No. 47195-7-II

IN THE COURT OF APPEALS OF THE
OF THE STATE OF WASHINGTON
DIVISION II

JOSEPH R. AMEDSON,

Plaintiff/Appellee,

and

PUGET SOUND ELECTRIC COMPANY, a Washington corporation; CHARLES W. CLARK and "JANE DOE CLARK" husband and wife, both individually and jointly as a marital community; and TRAVELERS CASUALTY AND SURETY COMPANY, BOND #105336057,

Defendants/Appellants,

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON
THE HONORABLE JERRY T. COSTELLO

APPELLANTS' OPENING BRIEF

L. PAUL ALVESTAD
WSBA #10892
Attorney for Appellants

GORDON & ALVESTAD, PLLC
7525 Pioneer Way, Ste. 101
P.O. Box 1189
Gig Harbor, WA 98335
Telephone No.: (253) 383-0775

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I. INTRODUCTION

Judgment was only issued against Travelers Casualty and Surety Company Bond #105336057. PSE is a necessary party under RCW 19.28.07. No separate judgment was entered against PSE.

PSE is a licensed electrical contractor who has a required $4,000 bond with Travelers pursuant to RCW 19.28 et seq. Plaintiff hired PSE to "rough-in"[1] and "trim"[2] electrical installations in three spec homes he owned. (Clark's Decl. P 2 at 7, et seq.) The "rough-in" work was completed and passed inspection around Christmas 2013. (Clark's Decl. P 4 at 4, et seq.) A dispute arose and was settled over payment of sales tax in April 2014. (Clark's Decl. P 6 at 15, et seq.) *Without demand or explanation or allegation of wrongdoing,* and before PSE could start the trim phase, Plaintiff fired PSE, hired three new electricians or electrical contractors and incurred additional costs to do the trim. (Clark's Decl. P 5 at 9, et seq.)

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[1] Basic electrical work before the drywall and installation is installed.

[2] Completion of the electrical work including installation of fixtures.

PSE, its shareholder and Travelers were sued for work that it could not perform due to PSE's discharge from the job. *The work for which Plaintiff complains was to be done during the trim phase.*[3]

After PSE answered and a partial exchange of discovery, Plaintiff moved for summary judgment against Travelers while naming PSE as a necessary party under RCW 19.28.071. Travelers responded with factual *and unrebutted expert* declarations alleging that PSE made the proper installations, that PSE was terminated without reason or notice and that the alleged defects were matters to be completed in the trim phase—which PSE could not complete because it was dismissed. (James Declaration)

PSE (Principal) argued that there could be no liability on the surety (Travelers) without a showing that there was a "failure" on the Principal's (PSE's) behalf. (Reply P 8 et seq.) In essence, PSE and Travelers assert that there was no failure to perform because the work of which the Plaintiff complains was to be performed during the trim phase—of which PSE was not involved.

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[3] At the time of summary judgment, the amount in controversy against PSE and its shareholder was in excess of $48,000.00. The Complaint against PSE and its shareholder has since then been voluntarily dismissed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in entering the order of December 12, 2014 (CP 287-292) granting the Plaintiff Amedson Summary Judgment against Puget Sound Electric, Inc. and Travelers Insurance Company in the amount of Puget Sound Electric's electrical contractor's bond. .

B. Issues Pertaining to Assignments of Error.

1. Was there a material issue of fact on whether electrical contractor PSE "failed" to meet electrical standards within the meaning of RCW 19.28.41 when its contract was prematurely terminated by Plaintiff before PSE could fully perform? [Assignment of Error 1]. [4]

2. Whether Defendant Travelers should be required to remit the amount of the surety bond absent a showing of failure by its principal, PSE. [Assignment of Error 1].

III. STATEMENT OF THE CASE

In November, 2012, PSE entered into three contracts to "rough-in" and "trim" electrical service on three homes owned by Plaintiff. (CP

[4] The statement of case is largely from the Declarations of Clark (CP149-192) and expert Mark James (CP 193-199). The specific Assignment of Error relates to finding that PSE ["failed"] to comply with the strict requests of the applicable laws (CP 289:27-29 and CP 290:18-24) and that Plaintiff was damaged thereby (CP 290:25-29).

