 4, l. 5; p. 5, ll. 2-27) The Court’s ruling was incorrect as a matter of law. Floor Express plead only two affirmative defenses: “estoppel” and “express consent.” Floor Express did not plead any of the other affirmative defenses listed in CR 8, nor any of the CR 12(b) defenses that must be raised in the party’s first responsive pleading. Specifically, Floor Express had not raised the CR 12(b)(7) defense of failure to join a necessary party.

CR 8(c) provides that a party must affirmatively plead certain defenses. If those defenses enumerated in CR 8(c) are not affirmatively pled, asserted with a motion to dismiss, or tried by the express or implied consent of the parties, such defenses are waived. DeYoung v. Cenex Ltd. 100 Wn.App. 885, 1 P.3d 587 (2000) *see also* Harting v. Barton 101 Wn.App. 954, 6 P.3d 91 (2000). Waiver and release are specifically enumerated in CR 8(c), and as such must be specifically pled as affirmative defenses. Failure to join a necessary party is specifically enumerated in CR 12(b)(7), and failure to raise that defense in the first responsive pleading results in a waiver.

After denying Margaret Daly’s motions in limine and allowing Floor Express to present the unpled affirmative defenses of waiver and

release, the Court allowed counsel for Floor Express to argue his untimely motion for summary judgment based on a third unpled affirmative defense not addressed in the Court's prior ruling: failure to join a necessary party. Floor Express argued that Margaret Daly's failure to join Mother Joseph Care Center as a defendant warranted dismissal of her counterclaim. It was error for the Court to consider Floor Express's motion.

Failure to join a necessary party is one of the seven affirmative defenses that must be raised in a party's first responsive pleading, or by Motion "made before pleading if a further pleading is permitted." CR 12(b)(7). Floor Express failed to raise the affirmative defense of failure to join a necessary party in its first responsive pleading, or in any subsequent pleading. A party is not entitled to an instruction relating to an affirmative defense which he failed to plead as required by CR 8(c). Haslund v. Seattle, 86 Wn.2d 607, 617, 547 P.2d 1221 (1976). A party has an affirmative duty to reveal its affirmative defenses in its Answer. Floor Express failed to do so. The Trial Court's denial of Daly's motions in limine to exclude unpled affirmative defenses was error. The Trial Court dismissal of Daly's claims based upon the unpled affirmative defenses of failure to join a necessary party was egregious error.

“The motion in limine is a motion that is made before the trial has begun.” 20 Am. Jur. Trials 441 § 2. “The term ‘in limine’ is a Latin phrase which may be translated ‘on the threshold’ or ‘at the outset.’ Broadly defined, it would apply to any motion made prior to the impaneling of the jury.” 75 Am Jur 2d. Trial § 94.

In one form, its purpose is to obtain an order in effect enjoining an opponent from using or mentioning certain prejudicial evidence before the jury or venire when the trial is under way. In another form, it seeks to compel the potential proponent of the prejudicial evidence to offer the evidence at the trial outside the presence of the jury and then to obtain a ruling as to its admissibility. A third variety involves a pretrial request by the party desiring to use the evidence for a ruling as to its admissibility. 20 Am. Jur. Trials 441 § 2.

The motion affords an opportunity to the court to rule on the admissibility of evidence in advance, and prevents encumbering the record with immaterial or prejudicial matter as well as providing a means of ensuring that privileged material as to which discovery has been allowed by the court will not be used at trial if it is found to be inadmissible.... It is the prejudicial effect of the questions asked or statements made in connection with the offer of evidence, and not so much the prejudicial effect of the evidence itself, that this very practical tool was designed to reach. Thus, the real purpose of a motion in limine is to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence which may irretrievably infect the fairness of the trial.

75 Am Jur 2d. Trial § 94.

“The motion should be granted only when the trial court finds two factors are present: (1) the material or evidence in question will be inadmissible at trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material or evidence will tend to prejudice the jury.” 75 Am Jur 2d. Trial § 1089.

“Consequently, before granting a motion in limine, courts must be certain that such action will not unduly restrict the opposing party's presentation of its case... [or] choke off an entire claim or defense...” 75 Am Jur 2d.

Trial §99. “[D]enial of the motion rarely imposes a hardship on the requesting party.” 75 Am Jur 2d. Trial § 1089.

