NO. 45925-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Thurston County Superior
Court No. 10-2-00972-5)

Douglas S. Radabaugh and Shirley Radabaugh,
Appellants (Defendants)

v.

Heritage Restoration, Inc.,
Respondent (Plaintiff)

BRIEF OF RESPONDENT, HERITAGE RESTORATION, INC.

Trevor A. Zandell, WSBA # 37210
Of Attorneys for Respondent
Swanson Law Firm, PLLC
908 – 5th Avenue SE
Olympia, WA 98501
(360) 236-8755

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

I. STATEMENT OF THE CASE

On March 10, 2009, appellants, DOUGLAS S. RADABAUGH and SHIRLEY RADABAUGH (hereinafter collectively referred to as "Radabaugh") entered into a written contract (hereinafter "Contract") with Heritage whereby Heritage agreed to restore the Radabaughs' home after a roof leaked that caused significant damage. (CP 13, 35, 45.) The repairs were being paid for by Grange Insurance (hereinafter "Grange") under a property insurance claim the Radabaughs made. (CP 34.) The Contract provided as follows with regard to the consideration Heritage was to receive in exchange for supplying materials and services to repair the home:

> For and in consideration of the services to be rendered by [Heritage] herein, [Radabaugh] hereby agrees to pay, upon receipt of invoice from [Heritage], the actual cost for said work. [Radabaugh] agrees to immediately forward all draws issued as partial or full payment regarding this claim....
>
> Furthermore, in consideration of the aforesaid services to be performed by [Heritage], Owner hereby authorizes and directs their insurance company to pay [Heritage] directly and/or include [Heritage] on all draws issued as partial or full payment regarding this claim.

(CP 13, 45.)

Before the Contract was executed, the Radabaughs had already received $34,715.03 from Grange, which amount represented the actual cash value of the damages as calculated by Grange. (CP 34-35, 38.) While Heritage

was performing the repairs, additional damage was discovered. (CP 37-38.) Heritage prepared an estimate to repair the additional damages, submitted it to Grange, and Grange agreed to cover the additional repairs at the prices stated in Heritage's estimate. Id.

On or about May 13, 2009, Grange sent a check to the Radabaughs, payable jointly to the Radabaughs and to Heritage, in the amount of $17,150.50 (hereinafter "Insurance Check"). (CP 38.) Those funds represented Grange's calculation of the withheld depreciation under the insurance claim, which is the difference between the actual cash value and replacement cost value. Id.

Heritage substantially completed the repairs at the home, including the supplemental work. (CP 40, 46.) In June 2009, Heritage submitted invoices to the Radabaughs for the work performed in the total amount of $29,983.05. (CP 39.) The invoices included prices for materials and labor that were set by a computer program called "X-actimate", as opposed to Heritage's actual costs for materials and labor. (CP 37, 42.) The Radabaughs disputed Heritage's bill arguing that certain work was not performed and other work was not completed to the standard of quality Heritage warranted. (CP 40-41.)

In August 2009, the Radabaughs endorsed the Insurance Check, wrote "Payment In Full" on it, and mailed it to Heritage. (CP 39.) Heritage retained but did not negotiate the Insurance Check. Id.

Having not received any monies from the Radabaughs in payment for the repairs (CP 39), Heritage instituted the trial court action on or about May 7, 2010 (CP 4-22, 42, 46). In its Complaint, Heritage attached and incorporated the Contract and sought relief under four causes of action: breach of contract, unjust enrichment, quasi contract and foreclosure of mechanic's lien. (CP 4-22, 42.) The Radabaughs filed counterclaims, including a claim seeking judgment for Heritage's allegedly uncompleted work, its allegedly defective work and for damage Heritage allegedly caused to the Radabaughs' home and property. (CP 23-25.) After the lawsuit was commenced, the Radabaughs, through their attorney, asserted for the first time that Heritage was not entitled to overhead and profit on the materials and services it provided because the Contract specified that the Radabaughs were only to be charged the "actual cost for said work". (CP 36, 40.)

