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NO. 65459-4-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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PLUMB SERVE, LLC, a Washington limited liability company, d/b/a  
BENJAMIN FRANKLIN PLUMBING,

*Plaintiff,*

v.

VIOLA M. SCOPY and "JOHN DOE" SCOPY, wife and husband; and  
JOHN W. SCOPY AND VIOLA M. SCOPY REVOCABLE TRUST of  
October 9, 1995;

*Respondents,*

v

PROFIT TWO, LLC, a Washington limited liability company, d/b/a  
PLUMB SERVE AND OUTTODAY SERVICE; RODNEY JESSEN,  
individually and as part of his marital community; and GARY JESSEN,  
individually and as part of his marital community;

*Appellants.*

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**REPLY BRIEF OF APPELLANTS**

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James E. Lobsenz  
Justin P. Wade  
Attorneys for Appellants

Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
(206) 622-8020

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**A. SUMMARY OF REPLY**

Viola Scoby would like to cast this case as a public interest case that she selflessly prosecuted to shine light on the Jessens' operations. But an entire trial's worth of sunlight failed to expose any evidence sufficient to support her Consumer Protection Act claim. Instead the trial revealed that some trial courts do not apply the law equally to all parties. Correcting those aberrations supplies the public interest aspect here.

This is a case about insufficient evidence and a litigant happening to draw a judge who, after a change of heart and a realization that the outcome called for by the applicable law was not the outcome he apparently wanted, was eventually willing to overlook the shortcomings in her evidence. Scoby offers no good reason why the trial court would have decided that Scoby's evidence, previously insufficient, suddenly became good enough to satisfy all the elements of her CPA claim. Neither party cited any newly issued CPA cases to the trial court. Nor was there any newly discovered evidence bearing on the once insufficiently proven elements of Scoby's CPA claim. Instead, there was post-trial argument and briefing on attorney's fees and then the trial court's recognition that Plumb Serve LLC, d/b/a Benjamin Franklin Plumbing (BFP) stood to recover more than Scoby had offered to settle its action to recover the value of its improvements to her property. This meant that an attorney fee award to BFP should have been mandatory. The only rational explanation for the trial court's change of heart is the one proffered by BFP: the trial

court must have decided that the law should not apply equally to all people in this case so that he could award the elderly lady her attorney fees.

Unfortunately for the elderly lady, this trial court's decision cannot stand. There is insufficient evidence to find that BFP violated the CPA. And the trial court misapplied controlling authority to erroneously deprive BFP of the attorney fees it incurred attempting to recover the value conferred on Scoby's property when it fixed her drainage problem.

**B. ARGUMENT**

**1. The Trial Court Erred in Concluding That BFP Committed a Consumer Protection Act Violation Because Scoby Failed to Establish Four Out of the Five Required Elements.**

**a. Scoby Failed to Prove That BFP Committed an Unfair or Deceptive Act by Replacing Part of Scoby's Sewer After the Repair Attempt Did Not Work.**

The trial court concluded that the unfair deceptive act BFP allegedly committed was using its "superior technical knowledge . . . to increase the price of the service." CP 29 (CL 38). The trial court called this "overreaching," or "price gouging." CP 29 (CL 38), 30 (CL 41). BFP, in its opening brief, established that the evidence in the record and the findings of fact did not support that conclusion because the price of "the service" did not increase. Instead, the type of service changed from a repair to a replacement (a different service with a higher price) after the repair was unsuccessful. *See* Opening Brief (OB) 10-13, 42-43. In her response brief, Scoby did not dispute that the type of service changed. *See* Brief of Respondents (BR) 28-29.

Scoby did not present evidence sufficient to show that any deception or misrepresentation was used to justify the change from repair to replacement and the attendant higher price for that service. As Scoby's daughter, Wanda Kristjanson, conceded, the representation that replacement was necessary might well have been the truth; she had no way of knowing otherwise. RP IV, 37. Because Scoby bore the burden of proving her CPA claim, this testimony relating to the necessity of replacement cannot satisfy her burden of proving the unfair or deceptive act element. *Cf.* CP 21-22 (CL 10); CP 33 (CL 52) (the trial court apparently, and erroneously, thought BFP, the CPA defendant, had to show that the replacement was necessary in order to prove the absence of an unfair deceptive act).

