

No. 34301-1-II

**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

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
DEPUTY

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APPELLANT'S REPLY 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 contractor, but not with the owner, on grounds that the general contractor lacked standing to complain about the subcontractor's defective work.

### *Issues Pertaining to Assignment of Error*

- A. Is a general contractor entitled to the benefit of its bargain when its subcontractor performs defective work?
- B. Is the Owner the proper party to assert any claim for defective work against a subcontractor?
- C. Is the Owner a necessary and indispensable party to a claim by a general contractor against a subcontractor involving defective work performed by the subcontractor?
- D. Are liquidating and pass-through agreements proper and enforceable in Washington State?
- 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 Trial Court's erroneous dismissal of her counterclaims, on the eve of trial, based on unpled affirmative defenses raised by Plaintiff, Floor Express, without notice in a hearing on Margaret Daly's Motions in Limine.

Floor Express filed a complaint against Margaret Daly seeking payment of amounts allegedly due Floor Express on its subcontract with Margaret Daly on a project Margaret Daly was performing for Providence Mother Joseph Care Center in Olympia. (CP 7-10.) Floor Express promised to perform the installation of the flooring "*in a workmanlike manner according to standard practices*". (CP 78-81.) Margaret Daly, the Owner (Mother Joseph's), and all expert inspectors (including both Daly's expert and Floor Express's own expert) all agreed that Floor Express failed to perform its work in a proper workmanlike manner, causing the floor to fail. (CP 71-77; 78-81; CP 595-603.) Despite this, Floor Express refused to correct the defective work and failed to credit Margaret Daly for the cost to cure the defective work. Margaret Daly had back-charged Floor Express when Floor Express's subcontract work

failed, resulting in a net amount due from Floor Express to Margaret Daly. (CP 15-18; CP 78-81.CP 595-603.)

Floor Express filed a lawsuit seeking \$6,740.84 as the unpaid contract amount due. (CP 7-10.) Margaret Daly counterclaimed for the cost of cure, damages that 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." (CP 255-256).

Daly and Mother Joseph's entered a liquidating and joint prosecution and defense agreement, which required that Margaret Daly, at her expense, prosecute a breach of contract claim against Floor Express and share any recovery with Mother Joseph's. Daly also exchanged indemnification duties. (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.)

On trial's eve, Margaret Daly brought Motions in Limine seeking to bar Floor Express from putting on evidence or argument regarding the unpled affirmative defenses of release and waiver. (CP 255-256.) At the hearing, Floor Express's attorney admitted that he intended to present evidence and argument of "waiver" and "release". Daly's attorney

objected. (RP 11/7, p 4, l. 15 - p 5, l. 13.) The Trial Court ruled that Floor Express could assert the unpled defenses. (RP 11/7, p , l. 21 - p 6, l. 14.).

Floor Express then said it had some motions to argue even though it had not noted any. (RP 11/7, p 6, l. 15 - p 8, l. 13.) These motions were based on Floor Express's trial brief, which cited no authority, and was supported by no sworn affidavits, and which was given to Margaret Daly's counsel for the first time while the argument was underway. This brief raised a wholly new theory that Mother Joseph's was a necessary party and that Daly, the general contractor, had no standing to sue its subcontractor for breach. (CP 296-302; RP 11/17, p. 28, l. 13 - p. 29, l. 1.)

Daly's attorney objected. The motion was both procedurally and substantively completely incorrect. It was an untimely and unnoted summary judgment motion brought without notice on yet another unpled affirmative defense. (RP 11/17, p. 28, l. 13 - p. 29, l. 1) Nonetheless, the Trial Court heard and granted the motion. (RP 11/17, p. 6, l. 15, *passim*.)

This ruling was based on a misunderstanding of the rights of owners to sue subcontractors. 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, through a claim against the general contractor. While Owners are sometimes parties to the action, they are not necessary parties because the primary action only involves the subcontract. Further, Owners are not parties if the general acknowledges liability in a liquidating agreement.

