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' REPLY 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

Respondent misses the point. The question is not "if" liability is imposed for a "failed" electrical installation. Solely for purposes of this appeal, Appellant agrees that the work needed to be completed before the trim was completed and then inspected—and if not, then *somebody* "failed" to make the proper installations and is therefore liable. And if that somebody was a bond principal, then the homeowner can pursue the bond.[1] The real question is whether there was a *failed* installation *by PSE* in these circumstances.

Respondent inaccurately represents Appellant's position to be that Respondent must show a breach of contract in order to recover. (Respondent's Brief at 17). Instead PSE asserts that as the bond principal, it did not "fail" to make the installation because: 1) the two phase (rough-in and trim) nature of the contract was not intended to be separated; 2) the electrical inspector's approval of PSE's rough-in work; 3) industry practices; and 4) Respondent's implied approval of prior work; must be reviewed to determine whether the state, industry and parties required that the questioned work be performed while PSE

[1] Appellant argued below that the electrical contactors bond statute was intended to protect only the homeowner and not Amedson who in this case was only the general contractor. *Stewart Carpet Service v. Contractors Bonding and Insurance Co.,* 105 22d 353 (1986). Without conceding its position, the issue is not before this court.

still was on the job. Respondent has not factually or by argument rebutted any of these issues.

Respondent's case would be better if Appellant was the only electrical contractor on the project, had not been dismissed after rough-in and its work did not pass inspection. But those are not the facts. The factual issue of whether there was a *failure by PSE* was addressed during Summary Judgment by the unrebutted independent testimony of Appellant's expert Pierce College electrical instructor, Mark James. James noted that with his industry experience the questioned items "....were to be completed or would be easily corrected during the trim work phase." (CP 196:4-12).

The Department of Labor and Industries inspector (and Respondent's testifying expert) agreed with Mr. James because he passed electrical inspection at rough-in. (CP 194:19 to 195:4) Agency interpretation of the statute is afforded deference as long as it does not conflict with the clear meaning of the statute. *Public Utility District #1 of Clark County v. Pollution Control Hearings Board*, 137 Wn. App at 154; 151 P3d 1067. Respondent would be hard pressed to produce testimony to the effect that the inspector mistakenly approved PSE's work. And even then, Respondent would have an even larger burden to establish that the Department of Labor and Industries electrical

inspector was not entitled to deference on his interpretation of under what stage the work must be completed.

PSE's shareholder (Clark) supported the notion that the work was to be done during the trim phase. (CP155:11-18). And perhaps most important, during discussions prior to PSE's dismissal from the project, Respondent through his attorney, indicated 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." (CP 153:20 to 155:20) No reference was made to work quality.

The above testimony indicates that everyone (inspector, industry and, PSE)—even the Respondent through his attorney—were accepting of the work that had been done up to the point of PSE's dismissal from the job. There was no opposing testimony by the Respondent that questioned whether the items should have been completed during rough-in. Respondent has not even made a prima facie case. But even if he had, he only would have created an issue of fact which has been rebutted by the State of Washington, industry practice, and the Appellants testimony.

Respondent makes the following additional argument which incorrectly summarizes the facts:

> There is no provision in or condition of Chapter 19.28 RCW that can fairly be read to require Amedson to wait until the underlying contract with PSEC has been completed to bring an action on the bond where under the circumstances the electrical services provided by PSEC have been confirmed by it to be complete and the underlying contract has been mutually concluded without PSEC raising any objections, reservations, limitations, exceptions or conditions whatsoever. Respondent's brief at 16.

The argument inaccurately sets forth facts which are not supported by the record. But in two pages Respondent finally attempts to address PSE's core factual argument—that the questioned work was to be done during the trim phase.

1. **"The electrical services provided by PSEC have been confirmed by it to be complete..." (Respondent's brief at 16)** This is not close to the testimony that was offered. PSE's shareholder noted in his summary judgment declaration: "I did all of the work properly and anything else would have been completed in the trim phase." (Clark's Decl. P. 8 CP 156). And he also noted: "At a point in later April, 2013, I receive a call from Plaintiff who wanted to come to my house to pick up exhaust fan covers that I acquired to do the trim work. After I gave it to him and without explanation, he 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 me to believe that he would use someone else for the job and that I was relieved of further responsibility. In that conversation I was not told of any dissatisfaction with my work or why PSE was being dismissed." (Clark's Decl. P. 7 CP 155).

2. "…. **And the underlying contract has been mutually concluded without PSEC raising any objections, reservations, limitations or conditions whatsoever." (Respondent's brief at 16).** That too is incorrect. The sited language in No. 1 above reflects that PSE was dismissed without notice or consent. Respondent did not himself reserve any action that he would take against PSE and did not indicate that any problems existed. If the argument is something to the effect that the contract was mutually rescinded with PSE agreeing to pay the cost charged by a third party during the trim phase, there is not a shred of evidence to support the conclusion.

Appellant can only assume that stretching the facts in such a manner was necessary to properly address the case.

II. SUMMARY AND STATUS OF CASE

If the Respondent's theory is accepted, then any general contractor could terminate a contract with a bonded subcontractor on day one, use another contractor on day two, and then collect against the

first contractor's bond for work required by statute that he had not been given an opportunity to complete.

A factual issue having been created, Appellant respectfully prays that the case be remanded in a manner consistent with the decision of this court.

Respectfully submitted this 21st day of September, 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

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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' REPLY BRIEF**

I, L. PAUL ALVESTAD, hereby certify that on the 21st day of September, 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' Reply Brief
- Certificate of Service of Appellants' Reply Brief

and 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 21st day of September, 2015.

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