

**FILED**

JAN 12 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 291774-III

COURT OF APPEALS, DIVISION III  
THE STATE OF WASHINGTON

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MARK BROTHERTON and GEORGIE BROTHERTON,  
Husband and Wife,

Plaintiff/Respondent,

v.

KRALMAN STEEL STRUCTURES, INC.,

Defendants/Appellants,  
NICKALAS AND HIS MARITAL COMMUNITY d/b/a  
KINCAID CONCRETE, AMERICAN CONTRACTORS  
INDEMNITY CO., and OLDREPUBLIC SURETY CO.,

Defendants.

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BRIEF OF APPELLANT

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## A. INTRODUCTION

This Appeal stems from the bench trial of a construction contract dispute. Appellant, Kralman, appeals the trial court's measure of damages and award of attorney fees.

## B. ASSIGNMENT OF ERROR

### 1. ASSIGNMENT OF ERROR

1. The trial court erred in entering Finding of Fact No. 7 "Brotherton's have obtained a bid from a licensed contractor to do the work for \$12,796.20."

2. The trial court erred in entering Conclusion of Law No. 2: "The price of \$12,796.20 is also reasonable".

3. The trial court erred in entering Conclusion of Law No. 4: "Plaintiffs are entitled to judgment against Kralman Steel Structures, Inc. and its surety in the amount of \$12,796.20."

4. The trial court erred in entering Conclusion of Law No. 5: "Plaintiffs are entitled to a reasonable attorney fee, costs and interest pursuant to RCW 18.27.040(6). Defendant's Motion for Reconsideration thereof is denied per the Court's letter of 6-9-10."

2. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. What is the proper measure of damages for breach of a construction contract by the contractor? (Assignments of Error 1, 2, 3)

2. Does RCW 18.27.040(6) provide for an award of attorney fees from a contractor? (Assignment of Error 4)

C. STATEMENT OF THE CASE

1. STATEMENT OF FACTS

Plaintiffs/Respondents Mark and Georgie Brotherton (“Brotherton”), entered into an informal oral contract for Defendant/Appellant Kralman Steel Structures, Inc. (“Kralman”) to remove and replace 1,340 sq. ft. of driveway. RP 4, 27-28, 122, RP 146. The new driveway was to be at least 3 ½ inches thick which is industry standard. RP 58, 146. The driveway was removed and replaced but, as left by Kralman, was not acceptable to Brotherton. RP 39, 43. Brotherton obtained a proposal from a contractor, Brit Watson d/b/a 4 B Contracting, to correct Kralman’s work. Ex. 7. RP 53-54. Watson’s proposal included both materials and work that exceeded the scope of the Brotherton - Kralman oral contract. Specifically, the driveway as replaced would be 5 inches thick rather than 3 ½ inches thick. RP 58. Reinforcing steel or rebar would be furnished and installed when none was included in the

Brotherton - Kralman oral contract. Ex. 7. RP 63. Watson would use 5 ½ sack concrete rather than 5 sack concrete. Ex. 7. RP 146. In addition to removal and replacement of the driveway, which was the scope of the Brotherton - Kralman contract, removal and replacement of the sidewalk, curb, gutter and approach were all included in Watson's proposal. Ex. 7. RP 53. There was testimony at trial about damage to the sidewalk and approach. RP 101. There was also testimony that there had been no damage to any existing concrete. RP 170.

Jeff Kralman testified for Kralman that the industry price of placing and finishing the driveway concrete was \$5 per sq. ft. RP 144.

## 2. PROCEDURE BELOW

This matter was tried without a jury. The trial court issued an oral decision at the end of trial. RP 196-201. Findings of Fact, Conclusions of Law and Judgment were proposed. CP 15-19. Kralman, through counsel, objected to the Findings, Conclusions and Judgment and moved for reconsideration. CP 20-23. The court requested briefing on the issue of attorney fees in a letter dated June 2, 2010. CP 24-25. The trial court entered revised Findings, Conclusions and Judgment and advised the parties by letter. CP 27, 28-32, 33-35. The court did not find that sidewalk, curb, gutter or

approach had been damaged by Kralman or should be replaced. However, in its Findings the court found the entire proposal price from Watson to be reasonable. This, despite the fact that the court also found that other contractors would do the work that Watson proposed to do for less. Finding No. 7. CP 30.