72-82[5] The owner/contractor said that this was a rush project and wanted PSE to complete the rough-in by Christmas. (CP 150:7-11)

In broad terms, "rough-in" means electrical work on everything to be covered by surfaces—principally drywall (e.g. wire, plug boxes). "Trim" work involves everything installed outside of the drywall (e.g. light fixtures, outlets, light switches) and all that is seen by the homeowner. Regulations determine the number of circuits that go in residential housing and in this case one circuit per 500 square feet with certain exceptions such as the kitchen, washer dryer, hot tub, heat pump, etc. *There are literally hundreds and perhaps thousands of ways the rough-in work can be completed all of which are consistent with industry standards and regulations. It therefore is important for the rough-in electrical contractor to also do the trim work.* (CP 150:12-20)

When the electrical contractor completes his rough-in, he has it inspected by Washington State Department of Labor and Industries ("L&I") and upon approval, the owner/contractor has permission to insulate, cover the walls with drywall and paint them. On average, it takes six to eight weeks to drywall, tape, mud, texture and paint a home

[5] The contracts each require payment of attorney's fees. If remanded to Superior Court, the substantial prevailing party could be entitled to an award of attorneys fees per contractor or other principals. "Any and all collection and attorneys fees will be paid by my homeowner." (CP 81)

of this size. The owner/contractor then contacts the electrical contractor to complete his job with the trim phase. He installs the light fixtures, outlets and light switches, turns on power, *troubleshoots and makes any corrections needed* and then calls L&I to do a final inspection. *The electrical contractor's job is not complete until the electrical contractor has everything working properly at the trim phase. Unfinished items from the rough-in stage, if any, are corrected at that point.* (CP 150:21 and CP 151:7)

The trim work is always done by the same electrical contractor who does the rough-in because he is the most familiar with the way the rough-in work was done. This is essential because issues inevitably arise during the trim in phase. Sometimes issues arise from changes made or damage caused by the contractor or the drywall subcontractor and sometimes the matters simply are not fully completed during the rough-in stage. (CP 151:8-15)

Because the rough-in electrical contractor is familiar with the system, incomplete items can quickly be fixed during the trim stage. It would be immensely more difficult for a new trim electrical contractor to take over at this point because he is not familiar with the system behind the drywall. For instance, electrical runs (called a "Home Run") extend from the electrical panel (the box containing circuit breakers) to a plug or

switch box and then branch from that point. Almost any plug or switch box can be the terminus of the Home Run. If the trim contractor is not aware of where the Home Run termini are, it is very difficult and almost impossible to troubleshoot or correct any incomplete items. (CP 151:16 to 152:2)

The contracts were entered into on November 28, 2012 with hopes and instructions to get the project roughed in by Christmas. It then would take 6-8 weeks to complete the drywall, texturing and painting, and then dry so that the electrical trim could be completed. The L&I rough-in inspection occurred on December 28, 2012 and passed as reflected in Exhibits 8(a),(b) and (c). (CP 152:4-8)

Greg Harris was the L&I inspector who passed the inspection in December, 2012. He also is Plaintiff's "expert" witness. It was he who gave the go ahead to install drywall, texture and paint. If there was a problem with the way the structures were wired, he would have made that observation when the rough-in inspection took place. He made no such observations. The court should note that Greg Harris *carefully parsed his words in his declaration (CP 110-112) and has not in his declaration concluded that the alleged deficiencies existed on this job site. He only testifies that the items mentioned in the attached declaration by SIRB (CP 60-70) would be out of compliance if true—but he does not say at what*

stage (rough-in or trim) they would be out of compliance. He also does not indicate that he knew that there were two previous contractors on the job who performed the work. PSE noted in its declaration that GFI ("ground fault indicator") outlets were missing. But, as it noted in PSE's declaration those always are installed during the trim phase. (CP 152:9-18 – emphasis added)

Following PSE's rough-in completion in late December, 2012, the project was stalled for several months due to water intrusion, contractor and subcontractor delays and other matters outside of PSE's control. The delay was surprising given the urgency expressed by Plaintiff to complete the rough-in by Christmas. (CP 152:19-22)

