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DIVISION II

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STATE OF WASHINGTON
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No. 36583-9II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JON M. RIEDEL and LISA RIEDEL, husband and wife, d/b/a **R & C CONSTRUCTION, INC.**, a foreign corporation, **RIEDEL and COMPANY CONSTRUCTION, INC.** and **R & C. CONSTRUCTION,**

Appellants

Vs.

LEANNE MCCONNELL, a single woman

Respondent

Reply Brief of Respondent Leanne McConnell

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I. INTRODUCTION

Appellants JON M. RIEDEL and LISA RIEDEL, R & C CONSTRUCTION, INC., RIEDEL and COMPANY CONSTRUCTION, INC. and R & C. CONSTRUCTION (referred to herein as "Contractor") vigorously defended Respondent Leanne McConnell's (referred to herein as "Homeowner") Complaint up until the time of trial, and again after the trial, but voluntarily elected to not appear at the Thurston County trial on June 21, 2007. There is no challenge to the trial court's findings and conclusions that Contractor engaged in unfair and deceptive acts, dealt with the Homeowner in bad faith, caused the Homeowner to be sued by Contractor's property seller, and has been sued by Homeowner's neighbors for similar bad acts. Contractor has not challenged the trial courts findings and conclusions that it sold Homeowner and her neighbor illegal lots that were not subdivided, gave access to a Thurston County road that was unsafe and illegal, and provided water from an uncertified and illegal well.

Two separate Thurston County Superior Court Judges considered Contractor's unfair, deceptive and illegal acts and practices, misrepresentations and bad faith then imposed an equitable hold on proceeds Contractor should have spent to correct some of the material breaches in its contract with Homeowner.

Judgment was entered at the trial court in the principal amount of \$66,124.04 together with prejudgment interest, costs and attorney's fees. Contractor accepts the judgment as entered by the trial court and assigns error only to the findings of fact and conclusions of law establishing a constructive trust on certain proceeds controlled by Contractor.

II. ARGUMENT

A) Substantial evidence supports the trial courts factual findings.

Substantial evidence exists and the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premises. *Bering v. SHARE*, 106 Wn. 2d 212, 220, 721 P.2d 918 (1986). This rule is based on the notion that the trier of fact is in the best position to decide factual issues. See, e.g. *Thorndike v. Hesperian Orchards, Inc.* 54 Wn. 2d 570, 575, 343 P.2d 183 (1959). Because Homeowner produced sufficient evidence to satisfy her burden of production, the trier of fact alone determined the facts in the case, and this appellate court should not substitute its judgment on such factual issues. See e.g., *In re Dependency of C.B.*, 61 Wn. App. 280, 283 810 P.2d 518 (1991).

Contractor challenges only Finding of Fact No. 14:

An alleged Assignment of Note and Deed of Trust was executed by Jon Riedel and Lisa Riedel on January 4, 2006, which assigns their interest in said sale with Puget Sound

Construction, LLC to Jon Riedel's father and mother-in-law. No evidence of payment for the assignment of Note was presented.

Appellant failed to designate the Trial Exhibits, and Trial Exhibit 15 is a true and correct copy of the Assignment of Note and Deed of Trust referenced in Findings of Fact 14. Trial Exhibits 16 and 17 explain the background regarding the previous trial judge's order to Contractor to pay \$30,000 to the clerk's registry. The Homeowner testified about the trial court order requiring the \$30,000 deposit to the clerk's registry and her knowledge of the debt. (6/21/07 RP Page 34 line 22 through page 37 line 12). Over a year prior to the trial, at Homeowner's Summary Judgment Motion, Trial Judge Casey acknowledged she didn't have authority to issue a writ of attachment, but felt compelled to take some steps to protect Homeowner. (6/9/06 RP Page 13 line 23 through Page 15 line 2). Contractor neither sought reconsideration of the Judge Casey Order nor assigned error to her Order.

