

67644-0

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No. 676440

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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Structural Concrete, Inc., et.al.,

Appellants,

v.

Bay View Electric, LLC,

Respondent.

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**BRIEF OF APPELLANTS**

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**ORIGINAL**

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 NOV 28 AM 11:14

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None.

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None.

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## **I. Assignments of Error**

### Assignments of Error

**No. 1.** The trial court erred in entering the Order on Motion to Enforce Settlement and its accompanying Judgment, both filed August 23, 2011.

### Issues Pertaining to Assignments of Error

**No. 1.** Does a settlement agreement lack consideration when the agreement calls for dismissal of an action upon payment of settlement funds, but the action to be dismissed is barred by statute? Assignment of Error No. 1.

**No. 2.** RCW 19.28.081 requires an electrical contractor that sues for work performed to allege that at the time of commencing and performing such work it had, “an unexpired, unrevoked and unsuspended license” under Ch. 19.28 RCW. Does the contractor’s failure to make that allegation in its complaint make the action void ab initio? Assignment of Error No. 1.

**No. 3.** If an electrical contractor fails to inform the Department of Labor & Industries that its electrical administrator is neither employed by nor an owner of the contractor, does that void its electrical contractor's license as a matter of law when by statute that person must be an employee or an owner? Assignment of Error No. 1.

## **II. Statement of the Case**

This is a construction contract dispute between the owner/Appellants ("Flake") and the contractor/Respondent ("Bayview"). Bayview is an electrical contractor that obtained its initial license in 2005. CP 59.

Bayview's original Electrical Administrator was Kevin Adams whose license expired March 21, 2008, although he appears to have ceased any association with Bayview on June 17, 2007. CP 73 & 75. Bayview's current electrical administrator is Tyson O'Neil. CP 75. However, Mr. O'Neil has only been licensed as an electrical administrator since April 15, 2009. CP 77. The period running from the March 21, 2008 expiration

date through the April 15, 2009 effective date is referred to as the “No Administrator Period.”

On July 30, 2007, Bayview submitted paperwork to the Department of Labor & Industries claiming Blake Van Fleet (“Van Fleet”) was the electrical administrator/master electrician (“Electrical Administrator”) for its license. CP 71. However, at his deposition, Van Fleet admitted he was never employed by Bayview. CP 35:24 - 36:4. Van Fleet also admitted he was not an owner of Bayview. CP 37:5-6. In fact, Van Fleet admitted he has worked full time at the Tesoro Refinery in Anacortes for the past eleven years. CP 29:17-21.

It is undisputed Bayview performed electrical work for Flake from July 15, 2008 to February 27, 2009 (“Contract Period”). CP 122:11-12 & 118:4. The Contract Period falls within the No Administrator Period.

A dispute arose between the parties and Bayview sued Flake on January 20, 2010. CP 119-131. Ultimately, the matter was mediated and allegedly settled. CP 88.

Although Flake signed the alleged settlement agreement he subsequently discovered Bayview's license was void during the entire Contract Period. CP 89-90. Flake notified Bayview that due to its void license there was no valid lawsuit for Bayview to dismiss. *Id.* This meant there was no consideration provided by Bayview for the alleged settlement agreement. *Id.* Bayview's stated consideration is found in Paragraph 4 of the Memorandum of Settlement which reads:

4. Upon payment of the aforesaid settlement within 60 days, the Snohomish County Superior Court action will be dismissed with prejudice and without costs, including satisfaction of the mechanics' lien filed on the property in question;

CP 88.

Bayview then moved to enforce the alleged settlement agreement. CP 79-100. Flake responded with two briefs detailing arguments against enforcement. CP 63-78 & 15-62. Bayview's reply brief supporting its motion and Mr. O'Neil's supporting declaration were not considered by the Court. CP 10:1.

The Court ordered enforcement of the alleged settlement agreement and entered judgment against Flake. CP 9-10 & 7-8.

This appeal was timely taken. CP 1-6.

#### IV. AUTHORITY & ARGUMENT

A. **Synopsis of Argument.** The alleged settlement between Bayview and Flake is unenforceable as a matter of law under the electrical contractors' statutes.

Simply put, as a matter of law Bayview's electrical contractor license was "void" when it performed the contract between the parties because it lacked an Electrical Administrator. Because its license was "void" it was unable, also as a matter of law, to maintain the underlying action. Because it was unable to maintain that action, there was no action to dismiss in consideration for the Flake's alleged settlement payment.

Without consideration the alleged settlement agreement is unenforceable under basic contract law.

B. **An Electrical Administrator Must be Employed by, or be an Owner of, the Contractor to Which he is Assigned.** RCW 19.28.061(1) requires an Electrical Administrator to be employed by, or be an owner of, the electrical contractor to which his license is assigned.

**C. The Contractor's License is "Void" 90 Days after its Electrical Administrator Ceases to be Associated with it if No New Electrical Administrator is Appointed.** RCW 19.28.061(1) also reads in pertinent part:

If the relationship of the master electrician or administrator with the electrical contractor is terminated, the contractor's license is void within ninety days unless another master electrician or administrator is qualified by the board.

