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Division III
State of Washington
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Court of Appeals No. 349233-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HNS INC., an Oregon Corporation,

Plaintiff/Respondent,

v.

EAGLE ROCK QUARRY, a Washington Business; CACTUS
QUARRY, a Washington Business; EAGLE ROCK QUARRY, INC.,
a Washington Corporation; EAGLE ROCK, LLC, a Washington
Limited Liability Company; and PAUL RIEDINGER and TINA
MURPHY, husband and wife, and the marital community composed
thereof; and LEXON INSURANCE COMPANY,

Defendants/Appellants.

RESPONDENT'S RESPONSE BRIEF

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I. INTRODUCTION

HNS, Respondent, filed a civil action in Franklin County Superior Court concerning a debt owned by the Appellants ("Eagle") in this matter after completion of work. Appellant sought and obtained dismissal under RCW 18.27 due to lack of contractor registration. Respondent argued substantial compliance with RCW 18.27. The Superior Court dismissed Respondent's claims, but also refused to award attorney's fees on two separate motions brought by the Appellant. Appellant appealed those denials of attorney's fees.

II. ARGUMENT

A. Appellant argues that RCW 4.84.185 entitles them to attorneys fees which a clear reading shows that it does not.

Appellant's memorandum fails to address the proper and requisite analysis to determine this case on appeal. This Court must determine whether RCW 18.27 applies, and if said RCW does apply, has HNS, Inc. substantially complied with the RCW? Eagle, ignores the evidence produced at the trial court level and simply states that HNS, Inc. didn't meet their obligation. Here it is clear from the case file and materials submitted, that HNS, Inc. did

provide adequate documentation of substantial compliance. RCW 4.84.185 awards attorneys fees for cases filed for frivolous purpose. HNS, Inc. filed a case for the legitimate purpose of seeking funds that were owed to them. Eagle then sought dismissal for lack of contractor registration. Eagle's motion, which was granted, does not suddenly make HNS, Inc.'s claims frivolous or fit under the narrow meaning of RCW 4.84.185.

It is well accepted that there are two exceptions to RCW 18.27, either a) the contractor substantially complied with the requirements, showing financial responsibility, or b) registration was not required because the contractor fell under one of the exceptions set forth in the act. *Martinson v. Publishers Forest Products*, 521 P.3d 233 (Wash.App Div 1 1974). HNS, Inc. clearly had a legitimate purpose for their lawsuit and a realistic expectation that they could prevail with a clear reading of the statute. As stated in the complaint, the parties did not sign a written contract, but had a verbal agreement. HNS, Inc. had a valid reason for listing these parties, as all defendants listed in the complaint did business out of Eagle Rock Quarry.

The fact that a party's action fails on the merits is by no means dispositive of the question of CR 11 sanctions or RCW 4.84.185.

Bryant v. Joseph Tree, Inc., 119 Wash.2d 210, 220, 829 P.2d 1099 (1992). A lawsuit can only be considered frivolous when it cannot be supported by any rational argument on the law or facts. *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 132, 783 P.2d 82, review denied, 113 Wash.2d 1001, 777 P.2d 1050 (1989).

The statute requires that the action be frivolous in its entirety. *Biggs v. Vail*, 119 Wash.2d 129, 133, 830 P.2d 350 (1992). Thus, if any one of the claims asserted was not frivolous, then the action is not frivolous. *Biggs*, 119 Wash.2d at 137, 830 P.2d 350. In this case, there is no denial that HNS, Inc. did work at the Eagle Rock Quarry in Franklin County, WA. There is further no denial that this Court dismissed the complaint after finding that HNS, Inc. failed to register as a contractor in Washington State. This Court did not make any other determinations about the case and did not determine that the case was frivolous. This Court did not determine that Paul Riedinger, Tina Murphy, and/or Eagle Rock, LLC were drawn into the case without reasonable cause. No such determination was made.

HNS, Inc. brought a case against said defendants with the legitimate purpose of seeking money owed to HNS, Inc. Eagle

should not be awarded attorney's fees and costs under RCW 4.84.185.

Appellant argues that Eagle spent substantial fees on a meritless case. Clearly the trial court did not agree with this allegation. Case law is clear that an award under RCW 4.84.185 is left to the discretion of the trial court and will not be disturbed by a higher court without a "clear showing of abuse." *Rhinehart v. Seattle Times, Inc.*, 59 Wn.App 332, 340, 798 P.2d 1155 (1990). *Tiger Oil Corp. v. Dept of Licensing*, 88 Wn.App 925, 938, 946 P.2d 1235 (1997). *Highland School District v. Racy*, 149 Wn.App 307 (Wash.App Div 3 2009). Attorney's fees cannot be awarded under RCW 4.84.185 without a specific showing of the trial court in written findings that the case was frivolous in its entirety and was advanced with no reasonable cause. *Hanna v. Margitan*, 193 Wash.App 596 (2016). *North Coast Electric C. v. Selig*, 136 Wn.App 636, 650, 151 P.3d 211 (2007). Any such award must have an objective basis and be sufficiently explained as to allow for appellate review. *Bowers v. Transamerica Title Insurance Company*, 100 Wash.2d 581, 675 P.2d 193 (1983). Because of the requirement for written findings, RCW 4.84.185 does not allow for an award of attorney's fees on appeal. *Hanna v. Margitan*, 193

Wash.App 596 (2016). *Bill of Rights Legal Found. v. Evergreen State Coll.*, 44 Wn.App 690, 697, 723 P.2d 483 (1986).

Nothing in this RCW allows for the award of attorney's fees or costs at the trial court level nor at the Appeals Court level. The finding of the trial court was correct and should be upheld.

