

66032-2

66032-2

No.66032-2-1

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

FILED
2011 APR 27 PM 1:23
COURT OF APPEALS
CLERK

Lightweight Steel Framing 2007 LTD, a Washington corporation,

Appellant,

v.

W.G. Clark, CM, Inc. a Washington corporation, and Brix
Condominium, LLC,,

Respondents.

RESPONSE BRIEF OF RESPONDENTS

Attorneys for Respondents

JAMESON BABBITT STITES & LOMBARD, P.L.L.C.

Matt Adamson, WSBA 31731
999 Third Avenue, Suite 1900
Seattle, Washington 98104-4001
Telephone: 206 292 1994
Facsimile: 206 292 1995
madamson@jbsl.com

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION.....	1
ISSUES.....	2
FACTS	2
ARGUMENT.....	6
A. The Dismissal Without Prejudice was Not an Appealable Order	6
B. The Trial Court Correctly Dismissed LSF’s Claims Without Prejudice.	7
C. This Motion Was Properly Before the Trial Court Rather than the Arbitrator.....	12
D. The Trial Court Correctly Refused to Set Mediation and Arbitration Dates.....	13
E. Brix Did Not Waive Its Right To Demand Compliance With U3.....	16
F. LSF is Not Entitled to an Award of Fees and Costs.....	17
G. Brix is Entitled to Its Attorneys’ Fees for Responding to a Frivolous Appeal.....	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Am. Safety Cas. Ins. Co. v. City of Olympia</i> , 162 Wn.2d 762, 174 P.3d 54 (2007).....	17
<i>American States v. Chun</i> , 127 Wn.2d 249, 897 P.2d 362 (1995).....	6
<i>Birkeland v. Houchen</i> , 51 Wn.2d 554, 320 P.2d 635 (1958).....	17
<i>Downie v. State Farm Fire & Cas. Co.</i> , 84 Wn. App. 577	8, 11
<i>In re Dependency of A.G.</i> , 127 Wn. App. 801, 112 P.3d 588 (2005)	7
<i>Melville v. State</i> , 115 Wn.2d 34, 793 P.2d 952 (1990).....	9
<i>Reid v. Dalton</i> , 124 Wn. App. 113, 100 P.3d 349 (2004)	18
<i>School Dist. No. 1J, Multnomah County v. AcandS, Inc.</i> , 5 F.3d 1255 (9th Cir. 1993).....	9
<i>Veit v. Burlington N. Santa Fe Corp.</i> , 2011 Wash. LEXIS 162, 11 (2011)	10
<i>Walter Implement v. Focht</i> , 107 Wn.2d 553, 730 P.2d 1340 (1987).....	11
<i>Young v. Key Pharmaceuticals Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	8

Statutes

RAP 2.2.....	6
RAP 18.1.....	17
RAP 18.9.....	20
RCW 7.04A.150	14, 20

INTRODUCTION

Appellant Lightweight Steel Framing 2007 LTD (“LSF”) has filed this appeal of the trial court’s dismissal that was issued “without prejudice.” The trial court found that LSF had failed to meet its burden to prove that it had satisfied a condition precedent to filing this lawsuit. The condition precedent required LSF to submit its full claim in writing, with backup documentation, to Respondent Brix Condominium LLC (“Brix”) prior to filing any claims in litigation or arbitration. LSF did not do so.

Rather than submit its claim and documents and then re-file the lawsuit, LSF filed this appeal. The trial court was correct in dismissing LSF’s claims without prejudice. Moreover, the trial court’s dismissal without prejudice was not an appealable order.

LSF should stop wasting time and money with this frivolous appeal, and instead prepare its claim and backup documentation and present it to Respondents. LSF would then be free to re-file its lawsuit and/or file counterclaims in arbitration. Because LSF chose to file a frivolous appeal rather than follow its contract and pursue its claims on the merits, Brix should be awarded its fees and costs for having to defend this frivolous appeal.

ISSUES

1. Was the order of dismissal without prejudice an appealable order?
2. Did the trial court have authority to dismiss LSF's complaint for failure to comply with a condition precedent to filing claims in litigation?
3. Did the trial court err in dismissing LSF's claims where LSF failed to meet its burden to prove it complied with a condition precedent to filing claims in litigation?
4. Did Brix waive its right to require LSF to comply with the condition precedent?
5. Did the trial court err in refusing to compel Brix to mediate and arbitrate this dispute?
6. Is Brix entitled to attorneys' fees incurred in responding to a frivolous appeal?

