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COURT OF APPEALS
STATE OF WASHINGTON
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Court of Appeals No. 64021-6
Superior Court No. 06-02-00229-9

COURT OF APPEALS, DIVISION I OF THE STATE OF
WASHINGTON

FRONTIER INDUSTRIES, INC.

Plaintiff/Respondent / Cross Appellant

v.

CASCADE MOUNTAIN CORP.

Defendants/Appellants.

~~REPLY BRIEF OF APPELLANT / CROSS APPELLANT~~
BRIEF OF RESPONDENT / CROSS APPELLANT

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I. REPLY BRIEF OF APPELLANT / CROSS APPELLANT

INTRODUCTION

Respondent and cross-appellant, Frontier Industries, Inc. (“Frontier”) sold three orders of windows to appellant, Cascade Mountain Corporation (“Cascade”). The first two orders are not at issue on this appeal. The third order is at issue. The third order was for eighteen (18) windows. Frontier sued Cascade for payment of the eighteen windows. The trial court found notwithstanding that John Gillette, a Cascade employee, ordered the eighteen windows, John Gillette did not have actual authority to do so because Cascade’s credit application stated there were no authorized purchasers on Cascade’s account. The trial court denied Frontier’s claim for payment for the sale and delivery of the eighteen windows to Cascade.

Cascade filed a counterclaim against Frontier for sale and delivery incorrectly sized windows for which Cascade claimed to have incurred extra costs at the time of installing the windows. The counterclaim was less than \$10,000.00. Cascade recovered nothing on its counterclaim. The trial court did not award Frontier attorney fees pursuant to RCW 4.84.270, which fees Frontier incurred in successfully defending against Cascade’s counterclaim at the trial de novo.

Cascade did not prevail at trial as claimed by Appellant (Appellant's Brief p.4). Frontier prevailed at both arbitration and upon trial de novo, but was awarded less at trial than at arbitration.

ASSIGNMENT OF ERROR

The trial court should not have concluded that Cascade was the prevailing party on trial de novo pursuant to MAR 7.3 and / or RCW 7.06.060.

Issue Pertaining to Assignment of Error

Did Frontier fail to improve its position on trial de novo.

STATEMENT OF CASE

Cascade Mountain Corporation ("Cascade") owns and operates Cascade Mountain Lodge in Concrete, Washington. The lodge comprises a motel, restaurant and a bar. CP 133.100, FF2. Cascade sought to upgrade the lodge. CP 133.100, FF3. John Gillette purchased eighteen new windows from Frontier Building Industries, Inc. ("Frontier"). RP 108-110 (09/24/08). Frontier sold and delivered the eighteen windows, but did not install them. RP 108-110 (09/24/08). There were three orders placed with Frontier. Cascade placed the first two orders, which are not at issue on this appeal. CP 133.100, FF 5.

The third order was placed by John Gillette, an employee of Cascade.

RP 108-110 (09/24/08). Cascade claimed that John Gillette did not have actual authority to place this third order for eighteen windows.

The case first proceeded to mandatory arbitration on 5/08/07 and concluded on 05/17/07. CP 105, Attachment G. An arbitration award of \$12,320.13 was ultimately made in Frontier's favor. CP 105.

Attachment H. Both Cascade and Frontier appealed for trial de novo.

The trial court ruled that Frontier did not improve its position at the trial de novo. The trial court therefore awarded Cascade reasonable attorney fees and costs pursuant to MAR 7.3 and RCW 7.06.060. However, pursuant to the terms of the credit application (Ex 5), the trial court awarded Frontier actual costs / attorney fees up to the date that Frontier filed its Request for Trial de Novo. The trial court did not award costs / attorney fees to Frontier for costs / attorney fees incurred at the trial de novo.

Despite the request of both parties, the trial court made no award of costs / attorney fees to either party pursuant to RCW 4.84.250 et seq. Appellant incorrectly states (Appellant's Brief p.5) that "the trial court therefore found Cascade to be the prevailing party at trial entitled to attorneys fees under the following (RCW 4.84.250 et seq.) authority." Appellant further overstates that Cascade was the prevailing party at trial

de novo (Appellant's Brief, p.5). Cascade was the prevailing party at trial de novo only for purposes of RCW 7.06.060.