After the rough-in passed inspection Plaintiff did a walk through and provided PSE with a punch list (Exhibit 11). Unfortunately, with the exception of nail plates (discussed later) the items were not included in the contract and PSE declined to do them for free. (CP 153:1-3)

While this caused some concern with the Plaintiff, he still asked PSE to perform extra work which PSE agreed to do for an additional sum and those items are not in dispute. Those items included wiring of a heat pump, phone and speaker wire, electric monitors for heat pump. For an additional fee which also is not in dispute, PSE installed the TV, phone and speaker for Lot 2. (CP 153:4-8)

While doing the additional work, PSE added a few additional nail plates as requested by Plaintiff and at that point was not told, (and therefore formed the belief) that there were no additional issues with PSE's work. During this time, PSE noticed that someone else was doing electrical work on the project. PSE was the only electrical contractor on the job and confronted Plaintiff about it. He said that he had "his electrician" do it. PSE later learned that that electrician was the electrician for the house on Lot No. 1. (Lot 1 was not wired by a licensed electrical contractor and the Plaintiff was cited by L&I inspector Greg Harris for having illegally wired the house.) (CP 153:9-16)

Drywall then was installed and PSE received updated reports from the Plaintiff on when PSE should start on the trim work. There were no complaints and therefore PSE formed the belief that Plaintiff was satisfied with the first stage of the work. (CP 153:17-19)

A dispute arose over payment of sales tax that was resolved. During the dispute Plaintiff's attorney sent an April 12, 2013 letter (CP 185-188) that is significant because it a) mentions nothing of the quality of the work PSE performed (pages 1 and 2); b) invites PSE to meet and discuss matters relative to completion and finalization of the trim work (page 3); and 3) indicates that "...There is not that much remaining to be done in order to complete the express agreed scope of work for each of

the new homes pursuant to your written Contracts for Lots 2, 3 and 4." PSE met with Plaintiff on April 17, 2013 gave him a bill for the sales tax (Exhibit 19(b)) which he acknowledged with his signature and (as previously discussed) Plaintiff PSE considered the minor disagreement over the timing of payment of sales tax resolved, and then waited for notice on when the trim work would be required. (CP 153:20 to 155:20)

At a point in late April 2013, PSE received a call from Plaintiff who wanted to come by Charlie Clark's (PSE's shareholder) house to pick up exhaust fan covers that PSE acquired to do the trim work. After Clark gave it to him, and without explanation, Plaintiff said that he no longer required PSE's services and drove off. While disappointed with the loss of work and future payment of an additional $2,000 per house, his words led PSE to believe that he would use someone else for the job and that PSE was relieved of further responsibility. In that conversation PSE was not told of any dissatisfaction with its work nor why PSE was being dismissed. PSE expected to make about $3,000 of profit from the trim work. (CP 155:3-10)

Clark's declaration indicated that he reviewed Plaintiff's supporting declarations as to quality of work. He could not determine the extent of nor whether the alleged deficiencies (incomplete work) are attributable to PSE or the one unlicensed and two other licensed other

contractors on site. But Clark testified that a) the items of which Plaintiff complains are common items to be completed during the trim phase—in other words, Plaintiff's concerns were of items which: a) can only be completed during the trim phase; b) PSE would have been able to easily complete those matters during the trim stage, and c) if not caused by any other contractor, would have been completed by PSE during the trim phase according to contractual terms. PSE did not do the work however, because PSE was taken off of the job without explanation. (CP 155:11-18)

Finally, PSE noted that it did "all rough-in work properly and anything else would have been completed in the trim phase." (CP 156:15-16 – emphasis added)

PSE then produced the expert testimony of Mark James, a licensed electrical contractor, member of the International Brotherhood of Electrical Workers Local 76, and an instructor at Pierce College in connection with the Southwest Washington Joint Apprentice Training Center for electrical contractors who are familiar with electrical regulations and industry standards. (CP 194:1-8)

Mr. James reviewed the contracts appended to Plaintiff's complaint and noted that PSE's work was to be done in two phases, "Rough-in" and "Trim" work. Each such phase is inspected by a state

electrical inspector--in Washington—the Department of Labor and Industries or "L&I." (CP 194:9-14)