On June 3, 2011, counsel for Heritage and the Radabaughs signed a Stipulated Motion and Order Directing Funds Be Deposited Into the Court Registry. (CP 29-33, 39.) The stipulated motion requested Thurston County Superior Court to direct Grange to deposit the $17,157.50 insurance proceeds, which had been originally issued by Grange in the Insurance Check, into the registry of court. (CP 29-33, 38-39.) The stipulated motion contained the following key language:

> This motion is made on the grounds that the Funds are insurance proceeds on a loss suffered by the defendants Radabaugh. Plaintiffs and defendants have a dispute in this case as to whom the funds properly belong.

(CP 29-33.) (emphasis added). The court granted the stipulated motion. Id. The order directed Grange to deposit the funds into the court registry and further stated:

> Once deposited, said funds shall be held in the court registry pending further order of this court.

(CP 30.)

The case was tried without a jury on June 27-30 and July 25-26, 2011. (CP 34.) On September 20, 2011, the court issued its Findings of Fact and Conclusions of Law. (CP 34-47.) The court held that the Contract required Heritage to provide the Radabaughs with an invoice for the "actual cost of said work" before the Radabaughs were required to pay the invoice. (CP 35-37, 42-43, 45-46.) Heritage had only ever provided the Radabaughs with invoices with prices set by the "X-actimate" program, as opposed to prices based on Heritage's actual costs. (CP 37, 42, 45.) As such, the Court concluded that Heritage had not delivered the appropriate invoice, and therefore, the Radabaughs' duty to pay under the Contract was never triggered. (CP 45.) As a result, the Court ruled against Heritage on its breach of contract and mechanic's lien claims. (CP 45, 47.)

However, the court held that the Radabaughs were required to pay Heritage for the value of the work performed "as a matter of equity" under Heritage's quantum meruit claim. (CP 46-47.) The court held the value of the work performed was $24,350.00, that the Radabaughs were entitled to relatively minor offsets on their counterclaims, and therefore that Heritage was entitled to judgment against the Radabaughs in the net amount of $20,600.00. (CP 47.) In its Findings of Fact and Conclusions of Law, the Court referenced the fact that $17,157.50 in insurance proceeds had been deposited into the court registry (CP 39), but the Court did not conclude whether Heritage or the Radabaughs were the rightful owner of those funds, nor did the Court order the release of those funds (CP 45-47).

On October 14, 2011, Heritage moved for and received a $20,600.00 money judgment against the Radabaughs' based on quantum meruit. (CP 48-50.) On November 9, 2011, Heritage moved to have the funds held in the registry of court distributed to Heritage. (CP 51-60.) On November 17, 2011, before there could be a hearing on Heritage's motion for release of funds, the Radabaughs filed for bankruptcy and a notice of automatic stay was filed in the Superior Court action. (CP 61, 85.)

On or about February 27, 2012, the Radabaughs received a discharge in the bankruptcy action. (CP 85-86, 95.) Heritage renewed its motion for release of funds after the automatic stay was lifted in the Radabaughs'

bankruptcy case. (CP 74, 85.) At the hearing on the motion on March 30, 2012, the Court denied the motion without prejudice because it wanted the parties to supplement the record with regard to the Radabaughs' bankruptcy action. (RP 3/30/12 at 14-15.)

Following the March 30, 2012 hearing, counsel for Heritage sought the bankruptcy trustee's position on the issue of ownership of the funds. (CP 86.) In response, the trustee filed a motion to abandon the funds as an asset of the bankruptcy estate in the bankruptcy action. (CP 86, 89-90, 95-96.) The Radabaughs' attorney in the Thurston County Superior Court action filed an objection to the trustee's motion in the bankruptcy action. (CP 86, 96.) Thereafter, Heritage's counsel filed a reply to the Radabaughs' opposition asserting it was the owner of the funds. (CP 96.) The trustee voluntarily withdrew his motion prior to a hearing before the bankruptcy Court. (CP 97.) Thereafter neither the bankruptcy trustee nor the Court in the bankruptcy action took any further action with respect to the funds held in the Thurston County Superior Court registry. (CP 87, 92-99.)