ARGUMENT

Frontier did *not* fail to improve its position on trial de novo. Frontier first received an arbitration award dated 05/24/07 in the amount of \$6,422.43 for principal and interest only. Frontier then received an amended arbitration award dated 07/17/07 in the amount of \$12,320.13 for principal, interest, costs and attorney fees incurred through the completion of the arbitration proceedings. CP 105, Attachments G and H. The arbitrator made an amended award on all four elements of Frontier's claim (i.e. principal, interest, costs and attorney fees) incurred through the completion of the arbitration proceedings. The trial court similarly entered judgment in favor of Frontier on all four elements of Frontier's claim (i.e. principal, interest, costs and attorney fees) incurred up to the date of Frontier's filing of its Request for Trial de Novo in the amount of \$69,298.25. In summary, the MAR award and the trial court's judgment compared as follows.

MAR Award 07/17/07	Trial Court Judgment 8/14/09
Principal/Interest: \$6,422.43	Principal: \$2,033.25
Costs/Attorney Fees: \$5,897.70	Interest: \$1,433.26
	Costs/Attorney Fees: \$65,831.74
	*without netting costs / fees award to Cascade
<hr/> Total: \$12,320.13	<hr/> Total: \$69,298.25

Obviously, the primary reason for the difference is that the arbitrator only awarded Frontier \$5,897.70 in costs and attorney fees incurred through the completion of the arbitration proceeding. Frontier's Complaint (CP 3) was for the principal amount of \$5,533.25. The first arbitration award was for only principal and interest in the amount of \$6,422.43. The amended arbitration award was for costs and fees in the amount of \$5,897.70. Frontier actually incurred costs / attorney fees of \$65,831.74 at the arbitration. Frontier was obviously unsatisfied with the arbitrator's award of only \$5,897.70 for costs / attorney fees. Frontier thus filed a Request for Trial de Novo. The trial court awarded Frontier \$65,831.74 for the actual costs / fees incurred for the arbitration. Frontier thus improved its position upon trial de novo. The credit application provided for the award of *actual* costs / attorney fees to the prevailing party. Frontier incurred \$65,831.74 in actual costs

/ attorney fees up to the date Frontier filed its Request for Trial de Novo. However, the arbitrator *only* awarded Frontier \$5,897.70 for arbitration costs / attorney fees incurred through the completion of the arbitration proceedings. The trial court awarded Frontier *actual* costs / attorney fees in the amount of \$65,831.74 pursuant to the terms of the credit application. Frontier thus improved its position upon trial de novo.

The trial court, with all due respect, should not have concluded that Frontier failed to improve its position on trial de novo and thus proceed to award Cascade reasonable attorney fees pursuant to MAR 7.3 and / or RCW 7.06.060. The trial court only compared the award of the *principal and interest* (\$6,422.43) awarded by the arbitrator versus the *principal* (\$2,033.25) awarded by the trial court. The trial court determined, solely on a basis on the differences of the awarded *principal and interest* that Frontier did not improve its *position* on appeal. It is respectfully submitted that the trial court should have compared the *overall position* of Frontier (principal, interest, costs and attorney fees) as per the arbitration award, with the trial court's overall judgment for principal, interest, costs and fees for the arbitration.

RCW 7.06.060 addresses the improvement of an appealing party's position as follows:

(1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and *fails to improve his or her position* on the trial de novo. The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(2) For the purposes of this section, "costs and reasonable attorneys' fees" means those provided for by statute or court rule, or both, as well as all expenses related to expert witness testimony, that the court finds were reasonably necessary after the request for trial de novo has been filed.

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

Because Frontier improved its *position* on trial de novo, Cascade should *not* have been awarded its costs and attorney fees on trial de novo pursuant to MAR 7.3 and / or RCW 7.06.060.

Cascade's assignment of error regarding improper netting of the parties' respective costs and attorney fees is award is therefore moot.

Although not addressed as an assignment of error, Cascade states (Appellant's Brief p.5) that the trial court either awarded and / or should have awarded (it is unclear) Cascade its costs / attorney fees pursuant to RCW 4.84.250 et seq. Both parties sought an award of costs / attorney fees pursuant to RCW 4.84.250 et seq. The trial court correctly denied Cascade's request for costs / attorney fees pursuant to RCW 4.84.250 et

seq. because “Cascade although the prevailing party, did not plead a specific amount in their answer to Frontier’s complaint. Therefore, they should not be awarded attorney fees under RCW 4.84.250”. (CP 120, page 3) The trial court may have relied upon *State v. Tush*, 83 Wash.App. 158, 165 (1996); *Reynolds v. Hick* 134 Wn.2d 491, 502 (1998); or *Woodruff v. Spence* 76 Wash.App. 76 (1994).