Further, Scoby could not prove that BFP's plumber failed to disclose the basis for the increased charges arising from the change in the type of service provided to her. She testified that he "might have" gone over with her "the changes [in the work to be performed] and the pricing" and then that he did tell her that the nature of the job was changing from a repair to a replacement when he told her the attempted repair "didn't work, and so [he] had to put in new [sewer line]." RP I, 92. Scoby does not contest these facts on appeal, admitting that "Ms. Scoby does not recall much of the details of the transaction with BFP's employee, Alex Shelton." BR 8. *See also* CP 10-11 (FF 3). Under *Robinson v. Avis Rent-a-Car*, a CPA plaintiff's testimony that the charges may well have been explained to them precludes any finding of an unfair or deceptive act

arising from an alleged failure to disclose the basis for a charge. 106 Wn. App. 104, 118, 22 P.3d 818 (2001). Just like the unsuccessful plaintiffs in *Robinson*, Scoby could not say that BFP failed to tell her about the basis for the charges. Accordingly, the evidence here was not sufficient to even raise a disputed issue of fact about whether BFP committed an unfair or deceptive act by fixing Scoby's drainage problem through partial replacement, and by pricing replacement higher than repair. Scoby has *nothing* to say about *Robinson* and its devastating impact on her case.

Perhaps realizing the merits of BFP's argument that the change from repair to replacement explains the increased cost (to the exclusion of the theory that BFP supposedly used its special knowledge to justify a price increase), Scoby attempts to find another basis to support the trial court's conclusion that BFP committed an unfair deceptive act by "price gouging." She thus appears to claim that she proved "price gouging" through testimony that BFP took longer and charged more in attempting to repair her sewer lines than another company charged to repair the sewer lines in one of her daughter's two houses. BR 28. But comparing the time BFP spent attempting to repair Scoby's sewer line with the time another company spent fixing a sewer line at an unrelated house simply does not prove an unfair or deceptive act or practice. Likewise, comparing the price quoted by another plumber (who would not actually be called on to perform the work for that price since BFP had fixed Scoby's drainage problem) to BFP's price does not establish an unfair or deceptive act. Scoby's own witness testified that the price BFP charged was "a good

one,” consistent with what other plumbers would charge for the same service. OB 45-46. Scoby has no persuasive response to this testimony from a witness who the trial court found credible. *See* BR 29 n.4. While the trial court was within its discretion to have found the other plumber’s price more reasonable when it came to awarding *quantum meruit* recovery, no evidence shows that BFP committed an unfair or deceptive act by charging the price it did for fixing the problem.

In short, there was insufficient evidence to conclude that Scoby was deceived into thinking that a partial sewer line replacement was necessary by BFP’s use of superior technical knowledge. And the evidence presented was not sufficient to support a conclusion that the basis for the increased charge — a change from repair to replacement — was deceptively or unfairly explained.

Since the record does not support the trial court’s conclusion that BFP’s plumber deceptively increased the price of Scoby’s repair job, Scoby instead attempts to re-cast the supposedly deceptive practice, claiming that the deceptive practice related to the length of the sewer line that was actually replaced versus the contract terms. But the trial court only concluded that those facts showed that the contract was not performed as written. CP 20-21 (CL 7). The trial court did not find that falling short of perfect contract performance was the deceptive unfair practice. And even if it had, Scoby could not base a CPA claim on that contractual shortcoming since she failed to establish how she was injured by that act when she withheld payment and failed to show a likelihood that

anyone else would be injured in exactly the same fashion.

**b. The Trial Court Erred in Concluding That Scoby Proved the Public Interest Element of Her CPA Claim Because Scoby Failed to Show a Likelihood That Other Parties Have Been or Will Be Injured in Exactly the Same Fashion.**

While Scoby does not dispute the applicability of the *Hangman Ridge* private dispute test to these facts, its test bears repeating since she omits a material portion of it in her response. See BR 38. Where the allegedly unfair or deceptive act or practice arises from a contractual dispute between the contracting parties, “it is the likelihood that additional plaintiffs have been or will be injured *in exactly the same fashion* that changes a factual pattern from a private dispute into one that affects the public interest.” See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986) (emphasis added).<sup>1</sup> In other words, a party dissatisfied with performance under a contract may not transform her breach of contract claim into a CPA violation without establishing a likelihood that the same act or practice will similarly injure others. Applying this test to Scoby’s claims about BFP’s allegedly unfair deceptive acts shows why her CPA claim must fail.

The trial court presumed to find two examples of “price gouging” in concluding that Scoby had satisfied the public interest element of the

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<sup>1</sup> The existence of a consent decree, which cannot be used to establish a CPA violation, also cannot take this contractual dispute between two private parties out of the realm of a private transaction. Cf. CP 31 (CL 44). Under *Hangman Ridge*, the private dispute test must be satisfied because this particular transaction, unlike the act involved in the consent decree, is a private dispute arising between contracting parties about the performance of a contract. 105 Wn.2d at 790.