On or about December 10, 2013, the Radabaughs' bankruptcy action concluded. (CP 86, 98-99, 117.) On January 13, 2014, Heritage once again renewed its motion for release of funds. (CP 85-99.) On February 21, 2014, Heritage's motion was granted, with the Court concluding that Heritage was the owner of the funds by a legal and/or equitable assignment from the

Radabaughs that predated the bankruptcy action or discharge of Heritage's money judgment. (CP 116-119; RP 2/21/14 at 15-16.)

II. ARGUMENT

A. Heritage Moves to Strike Factual Averments in the Radabaughs' Brief That Are Not Supported by Citation to the Record.

The Radabaughs' opening brief contained the following factual averments in their Statement of the Case that are not contained in the record and without citation to the record:

> Heritage Restoration received a money judgment against the Radabaughs based on Findings of Fact and Conclusions of Law prepared by Heritage Restoration's Counsel and approved and issued by the Trial Court.

(Appellants Opening Br. at 4.)

> Heritage Restoration filed a claim in bankruptcy as a creditor of the Radabaughs. That claim was based entirely on the judgment it had received.

(Appellants Opening Br. at 5.)

> The Heritage judgment was not paid in full in the bankruptcy.

(Appellants Opening Br. at 9.) One of the above claims is untrue, one is intentionally misleading, and the other requires further explanation and context. However, demonstrating that they are untrue or misleading would require citation to other materials that are also not in the record. Heritage is therefore unable to answer them. The inclusion of the above factual

averments without citation to the record is a violation of RAP 10.3(a)(5). As such, Heritage moves to strike those averments.

B. Because the Radabaughs Have Not Challenged Any of the Trial Courts Findings of Fact, They Are Verities on Appeal.

The Radabaughs did not assign error to any of the Trial Court's findings of fact in their opening brief. If the Radabaughs intended to challenge any of the Trial Court's findings of fact, they were required to list a separate assignment of error for each finding, with reference to the finding by number. RAP 10.3(g). Because the Radabaughs have not raised any challenges, the Trial Court's findings of fact are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002); Harris v. Urell, 133 Wn. App. 130, 137, 135 P.3d 530, 533 (2006).

C. The Trial Court's Judgment in Favor of Heritage Was Based On Quantum Meruit Not Breach of Contract.

The Radabaughs assert multiple times throughout their opening brief that the trial court awarded Heritage a money judgment based upon Heritage's breach of contract claim and not based on an equitable remedy. (See, e.g., Appellants Opening Br. at 4, 7, 11.) The Radabaughs argued precisely the opposite to the Trial Court in opposition to Heritage's motion for release of the funds:

> The absence of a holding that the moneys were equitably assigned to Heritage is despite the fact that the Court's judgment is based on the Court's equitable powers, as the

> Court, holding that Heritage had not proved its contract price (the actual cost of the work) and therefore could not award ordinary contract damages, based its judgment award on the equitable theory of *quantum meruit.* (See holdings 4 and 13.)

(CP 64.)

The Trial Court's judgment was indeed based on quantum meruit. In its Findings of Fact and Conclusions of Law, the Trial Court expressly ruled against Heritage on its breach of contract and mechanic's lien claims. (CP 45-47.) However, the Trial Court awarded Heritage damages under its quantum meruit claim. (CP 46-47.) The Judgment that was entered subsequent to the Trial Court's ruling was expressly based on quantum meruit and not on breach of contract. (CP 48-50.)

D. The Court Should Decline to Consider Several of the Radabaughs' Claims of Error as They Were Not Raised in the Trial Court.