Even when properly noted, Motions in Limine are not to be used as Floor Express used this one – to completely foreclose Margaret Daly’s claims and defenses on the eve of trial.

The ability to restrict interrogation at trial makes the in limine order a powerful weapon, but this power also makes it a potentially dangerous one. Consequently, before granting a motion in limine, courts must be certain that such action will not unduly restrict the opposing party's presentation of its case. An order in limine should only be used as

a shield and never to gag the truth and permit other evidence to mislead the jury because the order prevents such evidence from being rebutted. And it should not ordinarily be employed to choke off an entire claim or defense. It is clearly improper for the court to allow a motion in limine which limits or refuses the introduction of relevant admissible evidence.

Since the motion prevents a party from presenting his evidence in the usual way, its use should be exceptional rather than general, or at least selective. The motion should be used, if at all, as a rifle and not as a shotgun, with counsel pointing out the objectionable material and showing why the material is inadmissible and prejudicial. Since no one knows exactly how the trial will proceed, trial courts would ordinarily be well advised to require an evidentiary hearing on the motion when its validity or invalidity is not manifest from the face of the motion.

The use of motions in limine to summarily dismiss a portion of a claim has been condemned, and trial courts are cautioned not to allow motions in limine to be used as unwritten and unnoticed motions for summary judgment or motions to dismiss. Nor should the motion be used to perform the function of a directed verdict. Motions in limine are not to be used as a sweeping means of testing issues of law. And deficiencies in pleadings or evidence are not appropriately resolved by a motion in limine. Clearly, a motion in limine cannot properly be used as a vehicle to circumvent the requirements of rules of procedure.

75 Am Jur 2d. Trial §99.

The Trial Court's consideration of Floor Express's unnoted motion in limine violated these fundamental principles.

2. Procedural Impropriety.

There is also procedural impropriety in the manner in which this Court proceeding occurred. Floor Express used an unnoted motion in limine as a motion for summary judgment or directed verdict, attempting to limit the evidence to only that evidence that supports Floor Express's case, and seeking dismissal of counterclaims outright. The Trial Court, by granting the motion, prevented Margaret Daly from presenting her case or defenses. This process was straight out of Kafka's The Trial.

Floor Express's Motion was essentially an untimely Motion for Summary Judgment or Motion to Dismiss on unpled affirmative defenses first presented and heard on the day of trial. (RP 11/7/05; p. 16, ll 611; p 28, l. 4; p. 29, l. 1; RP 12/2/05; p. 26, l. 6; p. 27, l. 14) Floor Express's motion does not comply with the Court rules. Nonetheless, it was accepted by the Court. (RP 11/7/05; p. 37, l. 9-12; *see* p. 16, l. 6-11) This is a clear case of defense by ambush. Such sneak attack tactics are improper, and Trial Court's order should be reversed.

“With any written motion in limine, counsel should give notice to the opposing party in a form appropriate to the practice in the forum jurisdiction.” 75 Am Jur 2d. Trial § 105. Thus, the procedural notice requirement on a motion in limine can be handled in one of two ways. First, the motion can be treated as an ordinary motion, with the moving party providing five days’ notice as required by CR 6(d). Alternatively, CR 6(d) allows a different time to be set by order of the Court, and the Court often sets a special hearing of motions in limine on the eve of trial.

Floor Express’s motion was entirely untimely and unsound. First, Floor Express brought its motion on the first day of trial. Motions in limine are proper *pre-trial* motions, typically heard before the jury is seated. 75 Am Jur 2d. Trial § 94. While the motion in limine may be made at any time before the challenged evidence is offered or alluded to before the jury (even during the trial if there should be unexpected developments), as a practical matter the motion should be served and filed as early as possible in the proceedings. 75 Am Jur 2d. Trial § 105. Resolution of a motion in limine on the morning of trial has been criticized because the gravity of such a motion requires that it be resolved at a hearing, on the record, held prior to the date of trial . . . 75 Am Jur 2d.

Trial § 108.

Further, Floor Express's motion should not have been heard because they were set without proper notice. Floor Express's counsel served its motions in written form on Margaret Daly's counsel at 9:38 a.m., the morning of trial, after beginning his argument on that motion! CR 6(a) excludes weekend days from any time computation less than seven days. The written portion of Floor Express's motion was noted on one half-hour notice. This truncated notice is far less than the five days required by CR 6. The Court's hearing, let alone granting, the motion was an abuse of discretion.