Here, Margaret Daly had acknowledged her liability in a Liquidating and Joint Prosecution Agreement. (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) The Trial Court ruled that the owner was a necessary party with an independent claim. Margaret Daly's attorney reminded the Trial Court that under Berschauer Phillips vs. Seattle School District, 124 Wn.2d 816 at 821, 881 P.2d 986 (1994) Mother Joseph's had no claim against Floor Express to assign. (RP 11/7/05, p 12, l. 15 - p 13 l. 8.) Further, Daly's attorney argued that the liquidating agreement resolved any claim between Mother Joseph's and Margaret Daly. (RP 11/7/05, p 24, l. 17 - p 25, l. 10; p 26, ll. 16 - 20)

The Trial Court did not accept these arguments and ruled that the joint defense and prosecution agreement was not supported by consideration (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 assignment.

Thereafter, Margaret Daly and Mother Joseph's agreed to an addendum to the liquidating agreement that specified the consideration of the contract. Mother Joseph's was relying on Margaret Daly to prosecute the litigation and to recover damages from Floor Express on its behalf. This addendum further showed that Mother Joseph's had ratified Margaret Daly's claims against Floor Express and specifically assigned any and all claims Mother Joseph's had against Floor Express to Margaret Daly. (CP 327-345; 370-388; 395-398; 399; 426-435; 436-439; 595-603.)

The Court reheard the matter, and Margaret Daly's counsel renewed her objections to the irregular procedure and unpled affirmative defenses. Margaret Daly's counsel also presented the addendum to prove that the concerns of the Trial Court, as previously expressed, had been answered. (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, the Trial Court ruled that Mother Joseph's was a necessary party and had to be joined within two weeks or Margaret Daly's counterclaims would be dismissed. Daly could not join Mother Joseph's without breaching the liquidating agreement. (RP 12/2/05, p43, ll. 4-16.)

Floor Express's response is rife with factual misrepresentations. These factual errors, when corrected, completely undermine Floor Express's position before the Trial Court and here on appeal.

First, Floor Express asserts that Mother Joseph's is not asserting that it suffered any injury and is not pursuing any claim for redress of this injury against Margaret Daly. (Response, pp.10, 14, 15) This is false. Terry Weinheimer's Declaration clearly describes Floor Express's defective work and states how this defective work harmed Mother Joseph's. (CP 71-77.) The Addendum makes clear that the Liquidating Agreement includes, and liquidates based on Margaret Daly's admission of liability, "Mother Joseph's claims against Margaret Daly resulting from Margaret Daly's subcontractor performing bad work and providing bad materials. Such claims are believed to exceed \$50,000." (CP 434-435) Further, John Whipple's Declaration also refers to Mother Joseph's claim

against Margaret Daly, observing that the claim was liquidated in the Liquidating Agreement based on Margaret Daly's promises to pursue and share the proceeds of the claim as a pass-through claim against Floor Express. (CP 426-435 ) Finally, the Declaration of Kate Gormally also makes this point perfectly clear. (CP 595-603.)

I have reviewed the expert report by Terry Weinheimer. Mother Joseph's adopts that report as its position. Mother Joseph's therefore asserts that it was sold the wrong floor which floor was installed incorrectly. This floor will not last as long as it should. The only remedy is the removal and replacement of that floor. Mother Joseph, through its general contractor Margaret Daly, seeks the recovery of all damages necessary to correct the defects identified in the expert witness report. Specifically, Mother Joseph's seeks the cost to remove the incorrect floor, purchase correct flooring material, and install correct flooring material, and then reinstall all fixtures that must be removed in order to accomplish the above. I have reviewed the estimates submitted by Margaret Daly and adopt those damages as the damages suffered by Mother Joseph. In addition, Mother Joseph will suffer the inconvenience of this work occurring and should be entitled to some sort of remuneration to reflect that, which at a minimum should be at least 10% of the costs to correct.