The Radabaughs argue in their opening brief that the Trial Court, by its February 21, 2014, Order Granting Plaintiff's Motion for Release of Funds in Court Registry, amended or supplemented the Trial Court's earlier Findings of Fact and Conclusions of Law and Judgment. (Appellants' Opening Br. at 8-9.) The Radabaughs argue that was error, in part, because it was not done pursuant to a motion for reconsideration under CR 59(h), a motion to reopen the record under CR 59(g), or a motion for relief from judgment under CR 60. Id. However, the Radabaughs did not raise any of

those procedural objections to the Trial Court, and as such, this Court should refuse to consider those claims of error.

Generally, Washington appellate court do not consider arguments made for the first time on appeal. RAP 2.5(a); Clapp v. Olympic View Pub. Co., L.L.C., 137 Wn. App. 470, 476, 154 P.3d 230, 234 (2007); River House Dev. Inc. v. Integrus Architecture, P.S., 167 Wn. App. 221, 230, 272 P.3d 289, 294 (2012). The policy behind this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. Wilson & Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470, 473 (2011). The exceptions to the general rule are: jurisdictional issues, failure to establish facts on which relief can be granted, and manifest error affecting a constitutional right. RAP 2.5(a).

Here, Heritage initially filed and served its motion for release of funds on November 9, 2011. (CP 51-60.) That motion was not considered by the Court immediately due to the automatic stay issued in the Radabaughs' bankruptcy case. (CP 61). Heritage re-noted the motion after the bankruptcy stay was lifted and the Radabaughs substantively responded for the first time. (CP 62-75). The Court dismissed the motion without prejudice at the first hearing (RP 3/30/12 at 14-15.) When Heritage re-noted the motion for a third time, the Radabaughs filed a supplemental response. (CP 100-113.) However, at no time in any of their written responses or in

their counsel's arguments to the Trial Court did the Radabaughs raise the procedural objections listed above in this subsection. (CP 62-75, 110-113; RP 3/30/12 6-16; RP 2/21/14 9-19). In fact, the Radabaughs' counsel argued to the Trial Court that Heritage's motion was not a motion to amend the findings and conclusions:

> This wasn't a motion to amend the findings of fact and conclusions of law.

(RP 2/21/14 at 16). Both because the Radabaughs did not object in the Trial Court to the alleged amendments to findings and conclusions and because the Radabaughs acknowledged to the Trial Court that Heritage's motion was not one to amend findings and conclusions, this Court should decline to consider those claims of error.

E. The Trial Court Had Exclusive Authority to Determine the Party Entitled to Funds on Deposit in the Registry of Court and to Order their Disbursement.

The standard of review of a trial court's decision to disburse funds held in the trial court's registry is abuse of discretion. Pacific Northwest Life Ins. Co. v. Turnbull, 51 Wn. App. 692, 699, 754 P.2d 1262, 1267 (1998). The trial court has exclusive authority and control over funds that are on deposit in the registry of court:

> **RULE 67. DEPOSIT IN COURT**
>
> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of

> delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of RCW 4.44.480 through 4.44.500 or any like statute or rule.

CR 67. RCW 4.44.480 echoes the provisions of CR 67 and it also makes it clear that once funds are deposited into the court registry, the court has wide discretion over how the funds should be disbursed:

> **4.44.480. Deposits in court--Order**
> When it is admitted by the pleading or examination of a party, that the party possesses or has control of any money, or other thing capable of delivery, which being the subject of the litigation, is held by him or her as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

RCW 4.44.480 (2003) (emphasis added).

After funds have been deposited into the court registry, the court has wide discretion to disburse them pursuant to applicable principles of law and equity, even after judgment has been rendered and the case dismissed:

> A court which has custody of funds has the authority and the duty to distribute the funds to the party or parties that show themselves entitled thereto, and this duty continues even after the entry of judgment or dismissal of the action in which the court gained custody of the funds. Such a court

> has the power and the responsibility of protecting the fund and of disposing of it in accordance with the applicable principles of law and equity for the protection of the litigants and the public whose interests are affected by the final disposition thereof. The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an unlawful or unjust result.
>
> Thus the court has wide discretion in the disposition of deposited funds.