#### D. ARGUMENT

##### 1. Standard of Review

Actual Findings are reviewed under the substantial evidence standard: “The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question.” *Canon, Inc., v Fed. Ins. Co.*, 82 Wn.App. 480, 486, 918 P.2d 937 (1996). Questions of law are reviewed de novo, *Mountain Park Homeowners Ass’n v Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

2. The trial court erred in awarding approximately \$3,500 in damages beyond the reasonable cost to repair defective work.

The term “damages” means the compensation that the law will award for an injury sustained. *State ex rel. Macri v Bremerton*, 8 Wn.2d 93, 101, 111 P.2d 612 (1941). In *Spokane Truck & Dray Co., v Hoefler*, 2 Wash. 45, 25 Pac. 1072 (1891) the Washington Supreme Court said that:

. . . damages are given as a compensation or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or estate . . . .

*Id.* at p. 51. (Emphasis added).

A non-breaching owner to a construction contract is entitled to the reasonable cost necessary to correct defective work done by the contractor. *Pilch v Hendrix*, 22 Wn.App. 531, 533, 591 P.2d 824 (1979). When alternative remedies are presented, the owner is entitled to the lesser of the alternatives. *See, Eastlake v Hess*, 102 Wn.2d 30, 46-48, 686 P.2d 465 (1984).

There was conflicting testimony about damage to sidewalk and approach. There was no finding that such damage occurred. The repair cost that the trial court found to be “reasonable” included the cost to remove and replace both the sidewalk and approach. It also included the cost to remove and replace the curb and gutter which were not the subject of the Brotherton - Kralman contract and for which there was no evidence of any damage caused by Kralman or its subcontractors or suppliers.

The only credible evidence of the cost to remove and replace the driveway as agreed to by Brotherton and Kralman was the testimony of Jeff

Kralman. Jeff Kralman testified that the going cost to furnish, place and finish the driveway alone was \$5.00 per sq. ft. for the 1,340 sq. ft. of driveway which resulted in a replacement cost of \$6,700. RP 144. The court erred in taking the entire Watson proposal price as a reasonable cost to replace only the driveway. The Watson proposal included several “betterments” and when adopted by the court constituted a violation of the Rule stated in *Macri, supra*. The Watson proposal contained no break-out of the various costs and without the same there was no reasonable basis for the court to adopt a part of the proposal as a reasonable replacement cost. Note that for purposes of this appeal, Kralman does not challenge the removal and disposal elements of damages as substantiated by the concrete industry document or the RJ’s Backhoe document in Ex. 7. The total damages used by the court are the subject of a handwritten addition on Page 3 of Ex. 7.

3. The Trial Court Erred in Making an Award of Attorney Fees to Brotherton Against Kralman Pursuant to RCW 18.27.040(6).

The Washington Supreme Court in *Cosmopolitan Engineering v Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006) held that RCW 18.27.040(6) did not authorize an award of attorney fees against a contractor. *Id.* at p. 306. The trial court in its letter ruling of June 9, 2010, stated:

The case of *Cosmopolitan Engineering Group, Inc. v Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006) - which at first glance seems to be binding precedent - is not binding precedent in this case because the statute RCW 18.27.040, was reworded and reenacted in 2007 to clarify that it applies both to actions against contractors and actions against bonds. The majority's reasoning - that Section 4 and the attorney fee provision applies only against the bond - no longer works since the present wording makes clear the legislative intent that the prevailing party against a contractor and his bond is entitled to attorney fees.

The motion is therefore denied, and I have signed the Plaintiffs' Amending Findings of Fact and Conclusion of Law and Amended Judgment & Judgment Summary. Conformed copies are enclosed to each of you.

*Id.* CP 27.

A close reading of the 2007 law<sup>1</sup> belies the court's conclusion. Only two minor changes were made to paragraph 6 of § RCW 18.27.040. First, the authority for awarding any attorney fees was limited to a residential homeowner. The second change was making the deposit in lieu of the bond (renominated in the same Act as an "assigned savings account") subject to such an award for attorney fees. It is clear from a facial reading of the 2007 law that it was intended to and did, in fact, clarify the issue of personal jurisdiction on the contractor as raised by the case of *Collection Servs. v*

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<sup>1</sup>The 2007 session law Chapter 436, Section 4, SHB 1843.SL pages 7-11 is attached as Appendix A.