CPA by showing a likelihood that additional parties have been or will be injured. CP 30 (CL 43). Scoby, however, all but abandoned using the “price gouging” theory to satisfy the deceptive unfair practice element when she instead claimed that BFP’s failure to replace the whole 21-25 feet of line was the deceptive unfair practice. *See* BR 31. Yet she does not claim that others are likely to be injured through similar supposedly deceptive acts arising from contract underperformance. That is probably because the trial court did not find another example of BFP failing to perform a contract exactly as written. Scoby fails to reconcile her shifting theories of the alleged unfair or deceptive act with the requirement that private plaintiffs make a public interest showing in order to satisfy the CPA’s purpose of protecting the general public as a whole. *See Hangman Ridge*, 105 Wn.2d at 787-88.

After trying out various theories of alleged deception, Scoby appears to settle on the theory that she was deceived when BFP fixed her sewer drainage problem without replacing the entire 21-25 feet of sewer line. *See* BR 31. As explained earlier, this was not the basis for the trial court’s conclusion that BFP committed the unfair or deceptive act of “price gouging.” But even if the trial court had concluded that BFP’s contract underperformance was the unfair or deceptive act or practice, Scoby failed to prove a likelihood of anyone else being similarly affected. The only case law examples Scoby provides of scenarios where private disputes pass the public interest test involved form contracts or common sales pitches. *See* BR 27. It is easy to see how others could potentially be

injured in exactly the same fashion under those scenarios, but the amount of sewer line to be replaced is not part of a BFP form contract, nor did Scoby offer any evidence that Michelle Todd or any others were somehow “duped” by a common sales representative.

When the trial court reversed its earlier ruling that Scoby failed to prove her CPA claim, it concluded that the common practice was deceptive using special knowledge to “price gouge” vulnerable individuals. CP 29-30 (CL 40-43). *See* RP VII, 2. The first problem with this ruling, as BFP explained in its opening brief and above, is that Scoby’s evidence was insufficient to prove that Shelton used special knowledge related to the necessity of replacement to unfairly justify that cost. And the second problem, which BFP also addressed and will address again below, is that Michelle Todd’s testimony shows her alleged injury did not arise in the same fashion as Scoby’s.

Todd did not complain that the company she dealt with had used its superior technical knowledge to *increase* the price charged for the service of repairing her sink. She just thought that the price was too high, although she agreed to authorize the repair for the quoted price after talking with her husband. CP 14 (FF 23); RP II, 140. And then in Todd’s case, the price charged *decreased* in comparison to the quoted price. OB 21-22, 46-48. Further, Todd had no complaint about contract underperformance, *i.e.*, somehow getting less than her entire sink restored to its position in her granite countertop. The circumstances giving rise to Todd’s grievances are not exactly the same as, or even similar to, the

allegedly deceptive act at issue here, whether the deceptive act is defined as increasing the price based on superior technical knowledge or not replacing all 21-25 feet of sewer line. Scoby has no persuasive response to BFP's arguments on this subject. There is simply no basis in the record for Scoby's claim that Todd experienced "a series of increased prices" or that Todd got a lesser scope of work than was represented to justify the (non-existent) price increase. *See* BR 37. Todd got her entire sink repaired, and for a price that decreased from the quote.

Beyond the dissimilar facts, Todd was not dealing with BFP — her experience with Outtoday cannot make a "pattern" of two examples with BFP. *See* OB 21, 48-49. Scoby fails to address BFP's argument that the conduct of Outtoday cannot be used to establish the public interest element of a CPA claim against BFP. Scoby claims that similarity between her and Todd's experience was that both brought their complaints to Gary Jessen's attention and neither was satisfied with his response. *See* BR 37. But Gary Jessen's allegedly unsatisfactory response was not the act that the trial court found deceptive.

In short, Scoby presented no evidence that any other BFP customer had ever complained that BFP failed to perform all the work it had contracted to perform or that BFP used its superior technical knowledge to *increase* the price for a service. Without this evidence, she cannot show a likelihood that additional plaintiffs have been or will be injured in exactly the same fashion. Accordingly, the trial court erred by concluding that she proved the public interest element of her CPA claim at trial.

**c. The Trial Court Erred in Concluding That Scoby Satisfied the Injury Element of a CPA Claim. Scoby Adopts the Trial Court's Tactic of Re-Shuffling the Allegedly Deceptive Practices as Needed to Fill in the Missing Elements of Her CPA Claim.**

In order to prevail on her CPA claim, Scoby had to prove that she was injured by BFP's allegedly deceptive act or practice. The trial court identified price gouging as the deceptive act, but that act did not injure Scoby because she did not pay the allegedly unreasonable price charged by BFP. *See Hangman Ridge*, 105 Wn.2d at 793 (holding that the plaintiffs failed to establish the injury element when there was no indication that they had paid the tax liability claimed as an injury). BFP made this argument in its opening brief; Scoby has no response. Instead, she attempts to defend the trial court's unsupported conclusion that her injury was being left with an open gravel patch and loose sewer caps.