Wilson v. Henkle, 45 Wn.App. 162, 169, 724 P.2d 1069 (1986) (citations omitted) (emphasis added); See also, Turnbull, 51 Wn.App. at 699. Once money is deposited into the registry of court, it is held *in custodia legis* pending further order of the court and, because their ownership is in dispute, they may not be the object of a garnishment, levy or any other form of execution. Maybee v. Machart, 110 Wn.2d 902, 904-05, 757 P.2d 967 (1988).

Here, before the funds were deposited, they were insurance proceeds issued for a portion of the Radabaughs' insurance claim under which Heritage provided construction materials and services. They were deposited by Grange pursuant to a stipulated motion and order because, at the time, there was a dispute as to how much offset from Heritage's bill, if any, the Radabaughs were entitled. The Stipulated Motion provided that Heritage and Radabaugh disputed to whom the funds belonged. (CP 29-33.) By

signing the Stipulated Motion, the Radabaughs' counsel recognized Heritage's claim to ownership of the funds. The stipulation is binding on the Radabaughs. State v. A.N.W. Seed Corp., 54 Wn. App. 729, 732, 776 P.2d 143, 144 (1989). Once the parties recognized each other's claims to the funds and decided to deposit the funds into the court registry, the Trial Court gained exclusive jurisdiction to determine the owner of the funds and to disburse them.

F. The Funds Were Heritage's Property Because the Radabaughs Legally Assigned Them to Heritage.

Heritage was the owner of the funds that were on deposit in the registry of the Trial Court because the Radabaughs legally assigned them to Heritage under the parties' Contract. Funds are lawfully assigned when the assignor manifests an intention to assign them to a particular assignee. See, Washington State Dept. of Revenue v. Security Pacific Bank of Washington N.A., 109 Wn. App. 795, 38 P.3d 354 (2002); Shower v. Fischer, 47 Wn. App. 720, 737 P.2d 291 (1987). No particular words of art are required to make a legal assignment so long as the intention to assign is clear:

> No particular words of art are required to create a valid and binding assignment. Any language showing the owner's intent to transfer and invest property in the assignee is sufficient.

Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 208, 194 P.3d 280, 287 (2008) (citations omitted).

Here, the Contract required the Radabaughs to "immediately forward all draws issued as partial or full payment regarding this claim." By the terms of the Contract, the Radabaughs also directed their insurer to pay Heritage directly or to include Heritage on all payouts under the insurance claim. That provision was evidently honored by Grange when it initially issued the Insurance Check jointly to the Radabaughs and Heritage.

Under the Contract, the Radabaughs clearly evidenced an intention to assign the insurance proceeds to Heritage, at the prices negotiated between Heritage and their insurer, subject to certain warranties of quality. The trial below was necessary to determine how much of an offset to the agreed prices, if any, the Radabaughs were entitled due to alleged incomplete work or work that did not conform to the warranties of quality. Once those issues were decided by the Trial Court, the amount of the assignment was known. Since the Trial Court found that Heritage was entitled to more money than the amount in the court registry, it reasonably exercised its discretion in concluding that all the funds had been assigned to Heritage.

G. If the Funds Were Not Legally Assigned, They Were Equitably Assigned to Heritage.

Even if there was not a legal assignment of the funds, the Trial Court did not abuse its discretion in concluding that the Radabaughs equitably

assigned the funds in the court registry to Heritage. Whether an equitable assignment has occurred in the absence of a legal assignment depends on whether the circumstances evidence an intention to assign:

> To establish an equitable assignment it is sufficient if the language utilized, coupled with the surrounding circumstances, plainly reveals an intent on the part of the assignor to make an actual or constructive transfer to the assignee of a present interest in the debt, fund, or subject matter of the assignment, even though the circumstances do not permit the assignee's immediate exercise of the interest, and, in pursuit of such intent, the assignor unequivocally relinquishes his control or power of revocation over the debt, fund, or subject matter of the assignment to the use or benefit of the assignee. As pointed out in the latter authority, a reliable test of an equtable [sic] assignment is whether the debtor would be justified in paying or delivering the subject matter to the designated assignee.