Cascade relies upon *Singer v. Etherington* 57 Wash. App. 542 (1990) for the proposition that Cascade should be awarded its cost / attorney fees at both the arbitration and trial pursuant to RCW 4.84.270. Cascade made three offers of settlement. CP 114, Attachments B, C, and D. The first two offers of settlement were in the respective amounts of \$2,233.00 for (“all claims for damages, costs and fees”) and \$2,033.00 for (“all claims for damages, costs and fees”). Both settlement offers preceded the arbitration awards and were in amounts less than awarded by the arbitrator. The third settlement offer in the amount of \$5,750.00 was submitted after the arbitration was concluded and included “all claims for damages, costs and fees,” which Frontier recovered at trial in an amount exceeding \$5,750.00.

The *Singer v. Etherington* case is inapposite here because Cascade never made a valid settlement offer for the reason that Cascade never pled a specific dollar amount in their answer or counterclaim. In

Singer v. Etherington, the Court of Appeals addressed the issue of lapsing of an otherwise valid offer of settlement. Here, the trial court determined that Cascade did not make a valid offer of settlement.

The trial court denied Frontier's request for costs / attorney fees pursuant to RCW 4.84.270 because "Frontier made no settlement (offer) pursuant to RCW 4.84.250 et seq. so should not be awarded (costs / attorney fees) by this statute (RCW 4.84.250) et seq." (parenthetical inserts by Respondent). CP 120, page 3. However, RCW 4.84.270 provides an option to the party resisting relief to make an offer of settlement pursuant to RCW 4.84.280, but does not require the party resisting relief to do so. RCW 4.84.270 provides as follows:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

Pursuant to RCW 4.84.270, Frontier had the option of making a written offer of settlement pursuant to RCW 4.84.280, or making no written settlement offer at all. If Frontier made no written settlement offer, Frontier was entitled nonetheless under RCW 4.84.270 to recover its costs / attorney fees as a party resisting relief if Cascade recovered nothing on its counterclaim, which was the case. *Kingston Lumber*

Supply Company v. High Tech Development, Inc., 52 Wash.App. 864 (1988).

Although not addressed as an assignment of error, Cascade requests a review of the amount of the trial court's award of attorney fees to Frontier and further requests to Court of Appeals to reduce the award to a reasonable sum. Appellant's Brief pp. 9 and 10. However, Cascade fails to explain what was unreasonable about the trial court's award, or suggest what a reasonable sum should be. The credit application (Ex 5) provided that the prevailing party was entitled to recover its actual attorney fees. Both parties were awarded their respective actual attorneys fees. The trial court did not abuse its discretion. Moreover, the issue of post trial awards of attorney fees was a subject of debated presentations (both written and oral) before the trial court between 12/30/08 and 8/14/09. CP 98, 99, 99.100, 104, 105, 106.100, 108, 110, 111, 112, 114, 115, 118, 119, 121, 122, 123, 128 and 130.

CONCLUSION

Frontier requests the Court of Appeals to determine that Frontier improved its position upon trial de novo, and Cascade should not have

been awarded costs / attorney fees pursuant to MAR 7.3 and / or RCW 7.06.060.

RESPONDENT'S REQUEST FOR COSTS / ATTORNEYS FEES ON APPEAL (RAP 18.1)

Frontier requests an award of costs / attorney fees on appeal on two bases. The credit application (Ex 5) provides as follows:

“In the event of default, the applicant (Cascade) agrees to pay actual attorney fees, necessary disbursements and taxable costs including deposition costs and expert witness fees. The prevailing party shall be the one party in whose favor a net monetary judgment is entered.”

In the event that the Court of Appeals denies Cascade's appeal, Frontier should be awarded its costs / attorney fees as the prevailing party pursuant to the terms of the credit application.

RCW 4.84.270 provides as follows:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

RCW 4.84.290 provides as follows:

If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the

purpose of applying the provisions of RCW 4.84.250.

In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

In the event that the Court of Appeals determines that Frontier is entitled to costs / attorney fees pursuant to RCW 4.84.270 notwithstanding having made no offer of settlement pursuant to RCW 4.84.280, the Court of Appeals should award Frontier its costs / attorney fees on this appeal.