FACTS

Brix Condominium, LLC, ("Brix") was the developer of a residential condominium project on Capitol Hill in Seattle called Brix Condominiums. W.G. Clark, C.M., Inc. (W.G. Clark) is a construction firm, and was a member of Brix Condominium, LLC.

For the Brix Condominium project, W.G. Clark provided general contractor and construction management services. (CP 15-16)

On May 29, 2007, W.G. Clark entered into a subcontract with Lightweight Steel Framing 2007 Ltd ("LSF"). (CP 17) Section

U.3 of the subcontract states:

Subcontractor agrees not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing to Mike Ducey, president of W.G. Clark Construction Co. along with detailed cost documentation and all points of argument in Subcontractor's favor. Subcontractor acknowledges its responsibility to cooperate with W.G. Clark in avoiding unnecessary arbitration or litigation providing W.G. Clark all information available upon which a decision can be made. (CP 37)

Effective as of July 1, 2008, W.G. Clark assigned the subcontracts for the Brix Condominium project, including the subcontract with LSF, to Brix. (CP 16)

In February 2009, Brix sent a demand for arbitration to LSF. LSF never responded. (CP 10-12) LSF has never presented any claims against Brix in that arbitration.

In August 2009, LSF filed a complaint in King County Superior Court against Brix seeking to foreclose its mechanic's lien and for a money judgment. On September 24, 2009, LSF filed an amended complaint removing the lien foreclosure portion of its

complaint. In its amended complaint, LSF alleged that it provided labor, materials, and equipment for the project until July 29, 2008, and that LSF was terminated on that date. LSF alleges is it owed "no less than \$1,017,868."

In paragraph 7.2 of the amended complaint, LSF "requests a stay of these proceedings pending resolution of the claims stated herein by arbitration, which is required per Articles U2 and (3) of the parties' contract, which requires that the parties mediate, then submit to binding arbitration any disputes."

LSF's prayer for relief seeks a judgment in that amount either in arbitration or litigation.

Brix never filed an answer to the complaint or any counterclaims.

On June 10, 2010, Brix simultaneously demanded compliance with section U.3 of the LSF subcontract, and suggested certain dates for mediation and arbitration. LSF never responded. (CP 8). After demanding compliance with U.3, the remainder of that June 10, 2010 email read:

With regard to mediation, the people who need to be present are generally unavailable in July either due to vacations or other arbitrations. We are available and can set a date for the latter half of August, say the week of August 16.

As for arbitration, we can pick an arbitrator and set a date, though I think it's best if we wait until you comply with U.3 and until after the mediation. If you want to set a date now, we can set one for January - March 2011, subject to change if we have trouble getting information and documents from LSF.

But if LSF complies with U.3 in the next month, and we mediate in August, it's reasonable to think we could be ready to arbitrate in that January - March period.

Our willingness to set dates for mediation and arbitration is without prejudice to our rights to move for a dismissal based on non-compliance with U.3. (CP 14)

LSF never responded to that email. (CP 89)

After the motion for summary judgment was filed, LSF's attorney sent an email claiming that LSF complied with U.3 years ago, and asking to set dates for mediation and arbitration. Brix's attorney responded on August 18, 2010, as follows:

Dear Sean: We disagree with your contention that LSF has complied with U.3, which is why we filed the motion. If we have overlooked something and LSF did comply, then it should be pretty easy to send us a copy of what LSF contends was its compliance.

As for dates, I proposed some in my June 10 email which you never responded to. Those dates no longer work for us. Because of your refusal to respond and refusal to comply with U.3, we are no longer willing to set dates until LSF complies with U.3.

We also agreed to exchange documents. Brix produced their documents two months ago. You have not produced any documents.

In sum, once LSF complies with U.3 and produces its documents, we will be happy to set dates for the mediation and arbitration. (CP 91) (emphasis added)

There is an arbitration proceeding filed by Brix in February 2009. (CP 10-12) LSF has not filed any response or counterclaims to that demand for arbitration. The motion before the trial court concerned only LSF's claims in the litigation under its amended complaint and whether the trial court should dismiss those claims.