Robert Wise Plumbing & Heating, Inc. v. Alpine Dev. Co., 72 Wn.2d 172, 178, 432 P.2d 547, 551 (1967) (citing, Sundstrom v. Sundstrom, 15 Wn.2d 103, 129 P.2d 783 (1942); See also, Mercantile Ins. Co. of America v. Jackson, 40 Wn.2d 233, 242 P.2d 503 (1952).

Here, the Radabaughs have equitably assigned the funds to Heritage for all the same reasons argued above in favor of a finding of a legal assignment. Even if the Contract is unenforceable due to Heritage's failure to deliver an invoice for the "actual cost for said work," the Radabaughs still signed and agreed to the other provisions in the Contract quoted in the Statement of the Case above evidencing the intention to assign the funds.

The Radabaughs' counsel argued to the Trial Court that the Radabaughs were entitled to the funds at the time of the construction project and that they opted to use the funds to pay for the repairs:

> [The Radabaughs] chose to use the funds to -- at least they initially chose to use the funds to fund the construction project to repair the work, but they were entitled to those funds at the time.

(RP 3/30/12 at 10.) Additionally, under the test set forth in Robert Wise Plumbing & Heating, Inc. above, the Radabaughs certainly would be justified in paying the subject funds to Heritage. The funds are insurance proceeds intended to pay for materials and construction services performed by Heritage at the Radabaughs' home. Once the funds were deposited, the only dispute remaining was whether the value of materials and services performed by Heritage exceeded the amount of the funds held. The Trial Court heard six days of testimony on those issues, and concluded the net value of materials and services performed by Heritage was $20,600.00, which amount exceeded the funds in the court registry. At that point, the Trial Court reasonably exercised its discretion in finding that the whole of the funds had been assigned to Heritage.

H. The Radabaughs' Discharge in Bankruptcy Did Not Affect Ownership of the Funds.

The Radabaughs argue that the Judgment issued against them was discharged in their bankruptcy action, and therefore, the funds held in the

court registry should not have been released to Heritage. However, Heritage's motion was for release of the funds as the owner of the funds, and not an attempt to execute against the funds owned by the Radabaughs. A discharge in bankruptcy does not extinguish a debt, but merely releases the debtor from personal liability for the debt.

> A bankruptcy discharge extinguishes only *in personam* claims against the debtor(s), but generally has no effect on an *in rem* claim against the debtor's property. *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 92 (4th Cir. 1995). Thus, [i]t is well established that a discharge in bankruptcy does not extinguish a lien on property which had attached as of the date of the petition. *Barnes v. Sawyer (In re Barnes),* 326 B.R. 832, 841 (Bankr. M.D. Ala. 2005).

In re Anderson, 378 B.R. 296, 298 (W.D. Wash. 2007); See also, In re Walker, 151 B.R. 1006, 1008 (E.D. Ark. 1993). The debt survives after discharge and may be collected from any source that might be liable, with the exception of the debtor personally. 11 U.S.C. § 524(e); Hill v. Royal, 769 F.2d 1426, 1431-32 (9th Cir. 1985). The bankruptcy injunction applies only to suits "to collect, recover or offset" a debt as the "personal liability of the debtor". 11 U.S.C. § 524(a)(2); In re Fernstrom Storage and Van Co., 938 F.2d 731, 733-34 (7th Cir. 1991).