II. BRIEF OF RESPONDENT / CROSS-APPELLANT

INTRODUCTION

Respondent and Cross-appellant, Frontier Industries, Inc. ("Frontier") sold three orders of windows to appellant, Cascade Mountain Corporation ("Cascade"). The first two orders are not at issue on this appeal. The third order is at issue. The third order was for eighteen windows. Frontier introduced evidence that John Gillette, a Cascade employee, placed the third order for eighteen windows. However, the trial court declined to resolve that question of fact for the

reason that John Gillette did not have actual authority to place the third order for eighteen windows because Cascade's credit application stated that there were no authorized purchasers on Cascade's account with Frontier. The issues with regard to the third order are: (1) whether the trial court should have considered evidence of John Gillette's apparent (if not actual) authority to place the order for eighteen windows and (2) whether the trial court should have further considered evidence that Cascade ratified and / or retained the benefits of John Gillette's placement of the third order for eighteen windows. The trial court denied Frontier's claim for payment from Cascade for the sale and delivery of the eighteen windows.

Cascade filed a counterclaim (denominated as an affirmative defense) against Frontier for costs incurred by Cascade to Frontier's windows which Cascade claimed were incorrectly sized and measured by Frontier. CP 8. The counterclaim was for less than \$10,000.00. CP 95 page 3, Ex 31. Cascade recovered nothing on its counterclaim. The trial court did not award Frontier attorney fees pursuant to RCW 4.84.270, which fees Frontier incurred in successfully defending against Cascade's counterclaim. The trial court denied Frontier's request for attorney fees pursuant to RCW 4.84.270 for the reason that Frontier did not make a written settlement offer to Cascade pursuant to RCW

4.84.280 and the trial court believed that Frontier had a legal obligation to do so.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court should have awarded Frontier reasonable attorney fees and costs incurred at the trial de novo pursuant to RCW 4.84.270.

Issue Pertaining to Assignment of Error No. 1. RCW 4.84.270 states that the party resisting relief (Frontier) shall recover its reasonable attorney fees and costs if the party seeking relief (Cascade) recovers nothing. Cascade recovered nothing on its counterclaim. The trial court stated in its memorandum opinion that Frontier was required to submit a written offer of settlement to Cascade pursuant to RCW 4.84.280 in order to be entitled to recover attorney fees in this case against Cascade pursuant to RCW 4.84.270.

The issue is whether or not Frontier was required to submit a written offer of settlement to Cascade pursuant to RCW 4.84.280 as a condition to Frontier's entitlement to recover its reasonable costs and attorney fees pursuant to RCW 4.84.270 for successfully resisting Cascade's counterclaim, upon which Cascade recovered nothing.

Assignment of Error No. 2. The trial court should have considered evidence of John Gillette's apparent authority, notwithstanding the trial court's finding that John Gillette lacked actual authority to place the third order for 18 windows.

Issue Pertaining to Assignment of Error No. 2. Does the absence of actual authority preclude a trial court's factual inquiry into the existence of an agent's (John Gillette's) apparent authority.

Assignment of Error No. 3. The trial court should have considered evidence of Cascade's ratification of John Gillette's order for eighteen windows and Cascade's benefit from retention and installation (without restitution) of the eighteen windows.

Issue Pertaining to Assignment of Error No. 3. Does the absence of either or both actual or apparent authority preclude a trial court's factual inquiry into the principal's ratification of the agent's acts or the principal's retention of benefits and therefore obligation to make restitution to Frontier for the eighteen windows.

Assignment of Error No. 4. Frontier improved its position at the trial de novo and the trial court erred in awarding attorney fees to Cascade pursuant to MAR 7.3 and / or RCW 7.06.060.

Issues Pertaining to Assignment of Error No. 4. Did Frontier improve its position on appeal for trial de novo pursuant to RCW

7.06.060 where the trial court entered judgment in favor of Frontier for principal, interest, costs and fees in a total amount of \$69,298.25 (up to the date of Frontier's filing its Request for Trial de Novo) in an amount greater than the amount awarded by the arbitrator for those same four elements (again, taken together as a whole and only up to the date of Frontier filing its Request for Trial de Novo).

STATEMENT OF THE CASE

Frontier is a supplier of building and construction products (CP 133.100, FF1). Cascade purchased and commenced to operate a restaurant and motel in Concrete, Washington (CP 133.100, FF2). Cascade implemented a plan to upgrade the motel (CP 133.100, FF3). Cascade authorized Jeff Ball to place the order for twenty-seven (27) windows with Frontier on behalf of Cascade (CP 133.100, FF 5). Jeff Ball placed the initial order for twenty-seven (27) windows from Frontier (CP 133.100, FF 6). Five of the twenty-seven windows were returned by Jeff Ball to Frontier due an error in placing the order (CP 133.100, FF8). Some, but not all of the remaining twenty-two windows and related building materials were installed by Jeff Ball (CP 133.100 FF10). Cascade made a partial payment of \$3,500.00 for the twenty-

seven windows leaving a balance owed of \$2,033.25 (CP 133.100, FF 11).