This argument has two major flaws. First, the record shows that Scoby agreed to patch the asphalt herself, as BFP established in its opening brief. *See* OB 52-53. The typical practices of another contractor are completely irrelevant to Scoby's actual agreement with BFP. Second, the loose sewer caps have nothing to do with using superior technical knowledge to justify a price increase, which was the act found deceptive by the trial court. The trial court never found that BFP's failure to perform all the work it had contracted to perform was the deceptive act that satisfied the first element of Scoby's CPA claim (and if that had been the deceptive act, the public interest element could not have been satisfied

since there was no evidence of a likelihood that anyone else had been or would be injured in the same fashion).

Thus, Scoby has to abandon the conclusion that “price gouging” was the deceptive practice in order for the loose sewer caps to qualify as an injury. BFP identified this flaw in the trial court’s reasoning in its opening brief, arguing that the trial court slipped a new card in the deck in order to rule that Scoby satisfied the injury and causation elements. But Scoby just blithely repeats the trial court’s strategy of shuffling around the supposedly deceptive act depending on which element is in need of satisfaction.

Scoby also argues that she was injured by defending this lawsuit to remove the lien from her property. But she cannot link that alleged injury to the act found deceptive by the trial court. BFP addresses that causation shortcoming in Scoby’s CPA claim in the next section.

**d. The Trial Court Erred in Concluding Scoby Satisfied the Causation Element of Her CPA Claim.**

In its opening brief, BFP argued that the act found deceptive by the trial court — “price gouging” — could not have caused an overpayment injury to Scoby because she did not actually pay the supposedly unfair increased price that accompanied the change from repair to replacement. In other words, even if that increased price had been unfairly or deceptively increased, Scoby could not establish that she was injured by paying an amount not actually owed because she could not prove that the deceptive practice induced any payment. That argument is entirely

consistent with the Supreme Court's clarification of *Indoor Billboards v. Integra Telecom*, 162 Wn.2d 59, 170 P.3d 10 (2007). See *Panag v. Farmer's Ins. Co. of Wash.*, 166 Wn.2d 27, 59, 204 P.3d 885 (2009) ("*Indoor Billboard* merely holds that when the alleged injury is payment of an amount not actually owed, ***a plaintiff must prove the deceptive billing practice induced the payment to prove causation.***") (emphasis added).

*Panag* also held that a plaintiff could be injured by a deceptive act in ways other than remanding payment. 166 Wn.2d at 59. BFP does not argue otherwise, but asserts that none of the other injuries alleged by Scoby — defending a lien action and receiving incomplete work — were caused by the act the trial court ruled to be deceptive. For example, Scoby claims she was injured by BFP's failure to perform all the work it had contracted to perform. See BR 43 ("The injury is that Ms. Scoby received substantially less [sic] than the benefit of the money charged by BFP"). But, once again, the trial court never found anything unfair or deceptive about contract underperformance (and, once again, if it had, the public interest element would not have been met since there was no evidence of a likelihood that others would be injured in the same way). Accordingly, this contract underperformance "injury," was not proximately caused by BFP's alleged act of using its superior technical knowledge to increase the price of the service.

Moreover, Scoby cannot even establish that she was injured by supposedly receiving less than she was charged for by BFP because she

cancelled her check to BFP. This is the same type of “injury” dismissed as illusory in *Hangman Ridge*. 105 Wn.2d at 794 (“The fourth element, that of injury, was not established. Plaintiffs contended they were injured by a tax liability, yet they offered no verification that the liability existed or that they ever actually paid it.”).

Scoby fails to explain how any lien-related hardship could have been proximately caused by BFP’s “technique” of raising the price of plumbing services by the use of superior technical knowledge. That technique, even if BFP had actually used it, cannot be said to be a proximate cause of the defense costs because the links are too remote. Furthermore, any direct sequence, however attenuated, between the alleged price gouging and the lien was broken by a new independent cause: Scoby stopping payment on the checks to BFP. *See Indoor Billboard*, 162 Wn.2d at 81-82, citing WPI 310.07. In response to BFP’s brief, Scoby explains why her daughter stopped payment on the checks. But the reason she gives — infuriation with Mr. Jessen’s failure to acknowledge that 14 feet of sewer line were installed — is ultimately irrelevant because it does not explain how the alleged price gouging was the direct cause of her withholding all payment, in turn causing the filing of the lien. Surely she could not have thought she owed BFP **nothing** for the services performed. Had the checks not been cancelled, the lien would not have been filed. The direct cause of the lien filing, therefore, is Scoby’s action.