*McConnachie*, 106 Wn.App. 738, 24 P.3d 1112 (2001). In *McConnachie*, *supra*, the court held that a plaintiff's service on the Department of Labor and Industries pursuant to RCW 18.27.040 did not confer personal jurisdiction on a contractor for a debt not covered by the bond. *Id.*, at p. 743-744. The *McConnachie* decision was discussed briefly by the Supreme Court in *Ondeo*, *supra*, 159 Wn.2d at 300. This discussion by the Supreme Court could have been responsible in part for the 2007 Act.

The legislature is presumed to be familiar with prior judicial constructions of its Acts. *Buchanan v Int'l BHD. of Teamsters*, 94 Wn.2d 508, 617 P.2d 1004 (1980). Failure of the legislature to amend a statute for a considerable period of time after it has been judicially construed indicates an intent to concur in that construction. *Id.*

The legislature has had over four years since *Ondeo*, *supra*, was decided. Besides the changes in the 2007 law, the legislature amended RCW 18.27.030 in 2008 and RCW 18.27.062 in 2009. Despite these changes, the legislature has failed to act to clarify or change the attorney fee provision of RCW 18.27.040(6) as interpreted by the Supreme Court in *Ondeo*, *supra*.

*Ondeo, supra*, remains binding precedent. RCW 18.27.040(6) does not authorize an award of attorney fees against the contractor in an action against the contractor and his bond.

E. CONCLUSION

The court's judgment for damages must be reversed because it includes costs over and above the cost to correct defective work. In the alternative, this matter should be remanded for the court to enter a judgment limited to the cost of correcting defective work.

The trial court's award of attorney fees should be reversed.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of January 11, 2010.

  
\_\_\_\_\_  
Terry E. Miller, WSBA #14080  
Attorney for Appellants/Defendants

# **APPENDIX**

1 registrant does not maintain a valid unified business identifier  
2 number, if required by the department of revenue.

3 (c) The department may suspend an active registration if the  
4 department has determined that an owner, principal, partner, or officer  
5 of the registrant was an owner, principal, or officer of a previous  
6 partnership, corporation, or other entity that has an unsatisfied final  
7 judgment against it.

8 (4) The department shall not deny an application or suspend a  
9 registration because of an unsatisfied final judgment if the  
10 applicant's or registrant's unsatisfied final judgment was determined  
11 by the director to be the result of the fraud or negligence of another  
12 party.

13 **Sec. 4.** RCW 18.27.040 and 2001 c 159 s 3 are each amended to read  
14 as follows:

15 (1) Each applicant shall file with the department a surety bond  
16 issued by a surety insurer who meets the requirements of chapter 48.28  
17 RCW in the sum of twelve thousand dollars if the applicant is a general  
18 contractor and six thousand dollars if the applicant is a specialty  
19 contractor. If no valid bond is already on file with the department at  
20 the time the application is filed, a bond must accompany the  
21 registration application. The bond shall have the state of Washington  
22 named as obligee with good and sufficient surety in a form to be  
23 approved by the department. The bond shall be continuous and may be  
24 canceled by the surety upon the surety giving written notice to the  
25 director. A cancellation or revocation of the bond or withdrawal of  
26 the surety from the bond automatically suspends the registration issued  
27 to the ((registrant)) contractor until a new bond or reinstatement  
28 notice has been filed and approved as provided in this section. The  
29 bond shall be conditioned that the applicant will pay all persons  
30 performing labor, including employee benefits, for the contractor, will  
31 pay all taxes and contributions due to the state of Washington, and  
32 will pay all persons furnishing ((labor or)) material or renting or  
33 supplying equipment to the contractor and will pay all amounts that may  
34 be adjudged against the contractor by reason of breach of contract  
35 including ((negligent or)) improper work in the conduct of the  
36 contracting business. A change in the name of a business or a change

1 in the type of business entity shall not impair a bond for the purposes  
2 of this section so long as one of the original applicants for such bond  
3 maintains partial ownership in the business covered by the bond.