F. Margaret Daly is Entitled to Fees on Appeal.

RAP 18.1 provides that when a party prevails on issues that, under law or contract, entitle the prevailing party to recover attorney's fees, the prevailing party can recover fees on appeal if that party included a prayer for fees in its brief. State v. Farmers Union Grain Co., 80 Wn.App. 287, at 296, 908 P.2d 386. This action is an action for breach of a contract. The contract contains an attorney's fees clause, entitling the prevailing party to attorney's fees under RCW 4.84.330. Such fees should be awarded in this

case. The amount is to be stated in an affidavit of the prevailing party within ten days of the decision awarding fees.

Margaret Daly is entitled to recover her fees on appeal and requests such fees.

V. CONCLUSION

A. **General Contractors can Enforce their Subcontracts.**

Margaret Daly's argument rests on ancient and accepted principles of contract law: A party to a contract is entitled to the promised performance, and is entitled to sue for damages for breach of contract if that promise is not performed. The issue of amount and extent of damages is a proper question of fact and cannot be resolved on summary pretrial proceedings.

The Trial Court ruled that a general contractor cannot sue a subcontractor for defective subcontract work unless it is in litigation with the owner. This rule fails to respect the independence of the subcontract obligations and rights from the prime contract obligations and rights. This rule would also unnecessarily multiply and complicate construction litigation, which is already complicated enough.

Margaret Daly and Floor Express had a subcontract. Margaret Daly is entitled receive proper performance of that subcontract. Floor Express failed to properly perform the subcontract. On these facts alone, without reference to other facts concerning the prime contract, Margaret Daly is entitled to sue Floor Express.

Further, even if an owner complaint is a condition precedent to a general contractor's breach of contract claim against a subcontractor, there is such a complaint here. Mother Joseph's did complain about Floor Express's defective work. In the face of this complaint, Margaret Daly entered and completed settlement negotiations with Mother Joseph's and took on the affirmative obligation to pursue a recovery from Floor Express.

B. Secret Motions for Summary Judgment Heard and Granted In Limine are Not Proper.

A motion brought without proper notice and without legal citation must be denied out of hand. Davenport v. Davenport, 4 Wn.App. 733, 734, 483 P.2d 869 (1971). Floor Express's motion is just such a motion. It should not have been heard. Further, Floor express's motion was brought without notice, raised for the first time in an argument on a

motion brought by Margaret Daly. This is summary judgment by ambush, and is improper.

Despite this rampant irregularity, the Trial Court granted Floor Express's "motion." The effect of this ruling is not only to deny Mother Joseph's the refund to which it is entitled; it is to deny Margaret Daly any meaningful hearing on her claim. A person cannot be denied their day in court on a motion in limine, let alone an unnoted motion in limine. By denying Margaret Daly her opportunity for a full and fair trial on the day of trial, the Trial Court acted arbitrarily and capriciously, committing reversible error. The Trial Court's erroneous ruling should be reversed, and this matter should be remanded for trial between the original parties on the original claims.

Respectfully Submitted this 6 day of October, 2006.

CUSHMAN LAW OFFICES, P.S.



Jon E. Cushman, WSBA #16547
Ben D. Cushman, WSBA #26358
Attorneys for Margaret Daly

CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S, the attorneys for the appellants herein. I am over the age of 18, not a party to this action and competent to testify to the facts set forth herein.

2. On **October 5, 2006**, I placed for next day delivery via ABC Legal Messengers a copy of Appellant's Opening Brief to be delivered to the following:

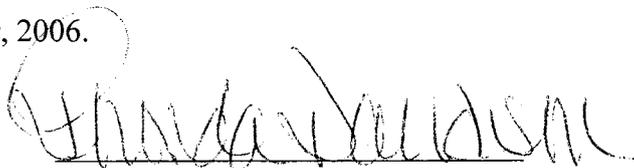
Richard Ditlevson
Ditlevson Rodgers
324 West Bay Drive NW, Suite 201
Olympia, WA 98502

3. On **October 5, 2006**, I placed for next day filing by ABC Legal Messengers and original and one copy of Appellant's Opening Brief to the following:

Court of Appeals, Division II
950 Broadway #300
Tacoma, WA 98402

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 5 day of October, 2006.



Rhonda Davidson

FILED
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STATE OF WASHINGTON
BY _____
CLERK