

NO. 36353-4-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON,

UNR

CAMPBELL CRANE & RIGGING SERVICE, INC., Respondent

v.

BERSCHAUER PHILLIPS CONSTRUCTION COMPANY AND
SAFECO INSURANCE COMPANY OF AMERICA, Appellants

RESPONDENT CAMPBELL CRANE & RIGGING SERVICE, INC.
BRIEF

Albert F. Schlotfeldt, WSBA #19153
Quinn H. Posner, WSBA #31463

Attorneys for Respondents

Duggan Schlotfeldt & Welch, PLLC
900 Washington Street, Suite 1020
PO Box 570
Vancouver WA 98666-0570

(360) 699-1201
(360) 693-2911 Facsimile

TABLE OF CONTENTS

Table of Authorities.....ii

I. IDENTITY OF RESPONDENT.....1

II. ISSUES PRESENTED FOR REVIEW.....1

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT

 A. Second-tier subcontractors providing crane services are providers of labor only and are not required to give pre-lien notice.....3

V. REQUEST FOR ATTORNEY’S FEES AND COSTS PURSUANT TO RAP 18.1.....8

VI. CONCLUSION.....9

TABLE OF AUTHORITIES

CASES	PAGE
<u>C-Star Concrete Corp. v. Hawaiian Ins. & Guar. Co.</u> 8 Wn.App. 872, 509 P.2d 758 (1973).....	9
<u>Diamco, Inc. v. Mettler</u> 135 Wn.App. 572, 145 P.3d 399 (2006).....	9
<u>National Concrete Cutting, Inc. v. Northwest GM Contractors, Inc.</u> 107 Wn.App. 657, 27 P.3d 1239 (2001).....	5-7
<u>Neil F. Sampson Equipment Rental and Sales, Inc. v. West Pasco Water Systems Inc.</u> 68 Wn.2d 172, 412 P.2d 106 (1966).....	4, 5, 8
<u>Lakeside Pump & Equipment, Inc. v. Astin Construction Co.</u> 89 Wn.2d 839, 576 P.2d 392 (1978).....	9
<u>LRS Electric Controls, Inc. v. Hamre Const., Inc.</u> 153 Wn.2d 731, 107 P.3d 721 (2005).....	7, 8
<u>Sutherland v. Smith</u> 123 Wn. 518, 212 P.2d 1060 (1923).....	5
<u>Willett v. Davis</u> 30 Wn.2d 622, 193 P.2d 321 (1948).....	5
 STATUTES	
RCW 39.08.030.....	8, 9
RCW 39.08.065.....	3, 4
RCW 60.04.031.....	3, 4
RCW 60.28.015.....	8
 RULES	
RAP 18.1.....	9

ERROR! NO TABLE OF AUTHORITIES ENTRIES FOUND.

I. IDENTITY OF RESPONDENT

Campbell Crane & Rigging Service, Inc., Respondent, asks this court to affirm the Superior Court decision.

II. ISSUES PRESENTED FOR REVIEW

1. Is a second-tier public works subcontractor that performs crane services a provider of labor such that pre-lien notice is not required?

III. STATEMENT OF THE CASE

Plaintiff Campbell Crane & Rigging (Campbell) is a provider of fully maintained and professionally operated construction cranes that are rented on an hourly basis with a Campbell Crane operator. CP 29. Campbell was hired to perform crane lifting operations at the Firstenberg Community Center Project (Project) located in Vancouver, WA. CP 34. The Project was awarded to Berschauer/Phillips Construction Company (Berschauer) by the City of Vancouver. CP 34. Berschauer then entered into a subcontract with defendant Dynamic International AK, Inc. (Dynamic) to provide labor and materials for the Project. CP 34. Dynamic in turn entered into a subcontract with Campbell. CP 34. As such, Campbell was a second-tier subcontractor on the Project.

Campbell commenced work on the Project on January 13, 2005 and completed work on February 18, 2005. CP 35. Campbell provided crane work over this period of time and fully performed the contracted services. CP 35. Dynamic failed to pay Campbell for its work. Campbell attempted to recover payment in the amount of \$16,246.87 from Berschauer's bond and the retained percentage. CP 35. However, Berschauer claimed Campbell did not provide pre-lien notice as a provider of materials, which it alleged would wipe out Campbell's ability to recover from Berschauer. Berschauer is incorrect in this defense as Campbell provided labor, not materials.

Campbell moved for summary judgment which was granted by the Superior Court. CP 60. In granting Campbell's motion for summary judgment, the Superior Court held:

"Campbell Crane...did not leave something which was incorporated into the building, but rather performed a rather sophisticated form of labor that does, yes, require a sophisticated type of equipment to be used with respect to that labor, but that it was in the nature of labor being performed by the crane company in order to perform their role in the construction of the facility."