4 (2) At the time of initial registration or renewal, the contractor  
5 shall provide a bond or other security deposit as required by this  
6 chapter and comply with all of the other provisions of this chapter  
7 before the department shall issue or renew the contractor's certificate  
8 of registration. Any contractor registered as of July 1, 2001, who  
9 maintains that registration in accordance with this chapter is in  
10 compliance with this chapter until the next renewal of the contractor's  
11 certificate of registration.

12 (3) Any person, firm, or corporation having a claim against the  
13 contractor for any of the items referred to in this section may bring  
14 suit (~~upon~~) against the contractor and the bond or deposit in the  
15 superior court of the county in which the work was done or of any  
16 county in which jurisdiction of the contractor may be had. The surety  
17 issuing the bond shall be named as a party to any suit upon the bond.  
18 Action upon the bond or deposit brought by a residential homeowner for  
19 breach of contract by a party to the construction contract shall be  
20 commenced by filing the summons and complaint with the clerk of the  
21 appropriate superior court within two years from the date the claimed  
22 contract work was substantially completed or abandoned, whichever  
23 occurred first. Action upon the bond or deposit brought by any other  
24 authorized party shall be commenced by filing the summons and complaint  
25 with the clerk of the appropriate superior court within one year from  
26 the date the claimed labor was performed and benefits accrued, taxes  
27 and contributions owing the state of Washington became due, materials  
28 and equipment were furnished, or the claimed contract work was  
29 substantially completed or abandoned, whichever occurred first.  
30 Service of process in an action filed under this chapter against the  
31 contractor(~~(7)~~) and the contractor's bond(~~(7)~~) or the deposit shall be  
32 exclusively by service upon the department. Three copies of the  
33 summons and complaint and a fee adopted by rule of not less than  
34 (~~twenty~~) fifty dollars to cover the costs shall be served by  
35 registered or certified mail, or other delivery service requiring  
36 notice of receipt, upon the department at the time suit is started and  
37 the department shall maintain a record, available for public  
38 inspection, of all suits so commenced. Service is not complete until

1 the department receives the fee and three copies of the summons and  
2 complaint. The service shall constitute service and confer personal  
3 jurisdiction on the ((~~registrant~~)) contractor and the surety for suit  
4 ((~~upon the~~)) on claimant's claim against the contractor and the bond or  
5 deposit and the department shall transmit the summons and complaint or  
6 a copy thereof to the ((~~registrant~~)) contractor at the address listed  
7 in the ((~~registrant's~~)) contractor's application and to the surety  
8 within two days after it shall have been received.

9 (4) The surety upon the bond shall not be liable in an aggregate  
10 amount in excess of the amount named in the bond nor for any monetary  
11 penalty assessed pursuant to this chapter for an infraction. The  
12 liability of the surety shall not cumulate where the bond has been  
13 renewed, continued, reinstated, reissued or otherwise extended. The  
14 surety upon the bond may, upon notice to the department and the  
15 parties, tender to the clerk of the court having jurisdiction of the  
16 action an amount equal to the claims thereunder or the amount of the  
17 bond less the amount of judgments, if any, previously satisfied  
18 therefrom and to the extent of such tender the surety upon the bond  
19 shall be exonerated but if the actions commenced and pending and  
20 provided to the department as required in subsection (3) of this  
21 section, at any one time exceed the amount of the bond then unimpaired,  
22 claims shall be satisfied from the bond in the following order:

23 (a) Employee labor and claims of laborers, including employee  
24 benefits;

25 (b) Claims for breach of contract by a party to the construction  
26 contract;

27 (c) Registered or licensed subcontractors, material, and equipment;

28 (d) Taxes and contributions due the state of Washington;

29 (e) Any court costs, interest, and ((~~attorney's~~ {~~attorneys~~}))  
30 attorneys' fees plaintiff may be entitled to recover. The surety is  
31 not liable for any amount in excess of the penal limit of its bond.

32 A payment made by the surety in good faith exonerates the bond to  
33 the extent of any payment made by the surety.

34 (5) The total amount paid from a bond or deposit required of a  
35 general contractor by this section to claimants other than residential  
36 homeowners must not exceed one-half of the bond amount. The total  
37 amount paid from a bond or deposit required of a specialty contractor

1 by this section to claimants other than residential homeowners must not  
2 exceed one-half of the bond amount or four thousand dollars, whichever  
3 is greater.