B. Appellant argues that RCW 18.27.040 entitles them to attorneys fees which a clear reading shows that it does not.

On October 10, 2016 the trial court denied Eagle's Motion for attorneys fees and costs. In Eagle's attempt to have the trial court revisit this same argument, Eagle argued that RCW 18.27.040 entitled them to attorney's fees and costs up to the bond amount. Eagle needs to actually read RCW 18.27.040.

RCW 18.27.040(6), as it clearly states:

“(6) The prevailing party in an action filed under this section against the **contractor and contractor's bond** or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond or deposit is not liable in an aggregate amount in excess of the amount named in the bond

or deposit nor for any monetary penalty assessed pursuant to this chapter for an infraction." Emphasis added.

Appellant tries to use *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.* at 2005 case to establish that fees should be awarded under RCW 18.27.040. 128 Wash.App 885, 892 (2005). This case was reversed in 2006 by *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.* 149 P.3d 666 (Wash. 2006). The Supreme Court held that the plain language of RCW 18.27.040 is limited to actions filed against the contractor AND contractor's bond or deposit and limits the application of RCW 18.27.040 to said actions filed for recovery against the contractor's bond. *Id.* The Supreme Court thoroughly discuss the legislative intent of the statute as well as the plain meaning of the statute itself. *Id.* The general rule is that each party in a civil action pay its own attorneys fees and costs, which is known as the American Rule. *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.* 149 P.3d 666 (Wash. 2006). *In re Impoundment of Chevrolet Truck*, 148 Wash.2d 145, 160, 60 P.3d 53 (2002). The Supreme Court did not find that RCW 18.27.040 was intended to overcome the American rule, unless said parties do so intentionally with an attorney's fees provision within the contract itself.

Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc., 149 P.3d 666 (Wash. 2006). At the end of the day our Supreme Court has found that RCW 18.27.040(6) does not authorize attorney's fees except against contractor's bonds. *Id.* In this specific case, Eagle, the Appellant, did not file the lawsuit, did not name the bond, and has not followed the requirements of RCW 18.27.040. It is clearly held that attorney's fees and costs will not be allowed unless allowed under contract terms, statute, or recognized ground of equity. *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277 (Wash.1994). Nothing in this statute allows Eagle an award of attorney's fees. The trial court correctly read and applied RCW 18.27.040 and .080 which only allows for attorney's fees in the strictest of situations, this case does not apply.

**C. HNS, Inc. is requesting attorney's fees and costs
as allowed under RAP 18.1.**

Attorney's fees are only allowable on Appeal under RAP 18.1, statute, rule, or contract. *In Guardianship of Wells*, 150 Wn.App 491 (Wash.App Div 1 2009). RAP 18.1 clearly states that the Appeals Court *may* award fees and costs, meaning that there is no obligation to do so. In this matter, HNS, Inc. feels that defending the trial court's decisions, when Eagle has brought two separate

motions for attorney's fees to the trial court which were both denied, should allow HNS to be awarded attorney's fees. To be awarded attorney's fees at the trial level, the trial court would have had to justify said decision and put those findings in writing. The trial court denied both motions. RAP 18.1 allows the Court of Appeals to grant attorney's fees and costs to the prevailing party. *Highland School District v. Racy*, 149 Wn.App 307 (Wash.App Div 3 2009). *Zink v. City of Mesa*, 137 Wash.App 271, 152 P.3d 1044 (2007). Under that rule, HNS, Inc. is specifically asking that Eagle not be awarded any fees or costs and HNS, Inc. be awarded all fees and costs for defense of the Appeal.

III. CONCLUSION

HNS, Inc. the Respondent, therefore respectfully requests that the case should be upheld and further action denied as the trial court did not abuse its discretion in denying attorney's fees and costs on two separate occasions in this matter. Further, this Court should award attorney's fees and costs to HNS, Inc. as the prevailing party as allowed as RAP 18.1.

RESPECTFULLY SUBMITTED this 8th day of November, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of November, 2017 I caused a true and correct copy of the foregoing document to be filed with the Court of Appeals Division III, Court of Appeals, Division III, 500 North Cedar Street, Spokane, WA 99201-1905, by sending the same by U.S. Mail, first-class postage prepaid, and copies of the foregoing document to be served upon counsel of records as follows:

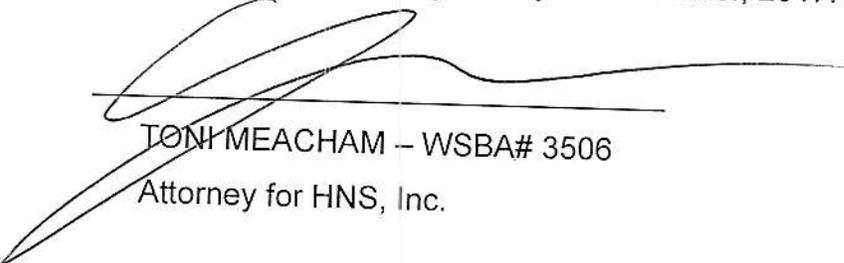
Attorney for Respondent
U.S. Mail

[x]

EAGLE ROCK QUARRY, CACTUS QUARRY, EAGLE ROCK QUARRY, INC., EAGLE ROCK, LLC, and PAUL RIEDINGER and TINA MURPHY
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A true and correct copy of the document to which this certificate is affixed to the parties shown above. I certify under penalty of perjury under the laws of Washington State that the foregoing is true and correct.

Signed at Connell, WA this 8 day of November, 2017.



TONY MEACHAM – WSBA# 3506

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Transmittal Information

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