RP I, pg. 16, 11-20.

In this appeal, Berschauer presents an identical argument to that offered to the Superior Court.

IV. ARGUMENT

- A. Second-tier subcontractors providing crane services are providers of labor only and are not required to give pre-lien notice.

In its brief, Berschauer again argues Campbell failed to provide pre-lien notice as a supplier of equipment under RCW 60.04.031 and RCW 39.08.065.

RCW 60.04.031 states, in pertinent part:

Except as otherwise provided in this section, every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien. If the prime contractor is in compliance...this notice shall also be given to the prime contractor...

RCW 60.04.031(1).

Notice of a right not to claim a lien shall not be required of:
Laborers whose claim of lien is based solely on performing labor;

RCW 60.04.031(2)(b)

RCW 39.08.065 states, in pertinent part:

Every person, firm or corporation **furnishing materials, supplies or provisions** to be used in the construction...for the state, or any county, city, town, district, municipality or other public body, shall, not later than ten days after the date of the first delivery of such **materials, supplies or provisions** to any subcontractor or agent of any person, firm or corporation having a subcontract for the construction... of such work, deliver or mail to the contractor a notice in writing stating in substance and effect that such person, firm or corporation has commenced to deliver materials, supplies or provisions for use thereon...and that such contractor and his bond will be held for the payment of the same, and no suit or action shall be maintained in any court against the contractor or his bond to recover for such **material, supplies or provisions** or any part thereof unless the provisions of this section have been complied with.

RCW 39.08.065 (emphasis added).

Berschauer asserts that Campbell provided materials or equipment and therefore was required to provide pre-lien notice. However, what Berschauer fails to understand is that Campbell provided labor **only** and was not required to provide pre-lien notice by any statute.

In Neil F. Sampson Equipment Rental and Sales, Inc. v. West Pasco Water Systems Inc., 68 Wn.2d 172, 412 P.2d 106 (1966), George Grant and Neil F. Lampson, Inc. claimed separate liens for crane services without pre-lien notice, exactly like Campbell. The court upheld the liens when it held it was clear that rental or leasing of equipment alone was not lienable without pre-lien notice, **but that rental of machinery with an**

operator was lienable. Id., 68 Wn.2d at 175 (emphasis added) (quoting Willett v. Davis, 30 Wn.2d 622, 193 P.2d 321 (1948)). “If a person lets to a subcontractor a truck...for hire...he furnishes a supply, and cannot claim against the principal contractor or his bondsman, unless he gives statutory notice.” Sutherland v. Smith, 123 Wn. 518, 520, 212 P.2d 1060 (1923). “On the other hand, if his contract is to perform labor by himself and his truck...at a stated consideration for fixed periods of time, he is a laborer, and **may recover from the principal contractor and his bondsman...**” Id. (emphasis added). Like Grant and Lampson, Campbell merely provided rental of machinery with an operator. The machinery and operator were provided by Campbell and the labor was provided by Campbell. This is not a situation where Campbell provided machinery to Dynamic for Dynamic’s own use. Campbell was not required to provide pre-lien notice.

Berschauer further argues that a provider of equipment is required to provide pre-lien notice identical to material suppliers and presents caselaw relative to material suppliers. However, Campbell was not a provider of equipment or materials. Materials are defined as those things supplied that either actually have been incorporated and become a part of the building, or have been delivered to the building site for incorporation into a building. National Concrete Cutting, Inc. v. Northwest GM

Contractors, Inc., 107 Wn. App. 657, 658, 27 P.3d 1239, 1240 (2001).

National Concrete Cutting was a case involving a second-tier subcontractor, like Campbell, that was not paid for labor. Lumpkin, Inc. was awarded the project as the prime contractor (like Berschauer) and subcontracted with Northwest GM (like Dynamic) for the mechanical work on the project. Northwest GM then subcontracted with National Concrete Cutting (like Campbell) for concrete cutting, sawing and coring. When National Concrete Cutting was not paid by Northwest GM, it sought to recover from Northwest GM, Lumpkin and United Pacific Insurance (who supplied the performance and payment bond). Lumpkin asserted that National Concrete should be considered a supplier of materials required to file a pre-claim notice. In response, National Concrete argued that it bills its work on an hourly basis for the time employees spend at the job site and that the hourly rate includes charges for the employee's time, overhead and profit, tools, and any incidental and consumable materials necessary for the employee to complete the work. National Concrete asserted that the only materials or equipment it supplied to the project were purely incidental to the on-site labor and work of its employees.