The trial court awarded Frontier \$2,033.25, which was the balance remaining due to Frontier on the first two window orders (CP 133.100, COL 2). Thus, the trial court arrived at \$2,033.25 on the basis of Frontier's sale and delivery twenty-seven windows from the first two orders. The trial court did not award \$2,033.25 based on the number of windows from the first two orders actually installed at Cascade Mountain Lodge. The trial court awarded \$2,033.25 to Frontier for the twenty-seven windows because the trial court found that a person named Jeff Ball was authorized to place the order with Frontier on behalf of Cascade, notwithstanding that five of the first two order of windows were returned due to an unattributable error in ordering the twenty-seven windows, and further notwithstanding that some, but not all, of the remaining twenty-two windows were installed by Jeff Ball. On November 13, 2008, the trial court prepared and sent counsel a memorandum opinion addressing the above matters and the court's reasoning. (CP 95)

The trial court received the following testimony. Kris Kinney was employed by Frontier as a store manager at Frontier's Sedro Woolley location. RP 1-2 (09/24/08). John Gillette came to the Sedro Woolley

store and met with Kris Kinney. John Gillette claimed that Frontier had not completed the first two orders of twenty-seven windows to Cascade. RP 15 - 16 (09/24/08). John Gillette and Kris Kinney agreed that the two would meet the next day at Cascade Mountain Lodge and “take a look”. RP 16 (09/24/08). The next day, Kris Kinney drove up to Cascade Mountain Lodge and “... he (John Gillette) showed me (Kris Kinney) the new windows on the front of the building, showed me the doors, showed me the rooms and how they’re really cleaning it up and trying to take this place and clean it up. He took me around back, showed me his hot tub. We left on fine terms. He said he needs to do these windows and I said: “I’ll tell you what I’ll do, I will send my man, Jim Melzark, up, he will measure the windows, therefore we know we get them right and I drove on down the road”. Kris Kinney sent Jim Melzark up to Cascade Mountain Lodge the next morning. RP 16 - 17 (09/24/08).

Kris Kinney reasonably believed John Gillette possessed authority to speak on behalf of Cascade. RP 21 - 23 (09/24/08). Kris Kinney directed James Melzark to travel to Cascade Mountain Lodge the next day and meet with John Gillette to measure windows already installed at Cascade Mountain Lodge and take an additional order for windows if and as directed, by John Gillette. RP 16 - 17 (09/24/08).

James Melzark met the next day (10/04/05) (RP 50 (09/24/08)) with John Gillette at Cascade Mountain Lodge. John Gillette pointed out five windows to James Melzark that John Gillette wanted re-measured and replaced, and further pointed out an additional thirteen windows that John Gillette wanted replaced. James Melzark measured the eighteen window openings, discussed the same with John Gillette in the lodge restaurant, was given approval by John Gillette to order the eighteen windows and James Melzark placed the order for eighteen windows that same day with Frontier's supplier, Jeld-Wen. RP 108 - 110 (09/24/08). James Melzark reasonably understood that John Gillette was authorized to place the order for the eighteen windows. RP 111 - 113 (09/24/08). Subsequently, James Melzark personally delivered the eighteen windows to Cascade. John Gillette accepted delivery and directed James Melzark where to put the windows. RP 115 - 117 (09/24/08).

Frontier promptly invoiced (Ex 20) Cascade for the eighteen windows on 10-10-05, only days after James Melzark met with John Gillette at Cascade Mountain Lodge and took and placed the order for eighteen windows. The invoice was sent to Cascade at Cascade's business address on Cascade Mountain Lodge, days after James Melzark met John Gillette at Cascade Mountain Lodge and took and placed the

order for eighteen windows. Ex 20. The invoice was sent to Cascade at Cascade's business address. RP 20 - 21 (09/25/08). At the end of October, Frontier sent Cascade a complete statement of its account showing Frontier's charge to Cascade for the third order of eighteen windows. Ex 25.