When an electrician completes his rough-in, he tests it, corrects problems, and if it passes his own internal inspection, he calls L&I to inspect. Any problems brought to the attention of the electrician by the inspector then are corrected, the site is reinspected and an inspection report is issued. (CP 194:15-18)

One important thing to note is that there are many ways (perhaps hundreds or thousands) to rough-in the wiring of a house which are consistent with industry standards and state regulations. It usually takes six to eight weeks to install surfaces and otherwise prepare the site for electrical trim-work. When ready, the general contractor contacts the electrician who then proceeds with the trim work. Upon completion, the system then is tested by the electrician, corrections are made, and the L&I inspector is called to do a final inspection. (CP 194:19 to 195:4)

The trim work always should be done by the same electrician who does the rough-in because he is the most familiar with the way the rough-in occurred. This is important because inevitably issues arise during the trim phase. Sometimes those issues arise from changes made or damage caused by the contractor or his drywall subcontractors between the rough-in and trim phases. Because he is familiar with the system, problems can

quickly be fixed. It would be immensely more difficult for a new trim electrician to take over at this point because he will not be familiar with what the system was like behind the dry wall. (CP 195:5-11)

An electrical contract will include both rough-in and drywall components which are performed by the same person as it will be less expensive to the general contractor and eventually the homebuyer. If there is more than one electrical contractor involved in either the rough-in or trim stages, problems and expense that can arise from the electrical wiring expand exponentially because the electrical contractor who finishes the contract now has to try to understand the wiring protocol of one or more of the electrical contractors. The more previous electricians and contractors, the more difficult it is to complete the final trim work. (CP 195:5-18)

James reviewed Plaintiff's supporting declarations. He noted that Greg Harris was only testifying about what regulations require. He noted that Harris was not testifying on whether the work was or was not done and did not comment on whether the work should have been done in the rough-in or dry wall phase, nor does he comment on what items were to be installed in the home, nor does he distinguish between work done by various contractors and electricians who worked on the job after PSE. (CP 195:19 to 196:3)

James also noted that the defective items alleged by SIRB are items *which were to be completed or would be easily corrected during the trim work phase*. Those corrections would most easily be done by the electrician who did the rough-in work. But even an electrician who is not involved in the rough-in could, with some degree of difficulty fix the problems which are noted with basic troubleshooting techniques of which every educated electrician should be aware. (CP 196:4-12 – emphasis added)

He also noted that there was breakdown in the declaration on who did or did not do the work if there was more than one previous electrical contractor on the project as is set forth in Amedson's declaration. If there were problems, there is no way to ascertain from his declaration whether PSE caused those problems or another contractor did. (CP 196:9-12)

The SIRB declaration makes reference to the electrical load. It does not take into account the difference between residential and commercial projects. Generally, a commercial project requires an electrical panel which could accommodate all of the circuits if all on at once. In a residential project, assumptions are made that all circuits will not be on at one time. (CP 196:13-16)

James also noted that the alleged defective items all are common issues, commonly corrected during the trim phase. None of the allegedly

defective items could not be addressed by a qualified electrical contractor who performed the rough-in phase. (CP 196:17-20)

James stated: "In conclusion, it is my educated opinion that even the work described in the SIRB and Harris declarations were either to be done during the trim phase or would easily be completed during the trim phase by the electrician who did the rough-in work. It also is my educated and experienced opinion that correction of those items would be much more difficult for one who did not do the rough-in work. And it also is my educated and experienced opinion that correction of those alleged problems would be even more difficult if more than one electrical contractor was involved before the participation of the final electrical contractor. It is also my opinion that based upon the declarations of Amedson, SIRB and the electrical inspector, it is unclear who, if anyone, caused the alleged problems if more than one electrical contractor was involved. And it is my further opinion that if the issues noted by SIRB and Harris are an exhaustive list of all the alleged problems with electrical problems in the homes, that based upon my special knowledge, experience, training and education, they are well within the range of the work quality typically found on a residential job site and would easily be completed or corrected during the trim phase by the electrician who did the rough-in work." (CP 197:1-15)

A. Standard of Review for Summary Judgment.

An appellate court reviews an order of summary judgment de novo, performing the same inquiry as the trial court. *Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). It considers "the facts and the inferences from the facts in a light most favorable to the non moving party." *Jones*, 146 Wn.2d at 300.