If anything other than Scoby’s refusal to pay for having her sewer fixed was the proximate cause of her having to defend the lien foreclosure

action, it would have been BFP's filing of the lien. But the filing of the lien was not (and could not have been) the unfair or deceptive act. BFP made this argument in its opening brief; Scoby has nothing to say in response. Accordingly, there was no causal link between the act found to satisfy the first element of the CPA claim and the injury of responding to the lien foreclosure action. The CPA claim was not a "close call." Scoby failed to prove 4 out of the 5 elements.

**2. The Trial Court Erred by Holding That It Had No Discretion to Award Attorneys' Fees Under RCW 60.04.181(3) in a Lien Foreclosure Action Because the Contractor Had Prevailed Under a *Quantum Meruit* Theory. The Lien Foreclosure Statute Expressly Allows for *Quantum Meruit* Recovery.**

Scoby makes no effort to assert that *DBM Consulting Engineers*, the case the trial court relied on to determine that it did not have the authority to award attorney fees where a contractor prevails under a quantum meruit theory, actually supports the trial court's decision. *See* BR 54. This is a wise concession since the case is inapplicable. *See* OB 60-64. Likewise, Scoby makes no attempt to rehabilitate the trial court's entirely unsupported conclusion that an "award of *quantum meruit* damages does not make Plaintiff the prevailing party under the . . . lien statute." CP 23 (CL 16). This is another wise concession because the lien foreclosure statute expressly provides the superior court with the discretion to award attorneys' fees to a party who recovers on a *quantum meruit* basis. As BFP explained in its opening brief, the lien foreclosure statute accomplishes that by defining "contract price" to include "the customary and reasonable charge therefor." RCW 60.04.011(2); *see also*

*Young v. Young*, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (holding that “*quantum meruit*” is “the method of recovering the reasonable value of services provided under a contract implied in fact.”).

With Scoby abandoning two crucial components of the trial court’s conclusion that BFP was not the prevailing party, the outcome on appeal should be straightforward: BFP should be considered the prevailing party. It did work that improved someone else’s property, and those services qualified for a lien. See *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 502, 210 P.3d (2009). The person whose property they improved *did not pay anything*. It filed a lien for an amount that the non-paying party’s witness considered customary for the service rendered. RP II, 93-94. It recovered less than it liened for, but nevertheless recovered an amount that was determined to be the reasonable value of services provided. And then the trial court ruled that the lien was “fully satisfied by the award of *quantum meruit* and is hereby dissolved.” CP 37 (CL 65). If this doesn’t qualify as prevailing under the lien foreclosure statute, it is hard to understand what would.

Even though BFP recovered the reasonable value of the services it provided and Scoby did not succeed in having BFP’s complaint dismissed with prejudice (CP 615), Scoby counters that *she* was the prevailing party under the lien statute because the lien was invalid.<sup>2</sup> And she claims the

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<sup>2</sup> Scoby claims she was the prevailing party in defending against BFP’s contract cause of action (BR 53), but BFP did not bring a breach of contract claim against Scoby. It sued her to recover money due under the contract, but the action was to foreclose on the lien. CP 682-86. Moreover, Scoby asserted in her counterclaim

lien was invalid because, in essence, BFP asked for more than it was awarded and because it filed the lien instead of agreeing with her about the meaning of a contract term. “A materialman’s lien will be declared invalid for an excessive amount *only* if the amount is claimed with an intent to defraud or in bad faith.” *Structural Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 715, 658 P.2d 679 (1983) (emphasis added). A lien is not claimed in bad faith when the amount is “fairly debatable.” *CHG Int’l, Inc. v. Platt Elec. Supply, Inc.*, 23 Wn. App. 425, 426, 597 P.2d 412 (1979) (quotation omitted). Here, two issues were fairly debatable: (1) whether BFP would be found to have performed under the contract, triggering Scoby’s duty to pay in full, and (2) even if BFP was found to have breached the contract, whether the amount liened was reasonable where Scoby’s witness agreed that amount was the customary charge for the service provided.

The trial court’s finding that Gary Jessen failed to review the work before filing the lien does not and cannot support its conclusion that BFP acted in bad faith. When BFP filed its lien for the contract price of \$6,655.98, the trial court had not yet ruled that BFP did not perform the contract as written. Whether BFP breached the contract was a matter for the court to decide. And in this case, the trial court had to make a

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that she did not owe BFP anything. *See* CP 615 (praying for BFP’s action to recover money owed under the contract to be dismissed with prejudice). But the trial court ruled that she had to pay BFP \$3,350 in *quantum meruit* recovery, so to the extent she had the contract declared unenforceable, she nevertheless failed to get the relief she was seeking.

determination about the meaning of a contract term before it could rule that BFP had breached the contract. *See* CP 21 (CL 28). Even if Gary Jessen had reviewed the plumber's work before filing the lien, the meaning of the contract term would have remained the determinative issue for the court to resolve. The trial court here concluded that the contract ambiguity should be decided against BFP as the drafter, but it never found that BFP's position was frivolous, unwarranted, or taken in bad faith. Just because Scoby felt that BFP's performance was incomplete under the contract does not automatically invalidate the contract or negate BFP's right to avail itself of the statutory provisions for the collection of money due under the contract.