ARGUMENT

A. THE DISMISSAL WITHOUT PREJUDICE WAS NOT AN APPEALABLE Order

A dismissal without prejudice is not appealable under RAP 2.2 unless it is a final judgment or a "decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action."¹ If the lawsuit can be re-filed, the dismissal is not appealable. If, for example, the statute of limitations has run, then the order is appealable because it is effectively a dismissal with prejudice.²

¹ *American States v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995).

² *Munden v. Hazelrigg*, 105 Wn.2d 39, 42-44, 711 P.2d 295 (1985).

In *In re Dependency of A.G.*, 127 Wn. App. 801, 112 P.3d 588 (2005), the Court held that the “practical effect of the order here is to temporarily discontinue or postpone the action by deferring resolution of the final issue until Green is given another opportunity to ‘get it together.’” Because the State could re-file, the dismissal did not effectively terminate the action.³

There is nothing preventing LSF from complying with the condition precedent – presenting its full claim with detailed cost documentation and all points of argument – and then re-filing its complaint. As such, the dismissal of the claims without prejudice was not appealable.

B. THE TRIAL COURT CORRECTLY DISMISSED LSF’S CLAIMS WITHOUT PREJUDICE.

Even if the order was appealable, the trial court must be affirmed. LSF’s subcontract contains a condition precedent that it must comply with before filing any claims in arbitration or litigation.

That condition precedent is in section U3, and states:

Subcontractor agrees not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing to Mike Ducey, president of W.G. Clark Construction Co. along with detailed cost documentation and all points of argument in Subcontractor’s favor. Subcontractor acknowledges its responsibility to cooperate with

³ *In re Dependency of A.G.*, 127 Wn. App. 801, 807-808.

W.G. Clark in avoiding unnecessary arbitration or litigation providing W.G. Clark all information available upon which a decision can be made. (CP 37 emphasis added)

LSF never complied with this condition precedent before filing this lawsuit. (CP 15-16; 89-91; 8-9, 14). Thus, Brix moved for summary judgment to dismiss LSF's claims under the authority of *Downie v. State Farm Fire & Cas. Co.*, 84 Wn. App. 577 (holding that party's failure to comply with contractual condition precedent prior to filing lawsuit mandated dismissal).

On summary judgment, if the moving party is a defendant, its burden is merely to "point out" that the claimant lacks evidence to support its claims.⁴ Regardless of whether the Adamson declarations (CP 8-14; 89-91) were admissible, Brix met its burden as the moving party by "pointing out" that plaintiff LSF lacked evidence to support its claims. (CP 3-5) In response, LSF "fail[ed] to make a showing sufficient to establish the existence of ... elements essential to its case, and on which it will bear the burden of proof at trial," thus, summary judgment [was] appropriate.⁵

⁴ *Young v. Key Pharmaceuticals Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182, 188 (1989) (if defendant points out that plaintiff lacks evidence, burden is not plaintiff to present evidence of each element of its claim).

⁵ *Young v. Key Pharmaceuticals Inc.*, 112 Wn.2d 216, 225 n.1.

The issue for the trial court was whether, prior to filing its claims in the lawsuit, LSF complied with the condition precedent in section U.3 of LSF's subcontract. Section U.3 required LSF to provide its "full claim in writing" along with its "detailed cost documentation and all points of argument." And it requires LSF to cooperate and provide "all information available upon which a decision can be made."

If LSF had complied before filing the lawsuit, it was incumbent on LSF to provide a copy of the same with its response to the motion for summary judgment.⁶ LSF did not present such a copy. It did not even submit a transmittal or a cover letter showing that it earlier sent its "full claim" with "cost documentation" and "all points of argument." Rather than prove its compliance by providing a copy of its earlier alleged compliance, LSF's response contained merely a single page document that lists the amounts and categories of its claim, and the testimony from Al Malcom stating that LSF submitted "other written cost documentation detailing the amounts of LSF's claim" on several occasions.

⁶ See *School Dist. No. 1J, Multnomah County v. AcandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993) (failure to attached report relied upon requires exclusion of evidence); *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990).