Summary judgment is appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones*, 146 Wn.2d at 300-01; CR 56(c). It is only appropriate where reasonable minds could reach but one conclusion. *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995). "A material fact is one upon which the outcome of the litigation depends." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The initial burden is on the moving party to show there is no issue of material fact. *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets this initial burden, then "[t]he non-moving party must set forth specific facts showing a genuine issue of material fact and cannot rest on mere allegations." *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); CR 56(e). Only where the non-moving party fails to present such evidence is summary judgment proper.

Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

IV. ARGUMENT

The summary judgment imposed liability upon the surety and not the principal. The bond upon which Plaintiff seeks to recover reads in pertinent part as follows:

> The license holder will pay for all labor, including employee benefits, and material furnished or used upon the work, taxes and contributions to the state of Washington, and all damages that may be sustained by any person, firm, corporation, or other entity due to a *failure* of the principal to make the installation or maintenance in accordance with this chapter or any applicable ordinance, building code, or regulation of a city or town adopted pursuant to RCW 19.28.010(3) (emphasis added). (CP 119-120)

It is clear that in order to recover against the surety that there must be a **failure** of the principal to perform. The undisputed facts are these: 1) PSE (the principal) was to "rough-in" and "trim" plaintiff's houses 2) it did the "rough-in"; 3) the rough-in passed inspection in December 2013 and no deficiencies were noted; 4) Plaintiff's attorney sent PSE a letter in April, 2014 "There is not that much remaining to be done in order to complete the express agreed scope of work ...."—mentioning nothing about PSE's work quality; 5) Plaintiff unilaterally terminated the contract with PSE without notice or announced reason; 6) three new electrical contractors worked on Plaintiff's project; 7) PSE and the expert agree that the items

that were complained of would normally be done or easily addressed in the trim phase; 8) PSE could not complete the job and was not paid to do the trim phase.

Plaintiff spends considerable effort describing the strict liability nature of installation failures but there is no factual or expert testimony nor briefing on when these failures occur. (CP 55-57)

The most extensive discussion on surety liability under breach is in *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wash 2d 577, 167 P.3d 2215 (2007). The case involved a performance bond for a contract to install sewer lines. The 32 page opinion contained several pages which discussed the extent and timing of the principal's performance, the warnings that were presented to the principal by the Plaintiff prior to the time that the Plaintiff took over the principal's duties, completed the job and sued the principal and surety for sums due.

While there is considerable discussion about whether the Plaintiff was required to formally declare the principal to be in "default" (it was not in that limited fact pattern), the entire discussion was based upon the premise that the principal materially breached. The entire discussion assumed liability was imposed when there was a breach of contract.

Citing the lower court, the Supreme Court noted: "A bond is a contract that governs the surety's liability to the obligee. *Joint Admin. Bd. v. Fallon*, 89 Wn.2d 90, 94 P.2d 90, 94, 569 P.2d 1144 (1977); *Walter*

Concrete Const. Co. v. Lederele Labs, 99 Ny.2d 603, 188 N.E. 2d 609, 758 N.Y.S.2d 260 (2003). It is interpreted using general principles of contract construction and performance.

The contract requires a "failure of the principal" (CP 119-120). The question of if and when a "failure occurred must therefore be examined. The contract provides for "rough-in" and "trim" (CP 150:7-11). There was no argument or testimony that the two stages would or could be separated or that Plaintiff could terminate PSE after "rough-in".

Washington case law requires the courts to examine the contract as a whole and its context.

> To interpret a contract, we must determine the parties' intent, for which we apply the "'context rule.'" *Roats v. Blakely **621 Island Maint. Comm'n. Inc., 169 Wash. App. 263, 274, 279 P.3d 943 (2012)* (quoting *Shafer v. Bd. of Trs. Of Sandy Hook Yacht Club Estates, 76 Wash.App. 267, 275, 883 P.2d 1387 (1994)).* This context rule allows a court, when "'viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations.'" *Roats 169* Wash.App. at 274, 279 P.3d 943 (quoting *Shafer, 76 Wash.App. at 275, 883 P.2d 1387).* This rules applies "even when the disputed provision is unambiguous." *Id.*

Federal Way Marketplace West, LLC v. State, 183 Wash.App. 860, 336 P.3d 615 (2014).