Third, Floor Express is asserting that Mother Joseph's has no interest in the outcome of the claim Margaret Daly is prosecuting against Floor Express. This is false. The Liquidating Agreement entitles Mother Joseph's to participate in any recovery Margaret Daly has against Floor

Express – and the purpose of this participation is to allow Mother Joseph’s to cure Floor Express’s defective work. (CP 426-435; 595-603.)

Fourth, Floor Express is asserting that Mother Joseph’s is the real party in interest, but has not ratified or assigned its claims to Margaret Daly. (Response, p. 12) This is false. The Declarations of John Whipple and Kate Gormally show that Mother Joseph’s expects Margaret Daly to pursue a claim based on the findings of Terry Weinheimer. (CP 426-435; 595-603.) This is the claim here.

Finally, Floor Express bases much of its Response, as it based much of its argument before the Trial Court, on language that was included in an unsigned draft of a declaration of John Whipple (counsel for Mother Joseph’s) but excluded from his signed declaration. (Response, pp 15-16.) Floor Express asserts that the omission of the language from the draft, unsigned declaration in the final, signed declaration is evidence of the negation of the language omitted. This is false. The unsigned declaration is not evidence at all. Therefore, the differences between the documents is not evidence. Language can be omitted from a declaration for any number of reasons. Further, the evidentiary rules do not allow unsigned declarations to be treated as

evidence. Floor Express's attempt to squeeze evidence out of an unsigned declaration is improper and is not supported by any rule of evidence.

### **III. ARGUMENT**

As observed by the Amicus, the Association of General Contractors, this case presents important issues involving the prosecution of claims on construction projects in Washington State. The Amicus focuses on the issues of claim presentation, joint defense and prosecution of claims, and liquidating agreement, and the propriety and importance of such agreements in Washington.

However, there is an even more basic, and potentially more important, issue involved in this case. In Response, Floor Express argued that general contractors lacked standing because the owners, not the general contractors, are, in some unspecified way, the "real party in interest" on construction defect claims involving subcontractor work. Simultaneously, Floor Express acknowledged that the owner's lack of standing on these claims, as strangers to the subcontract, lack privity of contract with the subcontractor. This creates a Catch-22 on all claims against all subcontractors who perform defective work on any project. On Floor Express's argument, no one has standing to complain of defective

subcontract work. This argument is absurd, and is not supported by applicable law or sound public policy.

**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 (9<sup>th</sup> Cir. 1995). Strangely, even though Floor Express now claims that it is asserting that Margaret Daly lacks standing to sue Floor Express, Floor Express has never provided an analysis of Margaret Daly's standing applying this three-part test. Floor Express failed to provide any such analysis before the Trial Court. Floor Express again fails to provide any such analysis in its Response Brief. Rather, Floor Express merely asserts that Margaret Daly lacks standing in some unspecified way.

In contrast, Margaret Daly has provided an analysis of standing, proving that Margaret Daly has standing to sue Floor Express for breach of contract. Floor Express's failure to perform as promised is a breach of contract. This breach has resulted in Margaret Daly not receiving something she was promised in her contract with Floor Express. This

failure is a legal injury to Margaret Daly. There is a legal remedy available to redress this injury – the cost to cure the defective work.

Floor Express asserts that Margaret Daly lacks standing because she lacks an injury in fact. Floor Express asserts that because the defective work is owned by 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, as seen in the conclusion of the fact statement, it is a bold misrepresentation of fact to assert, as Floor Express has done, that Mother Joseph's does not assert claims against Daly. This is a critical fact. Margaret Daly's exposure to Mother Joseph's claims is a clear injury-in-fact. To win, Floor Express must engage in revisionistic history and a wilful misreading of the Liquidating Agreement, its Addendum, and the Declarations explaining the intent of those documents.