The trial court's evidentiary rulings are generally reviewed only for an abuse of discretion, and the trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Havens v. C & D Plastics*, 124 Wn. 2d 158, 168, 876 P.2d 435 (1994). Error without prejudice is not grounds for reversal and error will not be considered prejudicial unless it affects, or presumptively

affects, the outcome of trial. *Thomas v. French* 99 Wn. 2d, 95, 659 P.2d 1097 (1983). The trial courts conclusions of law were supported by clear, cogent and convincing evidence regarding the constructive trust.

Contractor has not assigned error to the trial courts numerous findings and conclusions that Contractor worked without a contractor's bond, sold illegal lots, provided driveways with no safe or lawful access, refused to pay agreed expenses and borrowed and refused to repay Homeowner's loans. (Finding of Fact 7, 9, 10, 11, CP 163 line 20 through CP 164 line 24. Conclusions of Law 6, 7, CP 166 line 10-16.) Contractor has not challenged the court's conclusion of law that Contractor's acts impacted the public interest, was unfair and deceptive, and that the conduct of the Contractor was in total disregard and violation of its duty to deal with the Homeowner in good faith. (Conclusions of Law 16 CP 168 line 2-8 and Conclusions of Law 21, CP 169 lines 2-5). Even error of constitutional magnitude is harmless if the reviewing court is convinced that any reasonable fact finder would reach the same result if error had not occurred. See *State v. Valdez*, 82 Wn. App. 294, 294, 917 P.2d 1098 (1996), applying the beyond reasonable doubt standard in a criminal case. The trial court sitting in equity properly made Conclusion of Law 18 imposing a constructive trust because there was clear, cogent and convincing evidence of the reasons for impressing the trust. *In re:*

marriage of Lutz, 74 Wn. App. 356 873 P.2d 566 (1994). To determine a constitutional error is harmless, it must appear that the error did not contribute to the ultimate verdict. *State v. Berube*, 150 Wn. 2d 498, 79 P.3d 1144 (2003).

A constructive trust is implied by law as a remedy to prevent fraud or injustice where a person holds property that should in fairness benefit someone else. *Scymanski v. Dufault*, 80 Wn. 2d 77, 88, 491 P.2d 1050 (1972). A constructive trust arises in equity where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he or she would be unjustly enriched if permitted to retain it. *Brooke v. Robinson*, 125 Wn. App. 253, 257, 104 P.3d 674 (2004). Two Thurston County Judges looking independently at Contractor's inequitable conduct both concluded Homeowner needed equitable protection, then gave it.

B. The trial court's discretion was exercised on tenable grounds for tenable reasons in finding Contractor's conduct so inequitable as to justify imposing a constructive trust.

On June 9, 2006 Thurston County Superior Court Judge Paula Casey entered Order to Pay to Clerk's Registry after hearing argument on Plaintiff's Motion for Summary Judgment. (CP 133). Over one year later on June 21, 2007 Superior Court Judge Pomeroy conducted a bench trial,

reviewed McConnell's Trial Exhibits 15, 16 and 17, then entered judgment in favor of Homeowner. Trial Exhibits 15, 16 and 17 were known to Contractor as much as one year prior to the trial date, yet Contractor did not challenge the admission, or sufficiency, of the evidence at trial. (6/21/07 RP Page 21 Lines 21-25).

A fair-minded, rational person would be persuaded of the injustice of Contractor retaining a portion of Contractor's funds which if not applied to Homeowner's many legal problems caused by Contractor would result in unjust enrichment to Contractor. *Thordike v. Hesperian Orchards, Inc.*, Supra at 570. Both summary judgment Judge Casey and trial Judge Pomeroy reviewed the evidence and imposed an equitable remedy as a result of Contractor's inequitable conduct. (Order to Pay to Clerk's Registry, CP 133. Conclusion of Law 16 CP 168 lines 2-9). Both Judges exercised their discretion on tenable grounds and for tenable reasons to prevent unjust enrichment and protect Homeowner from Contractor's multiple illegal and bad acts in connection with the sale of property to, and construction of defective residence for, Homeowner. *Coggle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554 (1990).