The contract was implemented under rushed circumstances with the rough-in to be completed by Christmas 2013 (CP 150:7-11). The

contract also provides for PSE to do the "trim." There is no argument or testimony that the two stages could be separated. PSE completed the rough-in and it passed inspection (CP 150:21 to CP 151:7).

While one might infer from the contract that the electrical must be up to code, there was nothing in the contract, nor was there supporting testimony from Plaintiff's experts, nor was there factual testimony to support extrinsic evidence that the questioned items should have been done during the rough-in stage. And because PSE was not allowed to do the trim work, Plaintiff has not met the burden of proof in showing or even alleging a failure by PSE.

But even if there was an assertion that all of the questioned items should have been corrected during the "rough-in stage," the integrity of the assertion is brought into question by passage of the inspection (CP 150:12-20); the April 12, 2013 letter from Plaintiff's counsel that "....There is not that much remaining to be done [to complete the contracts]" (CP 153:20 to 155:2);and the complete silence from Plaintiff as to alleged deficiencies both before and after discharge (CP 155:3-10).

But even if there was an assertion that the alleged deficiencies should have been addressed at rough-in, and even if the inspector, Plaintiff's counsel and Plaintiff would have called them to PSE's attention, there still remains an issue of material fact.. The issue of material fact arises from the factual assertion by PSE's shareholder (CP

155:11-18 and CP 156:15-16) and PSE's expert (CP 194-197) to the effect that under industry standards and common practice, the items would have been addressed and are commonly addressed during the trim phase.

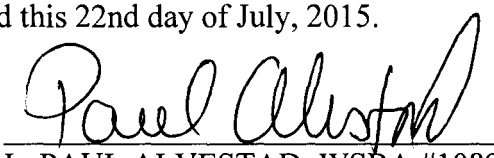
The determination of whether there was a "failure" can only be established by reference to the bond contract. To determine failure, the extrinsic contract between Plaintiff and Principal and industry standards must be reviewed. Here, upon review PSE acted properly and at a minimum there as a material issue of fact upon which the matter should be remanded.

V. CONCLUSION

There is no testimony that the questioned items should have been installed during rough-in. Even if there was such testimony, it is brought into question by the fact that the rough-in passed inspection, that the attorney mentioned nothing of the deficiency, and that the Plaintiff mentioned nothing to PSE at the time it was precluded from completing the job. And even if such statements had been made, question of fact arises because industry standards allow such questions to be resolved during the trim phase.

The matter should be remanded for trial and determination of attorneys fees to the prevailing party according to contract or other standards.

Respectfully submitted this 22nd day of July, 2015.



L. PAUL ALVESTAD, WSBA #10892
Attorney for Appellants
GORDON & ALVESTAD, PLLC
7525 Pioneer Way, Ste. 101
P. O. Box 1189
Gig Harbor, WA 98335
(253) 383-0775

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JOSEPH R. AMEDSON, Plaintiff/Appellee, v. PUGET SOUND ELECTRIC COMPANY, a Washington Corporation; CHARLES W. CLARK and "JANE DOE" CLARK, husband and wife, both individually and jointly as a marital community; and TRAVELERS CASUALTY AND SURETY COMPANY, BOND #105336057, Defendants/Appellants.	Court of Appeals No. 47195-7-II Pierce County Cause No. 14-2-06699-1 **CERTIFICATE OF SERVICE OF APPELLANTS' OPENING BRIEF**

I, L. PAUL ALVESTAD, hereby certify that on the 22nd day of July, 2015, I caused to be deposited into a receptacle for United States mail, in Gig Harbor, Washington, an envelope having first-class postage fully prepaid thereon containing the following:

- Appellants' Opening Brief
- Certificate of Service of Appellants' Opening Brief

I also caused to be served the above noted documents on opposing counsel by electronic means.

Counsel for Plaintiff/Appellee:
Rhys Alden Sterling
Attorney at Law
P. O. Box 218
Hobart, WA 98025-0218
E-MAIL: rhyshobart@hotmail.com

DATED this 22nd day of July, 2015.

L. PAUL ALVESTAD, WSBA #10892
Attorney for Defendants/Appellants