The one page document is, to state the obvious, not compliance with U.3. And merely stating that other unidentified documents were earlier provided is also not sufficient to raise a disputed material fact. Without copies of the documents, or even a description or identification of the documents it claims to have provided, the testimony is irrelevant. And of course, there was no evidence that LSF ever submitted “all points of argument in Subcontractor’s favor,” or that LSF has provided “all information available upon which a decision can be made” as required by U.3. This was all explained to LSF in a June 10, 2010, email, but LSF never responded to that email. (CP 14)

In fact, LSF’s own response to the motion showed that Brix asked for compliance with U.3 and backup documentation at least as far back as February 2010, and that LSF agreed to produce its documents. (S. Malcom Decl. Ex. A) Although Brix produced its documents, LSF never produced any documents. (CP 89-90)

The trial court also did not abuse its discretion in considering the two declarations of counsel for Brix.⁷ It was within the trial court’s discretion to determine that Mr. Adamson had personal

⁷See *Veit v. Burlington N. Santa Fe Corp.*, 2011 Wash. LEXIS 162, 11 (2011) (evidentiary rulings reviewed for abuse of discretion).

knowledge as counsel for Brix of whether or not LSF had ever submitted its “full claim in writing” with all “detailed cost documentation” and all “points of argument” to Brix as required by U.3. In any event, as noted above, the burden was on LSF to prove its compliance with the condition precedent and not on Brix to prove lack of compliance.⁸

The simple fact is that LSF never complied with the condition precedent before filing this lawsuit. If it had complied, it would have presented a copy of its compliance either before, or with, its response brief. The trial court was correct in dismissing the lawsuit.⁹ After the dismissal without prejudice, LSF should have simply presented its “full claim” under U.3 and then either re-file its lawsuit or file counterclaims in the existing arbitration. Its choice to instead pursue this appeal can only be viewed as an attempt to waste time and money. There is no non-frivolous basis for this appeal.

⁸ See *Walter Implement v. Focht*, 107 Wn.2d 553, 557, 730 P.2d 1340 (1987) (“The party seeking enforcement of the contract has the burden of proving performance of an express condition precedent”).

⁹ See *Downie v. State Farm Fire & Cas. Co.*, 84 Wn. App. 577 (holding that party’s failure to comply with contractual condition precedent to filing lawsuit mandated dismissal).

C. THIS MOTION WAS PROPERLY BEFORE THE TRIAL COURT
RATHER THAN THE ARBITRATOR.

LSF is wrong to claim that Brix's motion was an issue for the arbitrator. Section U.3 of LSF's contract specifically states that LSF will not file any "claims" in "litigation" until it complies with U.3. Brix sought dismissal of the claims brought in the litigation, including the claim to over \$1 million in damages. Obviously, the question of whether LSF has met that condition precedent prior to filing litigation is for the trial court. An arbitrator has no authority to dismiss claims brought in a lawsuit.

Brix did not seek to avoid arbitration by claiming a failure to comply with U.3. That question would be will be for an arbitrator if LSF ever files any counterclaims in the arbitration. But the question of dismissing LSF's claim to a judgment in the litigation was properly for the trial court.

LSF is also wrong to now claim that its lawsuit was filed only in order to compel arbitration. An arbitration demand had already been filed by Brix, thus there was no need to compel anything. Moreover, nothing in the complaint seeks to compel arbitration. LSF filed its lawsuit to foreclose its liens. It then realized its lien claims had expired, and it amended its complaint to seek a

judgment in either litigation or arbitration. Because of the alternative requested relief, and the approaching trial date, Brix was correct to seek dismissal of the claims in the litigation from the trial court.

LSF's claim that it has no remedy to compel arbitration is a red herring. A lawsuit to compel arbitration was never brought, and LSF never filed a motion to compel arbitration. If such a lawsuit was brought, it would not be subject to U.3. A request to compel arbitration would not be a "claim" in litigation under U.3.

Additionally, there is an existing arbitration, and, as LSF admits, Brix agreed to arbitrate this dispute and agreed to two arbitrators. LSF never pursued any claims in arbitration. Nothing is preventing LSF from filing claims in the arbitration. If it does, Brix will then move to dismiss those claims for lack of compliance with U.3. That issue – dismissal of claims brought in an arbitration – will be for the arbitrator. But dismissal of claims brought in King County Superior Court is for the judge.