4 (6) The prevailing party in an action filed under this section  
5 against the contractor and contractor's bond or deposit, for breach of  
6 contract by a party to ((a)) the construction contract involving a  
7 residential homeowner, is entitled to costs, interest, and reasonable  
8 attorneys' fees. The surety upon the bond or deposit is not liable in  
9 an aggregate amount in excess of the amount named in the bond or  
10 deposit nor for any monetary penalty assessed pursuant to this chapter  
11 for an infraction.

12 (7) If a final judgment impairs the liability of the surety upon  
13 the bond or deposit so furnished that there is not in effect a bond or  
14 deposit in the full amount prescribed in this section, the registration  
15 of the contractor is automatically suspended until the bond or deposit  
16 liability in the required amount unimpaired by unsatisfied judgment  
17 claims is furnished.

18 (8) In lieu of the surety bond required by this section the  
19 contractor may file with the department (~~a deposit consisting of cash~~  
20 ~~or other security acceptable to~~) an assigned savings account, upon  
21 forms provided by the department.

22 (9) Any person having filed and served a summons and complaint as  
23 required by this section having an unsatisfied final judgment against  
24 the registrant for any items referred to in this section may execute  
25 upon the security held by the department by serving a certified copy of  
26 the unsatisfied final judgment by registered or certified mail upon the  
27 department within one year of the date of entry of such judgment. Upon  
28 the receipt of service of such certified copy the department shall pay  
29 or order paid from the deposit, through the registry of the superior  
30 court which rendered judgment, towards the amount of the unsatisfied  
31 judgment. The priority of payment by the department shall be the order  
32 of receipt by the department, but the department shall have no  
33 liability for payment in excess of the amount of the deposit.

34 (10) Within ten days after resolution of the case, a certified copy  
35 of the final judgment and order, or any settlement documents where a  
36 case is not disposed of by a court trial, a certified copy of the  
37 dispositive settlement documents must be provided to the department by  
38 the prevailing party. Failure to provide a copy of the final judgment

1 and order or the dispositive settlement documents to the department  
2 within ten days of entry of such an order constitutes a violation of  
3 this chapter and a penalty adopted by rule of not less than two hundred  
4 fifty dollars may be assessed against the prevailing party.

5 (11) The director may require an applicant applying to renew or  
6 reinstate a registration or applying for a new registration to file a  
7 bond of up to three times the normally required amount, if the director  
8 determines that an applicant, or a previous registration of a corporate  
9 officer, owner, or partner of a current applicant, has had in the past  
10 five years a total of (~~six~~) three final judgments in actions under  
11 this chapter involving a residential single-family dwelling on two or  
12 more different structures.

13 (~~(11)~~) (12) The director may adopt rules necessary for the proper  
14 administration of the security.

15 **Sec. 5.** RCW 18.27.080 and 1988 c 285 s 2 are each amended to read  
16 as follows:

17 No person engaged in the business or acting in the capacity of a  
18 contractor may bring or maintain any action in any court of this state  
19 for the collection of compensation for the performance of any work or  
20 for breach of any contract for which registration is required under  
21 this chapter without alleging and proving that he was a duly registered  
22 contractor and held a current and valid certificate of registration at  
23 the time he contracted for the performance of such work or entered into  
24 such contract. For the purposes of this section, the court shall not  
25 find a contractor in substantial compliance with the registration  
26 requirements of this chapter unless: (1) The department has on file  
27 the information required by RCW 18.27.030; (2) the contractor has at  
28 all times had in force a current bond or other security as required by  
29 RCW 18.27.040; and (3) the contractor has at all times had in force  
30 current insurance as required by RCW 18.27.050. In determining under  
31 this section whether a contractor is in substantial compliance with the  
32 registration requirements of this chapter, the court shall take into  
33 consideration the length of time during which the contractor did not  
34 hold a valid certificate of registration.

35 **Sec. 6.** RCW 18.27.090 and 2003 c 399 s 401 are each amended to  
36 read as follows: