

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34920-9-III

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SUZANNE G. KUNDA, Appellant,

v.

AMERICAN CONTRACTORS INDEMNITY COMPANY, Bond No. 100124722, Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

Ultimately, ACIC's arguments come down to burden shifting and equivocation. It contends, in essence, that Kunda was obligated to disprove facts it did not raise, and conflates the legal conclusion of liability with the facts that give rise to it. At no point in the pleadings or at trial did ACIC establish any facts that would defeat the legal conclusion of liability arising from the facts it admitted, once the principal's liability was established at trial. Because ACIC had a full and fair opportunity at trial to support its affirmative defenses factually, but did not do so, its argument that Kunda failed to try her claim is meritless and the trial court's order should be reversed.

ACIC employs these sophistic tactics in arguing that CR 40(d) compels dismissal of Kunda's claim. *Respondent's Brief*, at 10-11. The claim is premised upon its denial that the trial occurred, notwithstanding that it acknowledges appearing through counsel at the one-week trial. CP 11. Kunda was not required to try the factual questions of whether ACIC issued the bond, or whether the bond provided the coverage called for in RCW 18.27.040, because ACIC admitted those facts. CP 45.

Next, ACIC suggests that because there is no authority holding that "a judgment against a bond principal automatically triggers liability

against the Bond,” that it is not liable in this case. *Respondent’s Brief*, at 11. This is a red herring, as Kunda has never argued that liability is always automatically triggered by a judgment against the principal, only that the judgment against the principal **in this case** establishes the liability of the bond.

Likewise, ACIC conflates its denial of liability in its Answer with the existence of factual defenses to liability. *Respondent’s Brief*, at 13. Liability is a legal conclusion that depends upon the facts admitted or proven. That ACIC denied liability does not, of course, foreclose ACIC from being liable under the facts established through admission and at trial. Because the facts admitted in the answer establish coverage and the facts proven at trial establish the principal’s liability, the evidence sufficient to establish ACIC’s liability as a matter of law.

In essence, ACIC’s argument rests upon its contention that the absence of a jury verdict on undisputed facts and the legal conclusions arising from those facts means that a trial did not occur. ACIC does not respond to or in any way rebut Kunda’s legal authority that juries are empowered to decide issues of fact, whereas courts are empowered to decide issues of law. *Appellant’s Brief*, at 5 (*citing* RCW 4.40.080 and 4.40.090). ACIC’s liability is an issue of law. Accordingly, it is

appropriate for the court to decide on the merits whether the facts admitted in the pleading and proven at trial establish liability as a matter of law.

ACIC contends that because an involuntary dismissal acts as an adjudication on the merits, dismissal with prejudice was appropriate. *Respondent's Brief*, at 17. This is a correct statement, provided that dismissal was appropriate at all. Only through ACIC's tortured logic - that a week-long trial of the disputed facts was not a "trial" - is dismissal of the claim justified.

Indeed, ACIC declines to respond to Kunda's argument concerning CR 54(e) simply because ACIC cannot concede that the week-long trial at which it appeared and participated through counsel was a "trial" without defeating its entire argument that the case was not brought to trial. If the triable facts were tried and Kunda was entitled to judgment as a matter of law against ACIC when the principal's liability was established, CR 54(e) applies, not CR 40(d). For the reasons stated in Kunda's Appellant's Brief, CR 54(e) is the correct vehicle for evaluating this dispute.

Finally, Kunda opposes ACIC's request for attorney fees under RCW 18.27.040(6) under circumstances where she prevailed on the merits in her claim against the contractor principal. Under RCW 18.27.140, the purpose of the contractor's registration act as a whole is "to afford

protection to the public . . . from unreliable, fraudulent, financially irresponsible, or incompetent contractors.” This purpose would be substantially undermined by saddling a homeowner who prevailed in her claim against such a contractor with attorney fees and costs, in addition to the damages in excess of \$132,000 she incurred.

Moreover, the statute provides for an award of attorney fees to “[t]he prevailing party in an action filed under this section against the contractor and the contractor’s bond.” RCW 18.27.040(6). Kunda was the prevailing party against the contractor. Should this court affirm the trial court’s ruling, at a minimum, both Kunda and ACIC prevailed in the action against the contractor and the contractor’s bond. Generally, when both parties prevail in part, neither is the “prevailing party” for purposes of an attorney fee award. *See, e.g., West v. Wash. Ass’n of County Officials*, 162 Wn. App. 120, 137-38, 252 P.3d 406 (2011); *Goodell v. Goodell*, 130 Wn. App. 381, 394, 122 P.3d 929 (2005). Because Kunda substantially prevailed in the underlying action, ACIC is not entitled to recover fees on appeal under the statute.

## II. CONCLUSION

For the foregoing reasons, Kunda respectfully requests that the court REVERSE the order dismissing her claim against ACIC with prejudice and REMAND for entry of judgment against ACIC.

RESPECTFULLY SUBMITTED this 23 day of June, 2017.

  
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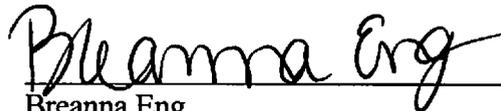
**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following party in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 23 day of June, 2017 in Walla Walla, Washington.

  
Breanna Eng

**BURKHART & BURKHART, PLLC**

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