Patricia Bickley is the accounts receivable manager for Frontier. RP 1 (09/25/08). Cascade submitted a credit application to Frontier (Ex 5) stating that Cascade did *not* use purchase orders or authorized purchasers. RP 5 – 7 (09/25/09). Subsequently, Frontier sent Cascade a letter (Ex 34), (RP 6 - 7 (09/25/08)) to confirm that Cascade did not use "purchase orders" or use "authorized purchasers". RP 11- 12 (09/25/08). Cascade did not respond to Frontier's letter. RP 12 - 13 (09/25/08).

Subsequently, Patricia Bickley, James Melzark, Kris Kinney and Chuck Posey (Frontier Operations Manager) met with John Gillette at Cascade Mountain Lodge for the purpose of inspecting the windows, their placement and determining how many and where Frontier's windows were installed. John Gillette was the sole person appearing for Cascade. John Gillette opened all of the rooms for inspection (RP 37 (09/25/08)), the windows were inspected and counted by Frontier, and Patricia Bickley prepared Ex 35 which confirmed that some, but not all,

windows from *each* of the three orders (including the third order for eighteen windows), were installed at Cascade Mountain Lodge. Patricia Bickley testified that each installed window showed a Jeld-Wen production number that verified that windows from all three Cascade orders were installed by Cascade. Ex 35 (color coded) was prepared by Patricia Bickley and showed that Cascade received and Cascade installed windows from Cascade's third order for eighteen windows. RP 29 - 48 (09/25/08).

Based on the above evidence admitted at trial, John Gillette had apparent authority to act on behalf of Cascade because Cascade placed him in a position of having full access and reign of the premises of Cascade Mountain Lodge for purpose of meeting with Frontier's personnel, making available all rooms at Cascade Mountain Lodge for the inspection of Frontier's personnel and permitting measurements and photographs of all the relevant window openings, ordering the eighteen windows from Cascade Mountain Lodge's Restaurant and taking delivery of the eighteen windows at Cascade Mountain Lodge. At no time did Cascade ever notify Frontier that John Gillette's order and receipt of the eighteen windows was not an act authorized by Cascade. Cascade retained the eighteen windows, was promptly invoiced for the eighteen windows by Frontier so that Cascade (and not just John

Gillette) could see that Cascade was being invoiced by Frontier for eighteen windows and Cascade then and subsequently installed the eighteen windows (or a portion thereof) at Cascade Mountain Lodge, thus receiving the benefit of John Gillette's third order for the eighteen windows.

Subsequent to the trial court's in memorandum decision dated 11/14/08 (CP 95) and subsequent to the trial court's memorandum decision regarding award of costs / attorney fees dated 05/15/09 (CP 120), Defendant Susan St. John, President of Cascade, filed a voluntary petition for bankruptcy (Ch. 7) on 6/25/09, wherein Susan St. John disclosed for the first time that John Gillette was a shareholder in Cascade (CP138, Attachment F, page 14), a secured creditor of Cascade in the amount of \$295,000.00 (CP 138, Attachment F, page 22) and also Vice President of Cascade. (CP138, Attachment F, page 40). Upon Frontier's Motion to Take Additional Testimony and Amend Findings of Fact / Conclusions of Law (CR 59(g), (CP 138), the trial court entered an Order (CR 59 (g)) directing Cascade to produce Cascade's corporate records to Frontier. (CP 169) Those records have not yet been fully produced. However, Cascade has produced corporate minutes showing John Gillette to be the groundskeeper at Cascade Mountain Lodge (Appendix 1 to this Brief).

Assignment of Error No. 1 (Brief of Respondent –Cross Appellant)
is addressed herein at pages 9-10.

Assignment of Error No. 4 (Brief of Respondent –Cross Appellant)
is addressed herein at pages 4-7.

ARGUMENT

An agent possesses apparent authority when the principal acts such or omits to act that a third person reasonably believes that the agent is authorized to act on behalf of the principal regarding the transaction(s) between the agent and the third party.

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations. Restatement (Third) of Agency, § 2.03 Apparent Authority (2006)

In this case, there was sufficient evidence before the trial court to create a factual issue regarding John Gillette's apparent authority to place and receive the order for eighteen windows on behalf of Cascade. According, John Gillette's apparent authority should have been addressed by the trial court, notwithstanding the trial court's finding that John Gillette lacked actual authority to place the order for eighteen windows with Frontier.

Additional to apparent authority which binds a principal to the agent's acts, the principal may also be bound to a third party by the principal's own ratification of the agent's acts when the conduct of the principal justifies a reasonable assumption that the principal so consents.

(1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.