D. THE TRIAL COURT CORRECTLY REFUSED TO SET MEDIATION AND ARBITRATION DATES.

The trial court was also correct in denying LSF's request that the court set mediation and arbitration dates. First, LSF did not

note or file a motion to compel arbitration or mediation dates, but only included the request in a response brief.

Second, as LSF admitted, the parties have agreed that this case is subject to mediation and then binding arbitration, and have agreed upon a mediator and arbitrator. Whether or not to compel Brix to set a date for the arbitration is an issue for the arbitrator, not the trial court. See RCW 7.04A.150(3) (“The arbitrator shall set a time and place for a hearing”).

Third, as noted above, the trial court correctly dismissed the claims because of LSF’s noncompliance with U.3, and thus the Court has no authority to force Brix to set dates.

Fourth, LSF’s demand is absurd given that the most recent correspondence between these parties prior to the motion was in June 2010, when Brix suggested certain dates for mediation and arbitration, and LSF never responded. (CP 8, 14). After demanding compliance with U3, the remainder of that June 10, 2010 email read:

With regard to mediation, the people who need to be present are generally unavailable in July either due to vacations or other arbitrations. We are available and can set a date for the latter half of August, say the week of August 16.

As for arbitration, we can pick an arbitrator and set a date, though I think it's best if we wait until you comply with U.3 and until after the mediation. If you want to set a date now, we can set one for January - March 2011, subject to change if we have trouble getting information and documents from LSF. But if LSF complies with U.3 in the next month, and we mediate in August, it's reasonable to think we could be ready to arbitrate in that January – March period.

Our willingness to set dates for mediation and arbitration is without prejudice to our rights to move for a dismissal based on non-compliance with U.3.
(CP 14)

After this motion was filed, LSF's attorney sent an email claiming that complied with U.3 years ago, and asking to set dates.

Brix's attorney responded on August 18, 2010, as follows:

Dear Sean: We disagree with your contention that LSF has complied with U.3, which is why we filed the motion. If we have overlooked something and LSF did comply, then it should be pretty easy to send us a copy of what LSF contends was its compliance.

As for dates, I proposed some in my June 10 email which you never responded to. Those dates no longer work for us. Because of your refusal to respond and refusal to comply with U.3, we are no longer willing to set dates until LSF complies with U.3.

We also agreed to exchange documents. Brix produced their documents two months ago. You have not produced any documents.

In sum, once LSF complies with U.3 and produces its documents, we will be happy to set dates for the mediation and arbitration. (CP 91)

The trial court correctly dismissed LSF's claims and refused to order dates for the parties to arbitrate.

E. BRIX DID NOT WAIVE ITS RIGHT TO DEMAND COMPLIANCE WITH U3

LSF claims that Brix "waived enforcement of U.3 ... by filing a Demand for Arbitration and agreeing to mediate and arbitrate the dispute." LSF is wrong (and its claim contradicts its other claim that Brix must be compelled to arbitrate).

Section U.3 only applies to "claims" brought by LSF in arbitration or litigation. Thus, by filing its own claims in an arbitration, Brix could not possibly waive U.3 as it applies to LSF's claims. Moreover, LSF has not filed any claims in the arbitration demanded by Brix. As soon as it does, if it has not complied with U.3, Brix will move for dismissal of those claims based on non-compliance. But failing to seek dismissal of claims in arbitration that have not yet been asserted cannot be a waiver of any rights.

Brix also did not waive U.3 as it applies to the claims in the litigation. Brix specifically reserved its rights under U.3 and demanded compliance. Brix wrote: "Our willingness to set dates for mediation and arbitration is without prejudice to our rights to move for a dismissal based on non-compliance with U.3." (CP 14)

Waiver is an intentional relinquishment of a known right. “The person against whom a waiver is claimed must have intended to relinquish the right .. and his actions must be inconsistent with any other intention than to waive. To constitute a waiver .. there must be unequivocal acts evincing an intent to waive.”¹⁰ LSF has not pointed to any facts in the record that could support waiver. That Brix specifically reserved its rights is directly contrary to LSF’s argument.