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C. The trial court's decision should be affirmed on the constructive trust basis and not the prejudgment attachment statutes.

A trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof. *Bock v. State*, 91 Wn. 2d 94, 95, 586 P.2d 1173 (1978). The trial court's Conclusions of Law 17 and 18 can be justified on the basis of the imposition of a constructive trust without even considering Contractor's prejudgment writ of attachment arguments. See e.g., RAP 2.5(a). Fraud, misrepresentation, bad faith or over reaching usually forms the base upon which a constructive trust is erected as a device used in equity to compel those who unfairly hold a property interest to hold it for another to whom it justly belongs. *Humphries v. Riveland* 67 Wn. 2d 376, 390, 407 P.2d 967 (1966). Because the trial court's findings are supported by substantial evidence, and its conclusions supported by unchallenged findings of the Contractor's many bad and illegal acts, Contractor's prejudgment attachment argument won't materially affect the trial outcome. See e.g. *State v. Cameron* 47 Wn. App. 878, 886, 737 P.2d 688 (1987) (error in admitting evidence harmless). Contractor's failure to assign error to any part of the findings of fact, conclusions of law or judgment other than those imposing a constructive trust are an acknowledgment by Contractor of the harmless error rule; the trial court's judgment should stand. Courts

will not decide constitutional issues unless it is absolutely necessary for determination of the case and it is not necessary in this case. *Weiss v. Glemp*, 127 Wn. 2d 726, 903 P.2d 455 (1955).

D. The Contractor invited the error it now claims and was not prejudiced by the actions of the trial court.

The complaint alleged Contractor's unfair and deceptive acts, misrepresentations, material breaches of contract, and sought relief "as may be just and equitable in the premise". (Complaint, CP 10 line 7-8) Counsel for Contractor appeared and signed the June 9, 2006 Judge Casey Order, later withdrew from the case then appeared again after trial. (Plaintiff's Response to Defendant's Motion for Consideration CP 156 line 22 through CP 157 line 13)

CR 15(b) Amendments to Conform to the Evidence, allows the constructive trust issue to be tried by the express or implied consent of the parties. Appellant's failure to object to the Trial Exhibits 15, 16 and 17, and failure to object to the court allowing evidence of the unjust enrichment to Contractor by retaining the funds resulted in Contractor's waiver of error. Error may be waived through failure to object at trial. *State v. Atkinson* 19 Wn. App. 107, 111, 575 P.2d 240 (1978). Contractor's waiver ran for over a year from the date of Judge Casey's first order entered June 9, 2006 and continued through trial. Error without

prejudice is not grounds for reversal, and error will not be considered prejudicial unless it affects the outcome of trial. *Thomas v. French*, Supra at 104. The trial court considered the clear, cogent and convincing evidence of contractor's inequitable and unjust conduct, and in an effort to prevent unjust enrichment, imposed a constructive trust. (Conclusions of Law 17 and 18, CP 168 lines 10-21). Contractor had received Homeowner's exhibits and trial brief in advance of the trial (Plaintiff's Response to Defendant's Motion for Consideration, CP 157 lines 13-19), yet elected to not challenge the introduction or the sufficiency of the evidence. (6/21/07 RP Page 5 line 9-11).

Homeowner's trial brief was filed and sent to Contractor in advance of trial and addressed in detail the Homeowner's claim addressing the constructive trust:

When Judge Paula Casey finally heard the Homeowner's Motion for Summary Judgment she ordered Contractor to pay \$30,000 from a pending Contractor property sale receivable to the registry of the clerk's court. Instead of complying with Judge Casey's order, Contractor claimed he had assigned his receivable to his father and mother-in-law even though the assignment was not recorded and no mention of it was made by Contractor or his attorneys until after Judge Casey had ruled. (Trial Brief Page 3, lines 9-16.)

Contractor's failure to comply with the order of Judge Paula Casey had caused Homeowner to lose \$30,000 worth of security to protect her judgment. No evidence of consideration or equivalent value will be presented by

Contractor in connection with this unrecorded, alleged assignment of promissory note and receivable to his family. A constructive trust should be imposed on that receivable for payment up to the amount of Homeowner's judgment; at least for \$30,000. (Trial Brief Page 3, lines 12-18.)