The court held that the notice statute clearly relates only to those who supply or deliver materials, supplies, or provisions intended to be

used on the job which enter into and form a part of the finished product. Id. 107 Wn. App. at 661. The purpose of the pre-lien notice statute is to protect the prime contractor so it will not pay twice for the same materials. Id. National Concrete was held to be unlike the materialman who drops off his goods unknown to the general contractor. Id. Rather, it provides specialized labor services to the project. Id. Aside from the type of specialized labor provided, this fact pattern is identical to the present case. Campbell provided specialized labor services utilizing its cranes as special tools. No material, supplies, or provisions provided by Campbell were intended to enter into and form a part of the finished product. Campbell was not a supplier of materials.

Finally, in its argument, Berschauer contend LRS Electric is identical to the issue at hand. However, what Berschauer fails to understand is that the issue in LRS Electric was whether a supplier of **materials** may recover without providing pre-claim notice. Id., 153 Wn.2d at 737.

In LRS Electric, a third-tier subcontractor, Tyko, did not receive full payment for materials supplied in construction of a hospital. Tyko provided materials for the HVAC system that were incorporated into the hospital project.... LRS Electric, 153 Wn.2d 731 at 746. Accordingly,

under the plain language of RCW 39.08.065 and RCW 60.28.015, Tyko was subject to pre-claim notice requirements. Id. The major distinction between LRS Electric and the issue at hand is that Campbell did not provide materials. While Berschauer argues Campbell supplied materials and equipment, it offers no support for that position. In stark contrast, the Washington State Supreme Court has held that an entity which provides cranes and crane operators merely provides labor, not materials or equipment. Neil F. Sampson Equipment Rental and Sales, Inc., 68 Wn.2d 172 (1966). While Berschauer is correct in its analysis of LRS Electric, it is inapplicable as Campbell only provided **labor**, not materials or equipment. Therefore, Campbell was not required to file pre-claim notice. Campbell should be allowed to recover payment from Berschauer's bond.

V. REQUEST FOR ATTORNEY'S FEES AND COSTS
PURSUANT TO RAP 18.1.

On June 22, 2007, Clark County Superior Court Judge Barbara Johnson granted attorney's fees and costs to Campbell pursuant to RCW 39.08.030. CP 95.

RCW 39.08.030 states, in pertinent part:

... in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items hereinbefore specified, the claimant shall be entitled to recover in addition to all other costs,

attorney's fees in such sum as the court shall adjudge reasonable...

RCW 39.08.030(1).

Under RCW 39.08.030 attorney fees are authorized in an action brought against the bond. Diamco, Inc. v. Mettler, 135 Wn. App. 572, 578, 145 P.3d 399 (2006). Generally, a contractor's successful claim of lien entitles it to attorney's fees where the surety has an adverse interest in the action. RCW 39.08.030; Lakeside Pump & Equipment, Inc. v. Astin Construction Co., 89 Wn.2d 839, 576 P.2d 392 (1978). A surety contests a right to recover when it denies the allegations in a complaint and seeks dismissal of an action. Diamco, Inc., 135 Wn. App. 578 (citing C-Star Concrete Corp. v. Hawaiian Ins. & Guar. Co., 8 Wn. App. 872, 875, 509 P.2d 758 (1973)).

Campbell makes its request for attorney fees and costs related to this appeal under RAP 18.1.

VI. CONCLUSION

Campbell provided contracted crane services to the Project in a workmanlike manner. No complaints have resulted from Campbell's labor. Campbell did not provide materials as part of the finished Project and was at all times in control of the cranes and its operators. As such,

Campbell was not required to file pre-lien notice. Campbell should be allowed to recover payment from the retained percentage and Berschauer's bond. Therefore, Campbell respectfully requests this court affirm the Superior Court's decision and grant Campbell's request for fees and costs.

DATED this 6 day of November, 2007.

RESPECTFULLY SUBMITTED:

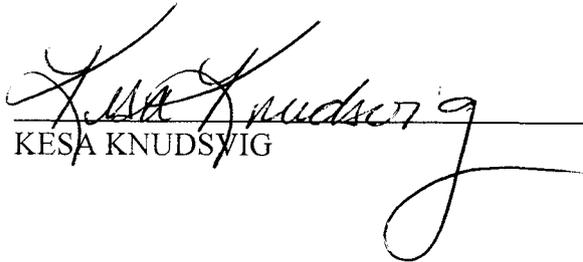


Albert F. Schlotfeldt, WSBA #19153
Of Attorneys for Respondent Campbell
Crane & Rigging, Inc.

DECLARATION OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that on this 6th day of November, 2007, a true and correct copy of the foregoing document was sent by depositing in the United States Mail, postage prepaid, addressed to the following party:

Jon E. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia WA 98501


KESA KNUDSVIG

yn