To hold a lien invalid due to a pre-filing dispute about the meaning of a contract term would effectively gut the legislature's decision authorizing mechanics and materialmen to ensure payment by using a lien because the non-paying party could simply dispute performance under the contract to do away with the materialman's right to file a lien. Accordingly, BFP, as a matter of law, cannot be found to have acted in bad faith by filing a lien for no more than the price under a contract that had not yet been rendered unenforceable by a court and when there was a good faith argument for the contract's enforceability.

Even assuming that Scoby's complaint about contract performance somehow rendered the contract unenforceable before the trial court had a chance to say so, BFP liened for an amount that Scoby's own witness said was a "good" price for the work and that the price was "absolutely"

consistent with what other plumbers in the area would have charged for the job, with some charging more and some charging less. RP II, 94-95. The trial court found this witness credible (CP 16 (CL32)), and never mentions why it utterly disregarded that testimony when it wrongly found that BFP “did not provide any evidence with regard to . . . the reasonable value of the work, . . .” CP 22 (CL 14). BFP not only provided that evidence, but managed to elicit it from Scoby’s witness. That another of Scoby’s witnesses would have charged less for the job simply does not prove that BFP knowingly liened for too much, which was Scoby’s burden to prove. *See CHG Int’l*, 23 Wn. App. at 426 (holding that an overcharge must be knowingly made to constitute bad faith). The lower priced estimate from Scoby’s witness does not prove that BFP had no justification for claiming the amount it did. Instead, the contrary evidence (that BFP charged a “good price” for the job performed) proves that BFP had a fairly debatable basis for liening the amount it did. *See CHG Int’l*, 23 Wn. App. at 426 (affirming trial court’s ruling that there could be no finding of a bad faith overcharge despite evidence supporting that finding where the existence of conflicting evidence made the issue fairly debatable.)

This is not a case where BFP filed a lien for more than would have been due under the contract. Nor did BFP lien for that amount *after* the contract had been declared unenforceable. Reviewing the work before filing the lien would not have given BFP reason to know the trial court would rule against it on the meaning of the contract term found ambiguous. The trial court erred by concluding that BFP acted in bad

faith by filing the lien. The lien was valid, and BFP prevailed in its action under the lien when it recovered the customary and reasonable charge for the work it performed, the recovery of which “fully satisfied” the lien and caused its dissolution. CP 37 (CL 65). Accordingly, the trial court had the authority to award attorneys’ fees to BFP under RCW 60.04.181(3).

**3. The Trial Court Erred by Removing the Amount of Sales Tax from the *Quantum Meruit* Recovery When That Was Part of the Reasonable Value of the Services Conferred on Scoby.**

Scoby agrees that *Kingston Lumber* stands for the proposition that the award of costs and attorney fees incurred in filing lien actions changes from discretionary to mandatory when the amount in controversy is less than \$10,000, in which case the prevailing party shall be awarded fees. *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wn. App. 864, 867, 765 P.2d 27 (1988). *Kingston Lumber* harmonizes RCW 60.04.181(3) and RCW 4.84.250 *et seq.* such that the lien foreclosure act plaintiff who recovers more than was offered to settle an action for less than \$10,000 shall be awarded attorney fees as the prevailing party. 52 Wn. App. at 867; RCW 4.84.260. This action was for less than \$10,000 and Scoby offered BFP \$3,350 to settle it. CP 464-65 (Appdx. A). The only way that the trial court could make sure that BFP was not entitled to an award of attorney fees was to remove the sales tax and permit costs from its initial award of *quantum meruit* recovery. Faced with the prospect of reaching a result the trial court apparently did not want to reach, the trial court doctored the outcome by removing the sales tax and permit costs, abusing its discretion along the way.

Scoby argues that the “award of sales tax is not appropriate because the quantum meruit award is an offset.” BR 50. The trial court said the same thing (CP 23 (CL 15)), but that *non sequitur* cannot possibly justify the decision reached. Both Scoby and the trial court fail to explain what it is about the structure of an offsetting award that makes sales tax inappropriate. Whether the awards were offsetting or not, the cost of the sales tax is part of the reasonable value of the benefit conferred on her property, meaning it is part of the recovery that must be awarded to BFP in *quantum meruit*. See *Pomeroy v. Anderson*, 32 Wn. App. 781, 649 P.2d 855 (1982). Scoby’s attempt to distinguishing *Pomeroy* is unconvincing. Like in *Pomeroy*, there was not a controlling contractual provision allocating sales tax, meaning the presumption that the buyer pays would also apply here. See 32 Wn. App. at 785. To the extent Scoby appears to be suggesting that no sales tax is due when one party is ordered to pay another under *quantum meruit* rather than a contract, she cites no authority for her novel tax avoidance strategy.<sup>3</sup>