(2) A person ratifies an act by

(a) manifesting assent that the act shall affect the person's legal relations, or

(b) conduct that justifies a reasonable assumption that the person so consents.

(3) Ratification does not occur unless

(a) the act is ratifiable as stated in § 4.03,

(b) the person ratifying has capacity as stated in § 4.04,

(c) the ratification is timely as stated in § 4.05, and

(d) the ratification encompasses the act in its entirety as stated in § 4.07. Restatement (Third) of Agency, § 401 (2006)

In this case, there was sufficient evidence of Cascade's ratification because the eighteen windows were delivered to Cascade Mountain Lodge, Cascade was directly invoiced for the eighteen windows, Cascade did not protest or return the windows and in fact, hired a laborer to install them. Furthermore, Cascade stood by while John Gillette met with Frontier representatives at Cascade Mountain Lodge, directed them and throughout the premises, acted if he was the owner of Cascade and placed the order for eighteen windows.

Finally, a principal is required to make restitution when the principal has accepted a benefit arising from the actions of an agent or apparent agent and the principal's benefit is at the expense of a third party. The principal has this duty to make restitution even though the agent acted without actual authority and the doctrine of apparent authority is unavailable.

If a principal is unjustly enriched at the expense of another person by the action of an agent or a person who appears to be an agent, the principal is subject to a claim for restitution by that person.

Comment:

a. In general. Restitution supplements actual and apparent authority when neither is present at the time an agent or apparent agent takes action and the principal accepts the benefit of the action. Restitution does not protect persons who confer benefits officiously. See Restatement Third, Restitution and Unjust Enrichment § 2(4) and Comment *f* (Discussion Draft, 2000). The rule stated in this section creates restitutionary claims against a principal that may be asserted by third parties.

b. Restitution to third party. The rule stated in this section requires a principal to make restitution when the principal has accepted a benefit resulting from the actions of an agent or apparent agent and the principal's benefit is at the expense of a third party. When this section is applicable, the principal has a duty to make restitution even though the agent acted without actual authority and the doctrine of apparent authority stated in § 2.03 is unavailable.

Illustration:

1. A is the head of procurement for P, a subdivision of the federal government. A's superiors within P have limited A's authority to purchase goods to a specified dollar amount. A contracts with T to buy goods in an amount that exceeds the limit imposed on A. T delivers the goods and all are put to use within P. T has a claim in restitution against P. Restatement (Third) of Agency, § 207 (2006)

In this case, there was sufficient evidence of Cascade's retention of benefits because there was substantial evidence that the eighteen windows were delivered to Cascade, Cascade was invoiced, Cascade accepted delivery and Cascade installed some, if not all, of the eighteen windows.

With all due respect to the trial court, Frontier submits on this appeal that the trial court's inquiry into Cascade's (the principal) liability for John Gillette's acts should have gone beyond the sole determination of whether or not John Gillette possessed actual authority to order the eighteen windows from Frontier for the reason that John Gillette was not listed as an authorized purchaser on Cascade's credit application.

Susan St. John is the owner of Cascade. Susan St. John affirmed under oath that John Gillette was a shareholder of Cascade, Vice President of Cascade and the groundskeeper for Cascade. Susan St. John, the defendant who signed the credit application, silently stood by while John Gillette traveled to Frontier's offices to order the eighteen windows, she silently stood while John Gillette met with Frontier's personnel at Cascade's premises and John Gillette proceeded to order the eighteen windows. She silently stood by when presented with

Frontier's invoice for the eighteen windows and she silently stood by while Frontier delivered the eighteen windows to Cascade's premises and John Gillette took delivery of those same windows at the Cascade premises.

CONCLUSION

Frontier requests the Court of Appeals determine that Frontier was the prevailing party at trial pursuant to RCW 4.84.270 for the reason that Cascade recovered nothing on Cascade's counterclaim for under \$10,000.00, notwithstanding that Frontier made no written offer of settlement pursuant to RCW 4.84.280. Frontier requests the Court of Appeals to remand this case to the trial court for determination and award of reasonable attorney fees and costs to Frontier pursuant to RCW 4.84.270.

Frontier requests the Court of Appeals determine that John Gillette's apparent authority remained a factual issue for determination, notwithstanding the trial court finding that John Gillette lacked actual authority to place the order for eighteen windows. Frontier requests the Court of Appeals to remand this case to the trial court for the appropriate factual inquiry and determination of John Gillette's apparent authority.