**B. *A General Contractor is the Real Party in Interest to Breach of Contract Action against a Subcontractor.***

The parties to a contract shall be bound by its terms. Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004). Parties to contracts are in contract with each other, but remain strangers to any other contract. A contract can be enforced only against those party to it. State v. Antoine, 82 Wn.2d 440, 444, 511 P.2d 1351 (1973). Owners cannot pursue breach of contract claims against subcontractors. Berschauer Phillips vs. Seattle School District, 124 Wn.2d 816 at 821, 881 P.2d 986 (1994). Daly faces liability to Mother Joseph's for the bad floors. Mother Joseph's and Floor Express lack privity. Daly is in privity of contract with both Mother Joseph's and Floor Express. The claim is Daly's.

Liquidating pass-through agreements allow parties to pursue claims up and down the chain of contract while respecting privity of contract principles. Here, the Trial Court invalidated this process. As the Amicus brief filed by the A.G.C. makes clear, this ruling was clear and costly error.

**C. *The Owner is Not a Necessary Party to, a Breach of Contract Action against a Subcontractor.***

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.) Under CR 19, a “necessary party” is a person in whose “absence complete relief cannot be accorded among those already parties” or who “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.

On these definitions, Mother Joseph’s is not a necessary party and the Trial Court erred in ruling that it was. (RP 12/2/05; p. 43, ll. 13-14). As seen above, a general contractor is entitled to enforce its contract with its subcontractors. The Owner is therefore not a person in whose “absence complete relief cannot be accorded among those already parties.” Further, given the presence and application of the Liquidating Agreement, Mother Joseph’s is not a party with an interest that trial of this matter could “as a

practical matter impair or impede.” Further, the terms of the Liquidating Agreement do not allow “any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.” One of the primary purposes of Liquidating Agreements is to prevent such impairment of relief or inconsistent relief while simultaneously simplifying litigation by limiting the number of necessary parties.

**D. *Even if Mother Joseph’s were a Necessary Party or the Real Party in Interest, Margaret Daly is the Proper Party to Pursue the Claim because Mother Joseph’s has Ratified this Action and has Assigned its Claims to Margaret Daly.***

The Trial Court also erred in ruling that Defendant’s counterclaims would be dismissed unless Mother Joseph’s Care Center was joined as a party to this action. In the Liquidating Agreement, Mother Joseph’s has ratified Daly’s claims made on behalf of Mother Joseph’s. In the Addendum to the Liquidating Agreement, Mother Joseph’s specifically assigned any claims it had to Margaret Daly, requiring that she pursue those claims on Mother’s Joseph’s behalf. This is a clear ratification and assignment, by Mother Joseph’s, of the claims made by Margaret Daly in this case. CR 17 blesses actions in such cases. Rinke v. Johns-Manville Corp., 47 Wn.App. 222, 734 P.2d 533 (1987).

CR 17(a) is intended to protect defendants from facing specious claims by insuring that claims have real substance to them. Dismissal under the rule is appropriate only if joinder, substitution, *or ratification* cannot be effected.” Rinke v. Johns-Manville Corp., 47 Wn.App. 222, 734 P.2d 533 (1987) [emphasis added]. (Floor Express misstates this rule as requiring dismissal “ if joinder *and* ratification cannot be effected.” (Response, p. 12.) Floor Express cannot prevail under the true rule.)

Mother Joseph’s has ratified the counterclaims and has acquiesced in and supported those claims. (RP 12/2/05; p. 27, l. 14; p. 28, l. 1; p. 42, ll. 519; CP 595-603). Mother Joseph’s has even assigned any claims it may have against Floor Express to Margaret Daly. Floor Express’s argument for dismissal unless Mother Joseph’s is joined is legally and factually wrong. “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].

In Response, Floor Express devotes a large portion of its brief to the argument that “Mother Joseph’s Has No Claim to Assign and no Ability to Ratify Daly’s Action.” (Response, pp 7-10.) This is Margaret Daly’s point in asserting that the General Contractor, not the Owner, is the real party in interest to breach of subcontract claims and has standing to pursue these claims. If a subcontractor breaches a subcontract, someone must have the right to assert a breach of contract claim. That person is the general contractor. In this case, that person is Margaret Daly, and she has properly asserted, and should be allowed to try, her counterclaims.