In In re Stratton, 106 B.R. 188 (E.D. Cal. 1989), a creditor asserted that the debtors had fraudulently used the creditor's funds to improve the debtors' homestead. Stratton, 106 B.R. at 192. If the fraud was proven, an

equitable lien, which is very similar in nature to the equitable assignment asserted here by Heritage, would have been formed against the debtors' equity in their homestead:

> An "equitable lien" is a creature of equity and is the right to have a fund or specific property applied to payment of a particular debt and is based on the equitable doctrine of unjust enrichment.

Id. at fn. 12 (citations omitted). The court held that the creditor could pursue the fraud claim post discharge because, if the creditor's allegations were proven, the equitable lien would have attached prior to the bankruptcy petition and survived the discharge. Id. at 193.

Here, by its motion, Heritage was not asserting an equitable right to payment as argued by the Radabaughs. If it had, such may have constituted a "claim" under 11 U.S.C. § 101(5)(8). Rather, Heritage was merely moving the court to disburse funds to it that it already owned. While Heritage may have been prohibited from enforcing the judgment against the Radabaughs personally, it was still entitled to the funds held in the court registry, as they were legally or equitably assigned before the bankruptcy petition was filed.

The fact that the Radabaughs attempted to claim the funds as one of their exemptions in the bankruptcy action also does not change the analysis. A debtor in bankruptcy may only claim an exemption on property that the debtor owns. See 11 U.S.C. § 522(b). The Radabaughs were not the owner

of these funds as of the date they filed for bankruptcy, so their exemption claim is a nonfactor.

Nor was Heritage's motion an attempt to circumvent the bankruptcy statutes as asserted by the Radabaughs. The funds were deposited into the court registry under a Stipulated Motion in which Heritage asserted ownership of the funds several months before the Radabaughs filed for bankruptcy. Also, Heritage first filed its motion for release of the funds, asserting legal or equitable assignment, before the Radabaughs filed for bankruptcy. If anything, the Radabaughs filed for bankruptcy in an attempt to prevent the Trial Court from distributing the money to Heritage.

I. Request for Attorneys' Fees and Expenses on Review.

Heritage requests the Court of Appeals award Heritage its reasonable attorneys' fees and costs on appeal. In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties in a trial court action or on appeal. Thompson v. Lennox, 151 Wn. App. 479, 484, 212 P.3d 597, 599 (2009). Here, the Contract provides, "In the event this account is referred to an attorney for collection, [Radabaugh] agrees to pay reasonable attorney fees and court costs." (CP 13.) Heritage clearly referred the Radabaughs' account to an attorney for collection as is evidenced by the mechanic's lien recorded and subsequent lawsuit to foreclose the same. (CP 4-22). As such,

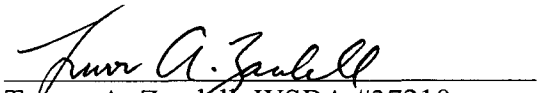
if Heritage prevails in this appeal, it is entitled to an award of its reasonable attorneys' fees and costs.

III. CONCLUSION

Heritage respectfully requests that this Court affirm the Trial Court's ruling in its February 21, 2014, Order Granting Plaintiff's Motion for Release of Funds in Court Registry, and award Heritage its reasonable attorneys' fees and costs on appeal.

DATED this 7th day of August, 2014.

SWANSON LAW FIRM, PLLC



Trevor A. Zandell, WSBA #37210
Of Attorneys for Respondent Heritage Restoration, Inc.

DECLARATION OF SERVICE

I, Amy E. Bergman, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am over the age of 18, I am competent to give testimony in court, and I make this declaration based on personal knowledge. On August 7, 2014, I served, via legal messenger, the foregoing Brief of Respondent, Heritage Restoration, Inc., filed in the above-referenced case on the Appellants, via their attorney, Ben D. Cushman of Cushman Law Offices, P.S., addressed to 924 Capitol Way South, Olympia, Washington 98501.

DATED this 7th day of August, 2014.

SWANSON LAW FIRM, PLLC

Amy Bergman, Legal Assistant to
Trevor A. Zandell