*Powell v. Kier* is directly on point. 44 Wn.2d 174, 175, 265 P.2d 1059 (1954). There, the trial court based the award of *quantum meruit* recovery on the plumber’s records and included the value of the sales tax in the award. Here, the trial court relied exclusively on the valuation

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<sup>3</sup> Scoby’s argument that the sales tax was not part of the reasonable value of the benefit conferred on her property by BFP because the company is now dissolved and bankrupt is meritless. Scoby offers no authority to support her argument that BFP (or the Jessens under *Chadwick Farms*), would somehow be immune from liability for failing to remit the sales tax to the state. See generally RCW 82.08.050.

evidence from Kevin Flynn, Scoby's expert, to establish the value of *quantum meruit*. Flynn **included** the value of the sales tax in his valuation of the reasonable and customary worth of the work BFP did. RP II, 110 (Flynn testifying that the work BFP performed had a value of \$3,350 **plus tax and permit.**) (emphasis added); CP 674 (Flynn's written bid states "Raymark Plumbing & Sewer quotes the price of \$3,350 **plus taxes and permit** to perform the following work.") (emphasis added). The trial court even went so far as to find that Flynn was "credible" and that he "indicated a price of this work for \$3,350 **plus tax and permit.**" CP 17 (FF 35) (emphasis added). This case should have come out just like *Powell*. Flynn's was the only evidence the trial court relied on to establish the value of the work BFP performed, and it included the value of the sales tax.

Scoby thus offers no plausible excuse for the trial court's arbitrary and undefendable decision to find that her expert's valuation testimony included sales tax and then to rely exclusively on that expert's evidence in making the award without including sales tax and without offering any explanation for that decision. No evidence supports the trial court's decision to omit the sales tax. BFP's explanation is the only one that makes sense: the trial court was engaged in impermissible results-oriented decision making.

The trial court's decision to omit the permit costs similarly shows that the court was determined to prevent the application of RCW 4.84.260 no matter the evidence in front of it. As stated above, Flynn's evidence

showed that permit costs were part of the reasonable value of the services BFP conferred on Scoby. While there was no evidence as to the exact value of the permits, the uncontroverted evidence from Scoby's own expert was that the permit fees were part of the reasonable value of the benefit conferred on Scoby's property. Because the trial court had no plausible basis for eliminating the permit fees from the final *quantum meruit* award to BFP, its decision to exclude those fees in their entirety was an abuse of discretion. Regardless of the exact amount of the permit fees, their value would have pushed the amount BFP recovered above Scoby's settlement. Likewise, the \$268 worth of sales tax benefit that BFP conferred on Scoby would have established that BFP's recovery of \$3,350 plus sales tax was more than Scoby's offer of \$3,350. The trial court erred by not awarding prevailing party fees to BFP for having improved on Scoby's settlement offer in an action for less than \$10,000.

**4. There is No Basis for Personal Liability Because Scoby Failed to Prove Her CPA Claim. But Even If This Court Upholds the Trial Court's Results-Oriented CPA Conclusion, There Is Insufficient Evidence of Any Wrongdoing by the Jessens.**

Because BFP did not violate the CPA there is nothing for which Gary and Rodney Jessen can be personally liable. Should this Court uphold the unfounded conclusion that BFP violated the CPA through "price gouging," there is still no basis for holding Rodney and Gary Jessen liable. The trial court was correct when it originally concluded that "no personal liability has been proven because no wrongdoing has been shown on the part of the Jessens." RP V, 19. The trial court's change of heart,

motivated by an apparent desire to ensure that Scoby would get attorney fees under the CPA despite BFP's bankruptcy, is not supported by substantial evidence.

Scoby argues that Gary and Rodney Jessen should be liable for Shelton's allegedly deceptive act because both of them must have known about Scoby's daughter's complaints and because Gary also served the lien without inspecting the sewer. This rationale is completely untethered from the act (using superior technical knowledge to increase the price of the services) that the trial court concluded was deceptive. Neither replacing less sewer line than was promised nor filing a lien without inspecting the work done was found to be the unfair and deceptive act. This is what BFP argued in its opening brief; Scoby has no answer but instead continues to shuffle the basis for the alleged CPA violation as needed to satisfy various other tests, never mind that she never could have proved that BFP committed a CPA violation with these new acts serving as the alleged unfair or deceptive act. Here, the evidence does not show that the Jessens knew or approved of BFP's plumber's supposed use of his superior technical knowledge to increase the prices of the service.