**E. *Liquidating Pass-Through Agreements are Proper and Enforceable in Washington State.***

Mother Joseph’s and Daly had entered a Liquidating Pass-Through Agreement under which Margaret Daly was obligated to pursue a claim against Floor Express, sharing the proceeds of trial with Mother Joseph’s to redress the harm suffered by Mother Joseph’s as a result of Floor Express’s defective subcontract work. (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 Liquidating Pass-Through Agreement in this case was not unusual. The A.G.C. of Washington’s Amicus Brief fully explores and justifies the utility, propriety and necessity of such Liquidating

Pass-Through Agreements under Washington law. The Trial Court erred in failing to respect the Liquidating Pass-Through Agreement in this case.

**F. *Sua Sponte Dismissal in Limine is Reversible Error.***

On the eve of trial, Margaret Daly brought a “Motion to Exclude Unplead Affirmative Defenses.” Floor Express noted no similar motion. Nevertheless, the Trial Court denied Margaret Daly’s motion, and dismissed her claims based on Floor Express’s assertion of unplead affirmative defenses of “waiver and release” and “failure to join a necessary party under CR 19.” (RP 11/7/05; p. 2, l. 8; p. 4, l. 5; p. 5, ll. 2-27)

This ruling was reversible error. Plaintiff plead only two affirmative defenses: “estoppel” and “express consent.” CR 8(c) requires that a party affirmatively plead certain defenses. If those defenses are not affirmatively pled, asserted in a timely and properly noted 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). Floor Express failed to plead any of the other affirmative defenses that it asserted in oral argument. Floor Express failed to note a timely or

proper motion to dismiss. Margaret Daly refused to consent to the affirmative defenses. It was error for the Trial Court to even entertain Plaintiff's untimely and unnoted motion. The Trial Court's order granting the motion is improper and should be reversed on this appeal.

As a motion on the threshold of trial, Floor Express's unnoted motion to dismiss was a motion in limine if it was any kind of motion at all. Motions in limine apply to exclude *evidence* to streamline trial. They are not properly used to dismiss or exclude entire *claims*. "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.

Motions in Limine are not substitutes for timely and proper pretrial motions for summary judgment under CR 56 or motions to dismiss under CR 12. They are also not substitutes for directed verdicts.

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.

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 order violated these fundamental principles.

Even if a motion in limine could be used to dismiss an entire claim, no motion to dismiss is proper unless the opposing party is given fair notice of the motion. This requirement is a basic rule of Due Process. Secret motions, especially secret dispositive motions, are fundamentally unjust. No court can legitimately entertain or allow such trial by ambush.

Here, Floor Express used its oral argument against a proper motion brought by Margaret Daly to present to the Trial Court an unnoted motion to dismiss Margaret Daly's counterclaims. The Trial Court granted this oral request as if it had been a properly noted and substantively justified motion. This ruling denied Margaret Daly a fair opportunity to present her claims, evidence or defenses at trial.

“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, a motion in limine can be handled in two ways. First, the motion can be noted five days' in advance of the hearing, as an ordinary motion under CR 6(d). Alternatively, CR 6(d) allows the Court to set a special hearing to hear motions in limine on the eve of trial.

Floor Express's motion was not proper under either of these processes. Floor Express never noted or briefed its motion. Rather, Floor Express used its “Trial Brief”, which was not in the form of a motion and which contained no analysis or authority and which was served on Margaret Daly's counsel at 9:38 a.m. the morning of trial, while oral argument on the “motion” was underway. In other words, this motion was

argued before it was served, insofar as it was ever served, on Margaret Daly!

CR 6(a) strictly requires one week prior notice of motions to allow parties to prepare for and respond to those motions. The written portion of Plaintiff's motion was noted, if at all, on one half-hour notice. The Court's hearing, let alone granting, this motion was reversible error.