F. LSF IS NOT ENTITLED TO AN AWARD OF FEES AND COSTS

On page 16 of its opening brief, LSF claims it should be awarded its fees and costs. There is no citation to any rule, statute, or case law to support its claim. And there is no argument or facts to support its claim, and it thus must be denied.¹¹ Like the rest of its arguments on appeal, the assertion is frivolous.

G. BRIX IS ENTITLED TO ITS ATTORNEYS’ FEES FOR RESPONDING TO A FRIVOLOUS APPEAL.

RAP 18.9(a) allows this court to award fees for a frivolous appeal. “An appeal is frivolous if there are no debatable issues

¹⁰ *Birkeland v. Houchen*, 51 Wn.2d 554; 565, 320 P.2d 635 (1958); *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 771-72, 174 P.3d 54 (2007)

¹¹ See RAP 18.1.

upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal."¹²

It is not debatable that LSF failed to meet its burden to prove compliance with U.3 before the trial court. Had LSF complied with U.3, it easily could have presented its compliance to the trial court. It did not do so. There is no disputing that.

Moreover, the appeal is completely devoid of merit because the case was dismissed without prejudice, and, rather than complying with U.3 and presenting its "full claim in writing" with backup materials, LSF filed this appeal.

Additionally, it is not debatable that the trial court has authority to dismiss claims brought in a lawsuit where the complaint seeks a judgment in the lawsuit. To say that dismissal of claims brought in a lawsuit is for an arbitrator to decide is an argument that is completely "devoid of merit."

It is also frivolous and inconsistent to argue that Brix waived the right to enforce U.3. LSF argues that Brix waived U.3 by agreeing to arbitrate, while contradicting itself by arguing that Brix is refusing to agree to arbitrate. LSF reserved its right to enforce U.3. (CP 14) And as U.3 only applies to claims brought by LSF, Brix's

¹² *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004).

filing of the demand for arbitration cannot waive enforcement of U.3. The waiver argument is not supported by any facts or any law and is entirely devoid of merit.

It is also frivolous to argue that Brix agreed to arbitrate the disputes, and then also argue that the trial court should have compelled Brix to arbitrate. This is also a frivolous argument because it is undisputed that Brix proposed dates for an arbitration (while reserving its right to enforce U.3) and LSF never responded. (CP 8, 14) It was LSF, by failing to respond, that refused to set dates.

What makes matters worse is that LSF litters its opening brief with unsupported accusations of bad faith and delay. The reality is that LSF's claims, brought in the litigation, were dismissed without prejudice. LSF has never filed any claims in the existing arbitration. LSF never even produced its documents despite agreeing to do so. (CP 89-90) One wonders why LSF pursued this appeal rather than merely submit its "full claim in writing ... with detailed cost documentation and all points of argument in Subcontractor's favor." Once it files any counterclaims in the arbitration, LSF will be required to submit such materials either under U.3 or in discovery. What is it hiding and why is it wasting

time with this frivolous appeal of a dismissal without prejudice rather than providing the documents and information required by U.3?

This Court should award Brix its attorneys' fees under RAP 18.9. LSF's arguments are frivolous.

CONCLUSION

The trial court correctly dismissed LSF's claims. LSF filed this litigation without complying with section U.3 of its subcontract. That section is a condition precedent to filing any claims in litigation, and Brix did not waive its right to enforce that condition. The question of whether the claims in the litigation should be dismissed was properly before the trial court rather than an arbitrator. And the trial court had no authority to set mediation or arbitration dates. LSF's request that it do so was contrary to the plain language of RCW 7.04A.150(3). Brix should be awarded its fees and costs under RAP 18.9.

DATED this 27th day of April, 2011

JAMESON BABBITT STITES
& LOMBARD, P.L.L.C.

By 

Matt Adamson, WSBA #31731
Attorneys for Respondents
madamson@jbsl.com

CERTIFICATE OF SERVICE

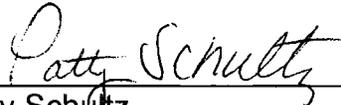
I, Patty Schultz, declare as follows:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.
2. On April 27, 2011, I deposited with the U.S. Mail a copy of the foregoing Response Brief of Respondents to be served upon counsel of record at the following address:

Sean B. Malcolm
Valdez Malcolm PLLC
5400 Carillon Point
Kirkland, WA 98033

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: April 27, 2011, at Seattle, Washington.



Patty Schultz