**5. Although the Basis for Personal Liability Should be Mooted by this Court's Reversal of BFP's Liability under CPA, Any Remaining Decisions Regarding the Jessens' Personal Liability Under *Chadwick Farms* Would Have To Be Remanded Back to the Trial Court to Allow the Jessens an Opportunity to Respond to the Post-Trial Evidence.**

Relying on bankruptcy documents that were submitted two months after trial, the trial court concluded that the Jessens were personally liable

for the CPA attorney fee award assessed against BFP under RCW 25.15.300 and *Chadwick Farms Owners Ass'n v. FHC*, 166 Wn.2d 178, 207 P.3d 1251 (2009). The trial court never allowed the Jessens an opportunity to respond to this new evidence before imposing upon them monetary sanctions, as the May 7, 2010 exchange between Jessen's counsel and the trial court makes painfully clear. See RP VII, 4. This action violated their due process rights to "be heard at a meaningful time and in a meaningful manner" before the imposition of sanctions. See *Post v. City of Tacoma*, 167 Wn.2d 300, 314, 217 P.3d 1179 (2009). This due process violation would be rendered moot upon a holding by this Court that BFP did not violate the CPA. Should this Court hold otherwise, the Jessens should be allowed an opportunity to meet that new evidence.

Scoby's response to this fundamental error is characteristically non-responsive. She talks about the trial court's authority to re-open proceedings and allow additional evidence. She does not explain how that authority would allow a trial court to impose monetary sanctions without allowing the other party the opportunity to respond to that evidence. And none of the cases she cites held that a trial court may entertain post-trial evidence without regard to the other party's due process rights. Scoby tries to make a "turnabout is fair play" argument about the Jessens being allowed to re-open their case, but her example cuts directly against her — there, the trial court allowed BFP to re-open the direct testimony of Gary Jessen during Scoby's case, and Scoby *was allowed* the opportunity to meet the additional testimonial evidence through cross-examination. RP

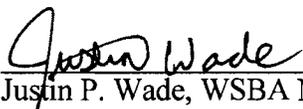
II, 3, 33. Scoby asserts that the Jessens had ample opportunity to respond to the bankruptcy documents, and that they simply squandered that opportunity. But the May 7, 2010 exchange shows otherwise — the trial court made itself clear that it was not going to entertain any explanation from the Jessens about what the new documentary evidence actually showed. RP VII, 4. Finally, Scoby focuses on the admissibility and validity of the evidence. Those issues are totally irrelevant to the due process violation. The issue is not whether the documents should have been admitted or whether they are valid. The issue is whether the Jessens were allowed an opportunity to explain why those documents, if valid and properly admitted, did not show that they had failed to properly wind up the business of the dissolved LLC. Their due process rights were violated when they were denied that opportunity.

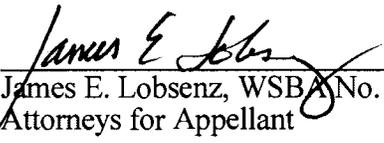
**C. CONCLUSION**

Appellants respectfully request the same relief set forth in their opening brief.

DATED this 7<sup>th</sup> day of July, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By   
Justin P. Wade, WSBA No. 41168

By   
James E. Lobsenz, WSBA No. 8787  
Attorneys for Appellant

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No. 65459-4-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

PLUMB SERVE, LLC, a Washington limited liability corporation, d/b/a BENJAMIN FRANKLIN PLUMBING,

Plaintiff,

v.

VIOLA M. SCOPY and "JOHN DOE"  
SCOPY, wife and husband; and JOHN W.  
SCOPY AND VIOLA M. SCOPY  
REVOCABLE TRUST of October 9, 1995;

Respondents,

v.

PROFIT TWO, LLC, a Washington limited liability company, d/b/a PLUMB SERVE AND OUTTODAY SERVICE; RODNEY JESSEN, individually and as part of his marital community; and GARY JESSEN, individually and as part of his marital community;

Appellants.

CERTIFICATE  
OF SERVICE

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

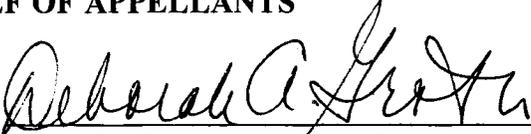
2. I am employed by the law firm of Carney Badley Spellman,  
P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600,  
Seattle WA 98104.

3. On July 8, 2011, I caused to be served via Legal Messenger,  
a true and correct copy of the following documents on:

Yen Lam  
Galvin Realty Law Group  
6100 – 219<sup>th</sup> Street SW, Suite 560  
Mountlake Terrace, WA 98043

Entitled exactly:

**REPLY BRIEF OF APPELLANTS**

  
DEBORAH A. GROTH