Frontier requests the Court of Appeals determine that Cascade (as principle) may be bound by its agent's (John Gillette's) acts, notwithstanding the agent's lack of either actual or apparent authority, if there is evidence that the principal ratified the agent's act or the principal accepted or retained the benefits of the agent's acts. Frontier requests that the Court of Appeals remand this case to the trial court for the appropriate factual inquiry and determination of Cascade's ratification or duty to make restitution to Frontier for receipt of installation of the third order of eighteen windows.

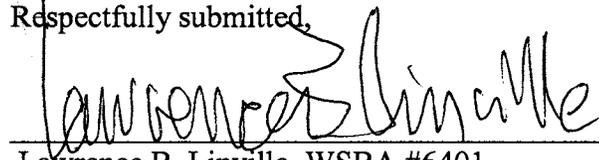
RESPONDENT'S REQUEST FOR ATTORNEY FEES / COSTS ON APPEAL (RAP 18.1)

Respondent-Cross Appellant's request for an award of costs / attorney fees on this appeal is addressed herein at pages 11-12.

Respondent requests an award of costs / attorney fees pursuant to RAP 18.1 on both Cascade's appeal and Frontier's cross-appeal based on the cited authority.

APPENDIX 1

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lawrence B. Linville". The signature is written in a cursive style with a large, prominent initial "L".

Lawrence B. Linville, WSBA #6401

Attorney for Respondent / Cross Appellant,
Frontier Industries, Inc.

**CASCADE MOUNTAIN CORPORATION
MINUTES OF 2006 TAX YEAR**

TIME AND PLACE:

The organizational meeting of the 2006 tax year with the Board of Directors of Cascade Mountain Corporation was held at 11:00a.m. on the 1st day of May, 2007.

PRESENT:

Present were Susan St John incorporator and Joy Barrett, Secretary. The incorporator chaired the meeting.

SHARES:

No change

TAX YEAR:

John Barrett sadly passed away March 15, 2007.

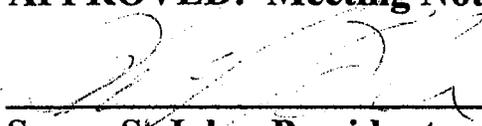
The 2006 tax year saw a loss of \$134,210 and Shareholder loans of \$115,020. Unsecured Promissory Notes have been issued for Shareholder loans.

Additional loans given by Johnny Gillette who is the chef/grounds keeper are to be kept by Susan St John, payable after Unsecured Promissory Notes are paid in full.

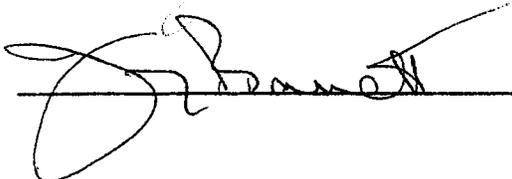
Due to the high Propane & Electric bills associated with the restaurant/lounge, we have closed this down and will focus on the lodge, joining with Expedia/Travelocity. The Restaurant and Lounge has a busted pipe, so far insurance won't pay on claim.

The Corporation purchased a 1992 Chevy s-10 pickup 2-06 for hauling debris off property.

APPROVED: Meeting Notice waived this 1st day of May, 2007



Susan St John, President



Joy Barrett, Secretary

FILED
JAN 12 2010
STATE OF WASHINGTON
2009 DEC 18 PM 2:39

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION I

FRONTIER INDUSTRIES, INC. d/b/a Frontier)
Building Supply, a Washington corporation,)

Plaintiff/Respondent,)

v.)

CASCADE MOUNTAIN CORPORATION,)
d/b/a Cascade Mountain Lodge, a Washington)
corporation. and SUSAN ST. JOHN,)
individually,)

Defendants/Appellants.)

NO. 640216
SUPERIOR COURT NO. 06-2-00229-9
AFFIDAVIT OF MAILING

I, Alicia Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by Linville Law Firm PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted:

REPLY BRIEF OF APPELLANT / CROSS APPELLANT
BRIEF OF RESPONDENT / CROSS APPELLANT

on the following persons:

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Joseph D. Bowen
Attorney for Defendant/Appellant
401 South Second Street
Mount Vernon, WA 98273

VIA U.S. MAIL
 VIA FACSIMILE
 VIA MESSENGER
 VIA EMAIL

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
STATE OF WASHINGTON THE FOREGOING IS TRUE AND CORRECT.

DATED this 18th day of December, 2009 at Seattle, Washington.

Alicia Wallace
Alicia Wallace