Emphasis added.

**D. A Contractor May Not Sue Unless it Held a Valid License at the Time it Performed Work.** RCW 19.28.081 contains a jurisdictional notice and pleading provision; it reads:

No person, firm or corporation engaging in, conducting or carrying on the business of installing wires or equipment to convey electric current, or installing apparatus to be operated by said current, shall be entitled to commence or maintain any suit or action in any court of this state pertaining to any such work or business, without alleging and proving that such person, firm or corporation held, at the time of commencing and performing such work, an unexpired, unrevoked and unsuspended license issued under the provisions of this chapter; and no city or town requiring by ordinance or regulation a permit for inspection or installation of such electrical work, shall issue such permit to any person, firm or corporation not holding such license.

Emphasis added.

Bayview never alleged in its Complaint that it had an unexpired, unrevoked and unsuspended license. CP 121-125. The logical purpose behind the notice requirement is to give a defendant, like Flake, an opportunity to confirm whether an electrical contractor's license was valid.

**E. Settlement Agreements are Analyzed as Contracts.** It is undisputed settlement agreements are analyzed as contracts governed by general principles of contract law. *Saben v Skagit County*, 136 Wn. App. 869, 876, 152 P.3d 1034 (2006); *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983). Contracts, to be valid, must be supported by consideration; if not they are unenforceable requiring rescission of the contract. *Krause v. Mariotto*, 66 Wn.2d 919, 920, 406 P.2d 16 (1965).

**F. Van Fleet's Lack of Employment by, or Ownership in, Bayview Voided its License.** Van Fleet admits he was not employed by, or owned any part of, Bayview (CP 35:24 - 36:4 & 37:5-6); however, even assuming Van Fleet had a relationship with Bayview, that relationship terminated as a matter of law on July 30, 2007 – the date Bayview tried to assign his Electrical Administrator license to it. See RCW 19.28.061(1) &

CP 71. Ninety-one days later, on October 29, 2007, Bayview's license became "void" as a matter of law under RCW 19.28.061(1).

**G. Bayview's License was "Void" during the Contract Period.**

Bayview's license was "void" from October 29, 2007 until April 15, 2009, when Mr. O'Neill became Electrical Administrator. CP 77. Because the "void" period coincided with the Contract Period (July 15, 2008 to February 27, 2009), CP 122:11-12 & 118:4, Bayview's license was "void" during the entire period it worked on Flake's Project.

**H. As a Matter of Law, Bayview's "Void" License Means it Cannot Maintain the Current Suit; It Also Breached the Jurisdictional Notice Provision.**

RCW 19.28.081<sup>1</sup> is clear that if a contractor has an invalid license it cannot commence or maintain a court action to recover for work done during that time. Because Bayview's license was void during the Contract Period, RCW 19.28.081 prohibited it from commencing or maintain the superior court action as a matter of law.

Bayview also failed to comply with the pleading requirements of RCW 19.28.081. That statute required it to state, and thereby give Flake

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<sup>1</sup> Although the statute does not use the word "void", "revoke" is synonymous with "void". HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1188 (5<sup>th</sup> ed., West Publishing Co. 1979) (1891).

notice and the opportunity to verify, that Bayview's license was not void. Its failure to do so voids the action.

**I. Lack of Ability to Maintain Action Means No Consideration for Settlement Agreement.** Because, as a matter of law, Bayview could not maintain the superior court action, it can provide no consideration to support the settlement agreement. If there is no consideration, there is no binding contract to enforce. *Krause, supra*. The alleged settlement agreement should be rescinded.

**J. RAP 18.1 & 14.2: No Attorney's Fees Awardable; Only Costs.** The Contract at issue, CP 126-131, lacks an attorney fee provision. Consequently the contractual attorney fee statute, RCW 4.84.330, does not apply. No other statute or recognized ground of equity exists to grant either party an award of attorney's fees.

Only the statutory attorney's fee and other statutory costs are awardable. RCW 4.84.015 & .080, RAP 18.1 & 14.2.

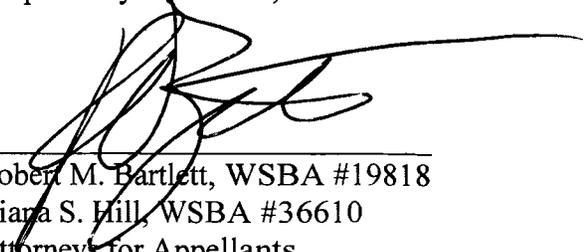
## V. CONCLUSION

Flake requests the Court to order the trial court to:

- A. Vacate the order enforcing the alleged settlement agreement;
- B. Vacate the money judgment entered pursuant to the order enforcing the alleged settlement agreement;
- C. Dismiss the action; and,
- D. Enter such other relief as deemed appropriate by the Court.

Dated this 25<sup>th</sup> day of November, 2011.

Respectfully submitted,



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