There was clear, cogent and convincing evidence supporting the trial court's finding of inequitable conduct by Contractor and the necessity of imposing a constructive trust to protect against Contractor's unjust enrichment. (Findings of Fact 10, 11, 12, 13, 14, CP 164 line 17 through CP165 line 14. Conclusions of Law 7, 16, 17, 18 CP 166 line 14-17 and CP 168 lines 2-23)

After considering all of the testimony and the evidence, the trial court properly imposed the equitable remedy of constructive trust.

Where for any reason the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto. This arises by construction of equity, independently of the intention of the parties. Equity will raise a constructive trust and compel restoration where one through actual fraud, abuse of confidence reposed and accepted, or through other questionable means, gain something for himself which in equity and good conscience he should not be permitted to hold. *Scymanski v. Dufault*, Supra at 88.

When property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts such holder into a trustee. *Id.*, citing *Perry on Trusts* P. 301, Sec. 183.

Contractor voluntarily elected to give no evidence or testimony about the circumstances surrounding his retaining of funds which should have been used to provide Homeowner legal access, a legal lot, legal water and the repayment of loan. Contractor had notice of the general nature of Homeowner's claim for over a year prior to trial and the Complaint was sufficient in seeking just and equitable relief in connection with Contractor's multitude of bad acts. The trial court reached the only conclusion reasonable after a consideration of the evidence: Contractor would be unjustly enriched without the imposition of the \$30,000 partial constructive trust.

E. The Homeowner should be awarded her reasonable attorney's fees and expenses.

Applicable law grants to Homeowner the right to recover her reasonable attorney's fees and expenses in this appeal. Contractor signed a Promissory Note dated May 18, 2004, providing that the prevailing party shall be entitled to such legal fees and cost of suit as determined by a court. (Promissory Note, Trial Ex. 7). Contractor signed an amended Promissory Note on September 11, 2004 also providing legal fees as determined by a court. (Promissory Note Amendment, Trial Ex. 9. Findings of Fact CP 166 lines 14-16). Contractor violated the Washington Contractor Registration Act and the Washington Consumer Protection

Act. (Conclusions of Law 6 and 7, CP 166 lines 11-16). Both statutes provide the basis for Homeowner's recovery of attorney's fees. The trial court specifically concluded that Homeowner is entitled to recover her reasonable attorney's fees and costs pursuant to the promissory note, RCW 18.27.040, and the Washington Consumer Protection Act. (Conclusion of Law 22, CP 169 line 5-8). The trial court awarded judgment against Contractor including Homeowner's attorney's fees in the amount of \$25,116 and costs in the amount of \$1,730.22. (Judgment Summary and Judgment, CP 148).

Contractor has not assigned error to the court's Findings of Facts, Conclusions of Law, or Judgment awarding Homeowner her reasonable attorney's fees.

III. CONCLUSION

Two Thurston County Superior Court Trial Judges reviewed the substantial evidence of Contractor's multiple acts of wrongdoing and injustice, and imposed equitable relief. This court need not consider Contractor's prejudgment attachment argument because the trial court's equitable remedy imposing a constructive trust was made in accordance with governing law, and was based on clear, cogent and convincing evidence.

Contractor has not challenged the court's finding about Contractor's multiple violations of statutes, unfair and deceptive acts, bad faith, misrepresentations, and unlawful conduct in connection with a series of transactions with Homeowner, its' victim. The error claimed now by Contractor was both invited and waived by its failure to attend trial or object to or provide evidence. The judgment of the trial court should be affirmed and Homeowner awarded her fees and costs.

RESPECTFULLY SUBMITTED this 28th day of May, 2008



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I hereby certify that on May 28, 2008 I deposited in the US Mail by prepaid first class mail, a copy of the document to which this certificate is attached for delivery to the following parties at the addresses listed below as well as the below facsimile numbers:

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