**G. *Margaret Daly is Entitled to Fees on Appeal.***

RAP 18.1 provides that when a party prays for fees on appeal and prevails on issues that entitles the prevailing party to recover attorney's fees, the prevailing party can recover fees on appeal. 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 that contains an attorney's fees clause, entitling the prevailing party to attorney's fees under RCW 4.84.330. Margaret Daly is entitled to recover her fees on appeal and requests such fees.

**IV. CONCLUSION**

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

A party to a contract is entitled to the promised performance, and is entitled to sue if that performance fails. The Trial Court ruled that a

general contractor cannot sue a subcontractor for defective subcontract work unless the owner sues the general contractor. This rule fails to recognize that the subcontract set its own obligations, distinct from other obligations, even parallel obligations, that may exist under the prime contract. In the construction context, interwoven contracts are the rule. However, the Trial Court's ruling that all parties to all contracts must participate in litigation denies the independence of the various contracts and violates the rule that 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 Wn.2d 440, 444, 511 P.2d 1351 (1973); Gall v. McDonald Industries, 84 Wn.App. 194, 201-2, 926 P.2d 934 (1996). Further, the Trial Court's ruling denies the effectiveness of Liquidating Pass-Through Agreements. Such a rule would unnecessarily complicate construction litigation, deny contractors the right to determine and limit their own risks, and increase the cost of construction in Washington State.

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

Further, even if an owner's claim against a general contractor were a condition precedent to a general contractor's breach of contract claim against a subcontractor, there is such a claim here. Mother Joseph's did complain about Floor Express's asserted a claim against Margaret Daly as a result of Floor Express's defective work. Recognizing the justice of this claim, Margaret Daly chose to stipulate to liability and pursue pass-through damages rather than fight what she recognized as a doomed defense of Floor Express's work. This decision was responsible and honest. Margaret Daly should not be penalized for behaving with integrity and reason.

**B. *Secret Motions In Limine are Not Proper.***

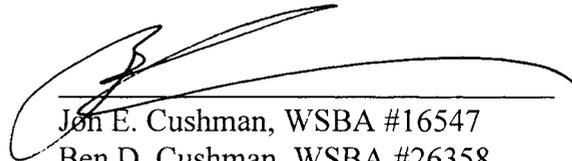
A motion brought without proper notice and without legal citation must be denied. Davenport v. Davenport, 4 Wn.App. 733, 734, 483 P.2d 869 (1971). Floor Express's motion was a surprise motion. The motion was brought without notice, raised for the first time in oral argument on Margaret Daly's proper motion. It should not have been heard.

Despite this clear violation of Due Process, the Trial Court granted Floor Express's "motion." This ruling not only denied Mother Joseph's the refund to which it was entitled; it also denied Margaret Daly any

meaningful opportunity to present her evidence, counterclaims or defenses. A motion in limine cannot be used to deny a litigant the right to try their claims. An unnoted motion in limine seeking dismissal of claims is doubly improper. By denying Margaret Daly a full and fair trial by granting an unnoted motion improperly entertained the morning of trial, the Trial Court's ruling is wrong. This Court should correct this violation of Due Process and reverse the Trial Court, reinstate Margaret Daly's claims, and order a fair trial on all the properly pled claims and defenses.

Respectfully Submitted this 18<sup>th</sup> day of January, 2007.

CUSHMAN LAW OFFICES, P.S.



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Attorneys for Margaret Daly

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S, the attorneys for the Appellant 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 **January 18, 2007**, I faxed and placed for next day delivery via ABC Legal Messengers a copy of Appellant's Reply Brief to be delivered to the following:

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

Matthew G. Johnson  
Law Offices of Kelly J. Sweeney  
3315 S 23rd St Ste 310  
Tacoma, WA 98405-1617

3. On **January 18, 2007**, 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 18 day of January, 2007.

  
Rhonda Davidson