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NO. 702696

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

(Whatcom County Court Case No. 08-2-01924-8)

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**DEREK R. STEBNER, and JANE DOE STEBNER, and their
marital community; STEBNER ENTITIES, CANYON HOLDINGS,
INC., a Washington Corporation, PLANTATION BUILDERS,
LLC, a Washington company,**

Appellants/Defendants,

vs.

**JONES ENGINEERS, INC., P.S., a Washington professional
service corporation,**

Respondent/Plaintiff.

BRIEF OF APPELLANT

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October 7, 2013

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I – INTRODUCTION

This appeal involves the question of who is liable for a disputed bill. The disagreement as to the amount of the appropriate billed amount was resolved at trial in favor of the Plaintiff below, Jones Engineers, Inc., P.S. ("Jones"). The total amount due is not appealed. Jones, however, obtained judgment holding Derek Stebner liable on a January 2005 contract drafted by Jones and signed by Derek Stebner as follows:

Client: Derek Stebner Entities, et al

By: *Derek Stebner*

Name/Title: Derek Stebner
Owner

In January 2007, a memorandum was drafted by Jones. The stated purpose was to obtain authorization for additional design work. It was, however, drafted with a very subtle, yet potentially important difference:

Agreed to hereon;

Derek Stebner

Derek Stebner, et al
Owner

There was never any discussion of changing the language to obtain a personal guarantee, nor did Derek Stebner understand that by signing the January 2007 memorandum, he was providing one.

In addition to judgment against Derek Stebner individually, and the two developer defendants, Jones obtained conclusions of law supporting judgment against "Defendants." Several defendants were listed using fictitious names, and one was found by the Court to be non-existent. No "Jane Doe Stebner" was ever proven to exist, yet she is listed as a defendant. "Derek Stebner Entities" was found not be an entity in itself, yet the name is listed as defendant.

This appeal therefore involves issues surrounding whether non-existent entities, un-named entities, or entities that may potentially exist in the future can be listed as liable parties. Specifically, Mr. Stebner's ability to become a stakeholder in a business, obtaining financing, and do business in general may be adversely affected by the ambiguous trial court's decision.

II – ASSIGNMENTS OF ERROR

The trial court erred in –

A. Entering Judgment against Derek Stebner and Stebner Entities. CP 93, 94.

B. Finding that "Derek Stebner is the owner and authorized representative of the entity defendants in this action." Finding 1.

C. Finding that "Derek Stebner was authorized to bind the entity defendants." Finding 2.

D. Finding that "Derek Stebner included language in his contracts indicating that only [sic] had authority to bind the entity defendants." Finding 3.

E. Finding that "Derek Stebner utilized the moniker "Derek Stebner Entities" when entering into contracts and subcontracts." Finding 5.

F. Finding that "Big Sky Industries moved funds from other entities of Derek Stebner to Canyon Holdings to pay Plaintiff on the Semiahmoo Project." Finding 10.

G. Finding that "On December 27, 2005, Plaintiff and Defendants entered into a contract for professional engineering services to be provided by Plaintiff to Defendants." Finding 12.

H. Finding that "Pursuant to the contract, Defendants agreed that the periodic billings from Plaintiff to Defendants were correct, conclusive and binding upon Defendants, unless Defendants, within thirty (30) days of receipt of such billing, notified

Plaintiff in writing of alleged discrepancies or errors in billings.”

Finding 13.

I. Finding that “The contract does not require a written agreement for work outside the services set forth in the contract.”

Finding 14.

J. Finding that “The contract has a provision such that it could be modified orally between the parties.” Finding 15.

K. Finding that “Between December 2005 and June 2008, Defendants requested and authorized work to be done pursuant to the contract.” Finding 16.

L. Finding that “Between December 2005 and June 2008, Defendants requested Plaintiff to perform additional work outside the terms of the contract, including for tree survey, storm water, and sanitary sewer alternatives.” Finding 17.

M. Finding that “Between December 2005 and June 2008, Plaintiff performed work for Defendants pursuant to the contract and outside the scope of the contract, which additional work would not have been performed if it had not been requested by Defendants and the result of which Defendants have in their possession.” Finding 18.

N. Finding that "Defendants received a benefit of the work performed by Plaintiff related to the tree survey in that Defendants were given sewer and water plans for off-site connections approved by the city of Blaine to connect to the subdivision to the North running through the golf course. Plaintiff would not have performed this work had it not been requested by Defendants." Finding 19.

O. Finding that "Defendants received a benefit of the work performed by Plaintiff by being provided storm water pond designs, all of which went into the final plans, and which Defendants have in their possession and which can be used. Plaintiff would not have performed this work had it not been requested by Defendants." Finding 20.

P. Finding that "Defendants received a benefit of the work performed by Plaintiff, including grading and drainage plans, streets and utility plans, storm water pollution and prevention plans, storm water detention pond designs, all of which are for both on- and off-site improvements. Plaintiff would not have performed this work had it not been requested by Defendants." Finding 21.

Q. Finding that "Defendants received the benefit of being given sewer and water plan for off-site connections approved by the City of Blaine to connect to the subdivision to the North running through the golf course, which plans Defendants currently have in their possession and which can be used. Plaintiff would not have performed this work had it not been requested by Defendants." Finding 22.

R. Finding that "Defendants received a benefit of the work performed by Plaintiff, which includes significant land surveying to collect the topographic and environmental data of neighboring properties and significant engineering design work to determine the suitability of off-site properties for use as a storm water detention pond to serve Defendants' property. Plaintiff would not have performed this work had it not been requested by Defendants." Finding 23.

S. Finding that "Defendants received a benefit of an investigation performed by Plaintiff regarding the suitability of one site for a storm water detention facility, and Defendants gained from the knowledge that the particular site would not be beneficial.

Plaintiff would not have performed this work had it not been requested by Defendants.” Finding 24.

T. Finding that “Defendants received a benefit of topographical survey work and engineering design work done by Plaintiff for another site, and Defendants benefited from the knowledge that the site would work. Plaintiff would not have performed this work had it not been requested by Defendants.” Finding 25.

U. Finding that “Defendants received a benefit of final engineering plans that were submitted to the City and resulted in a City plan check review that was favorable to Defendants. Plaintiff would not have performed this work had it not been requested by Defendants.” Finding 26.

V. Finding that “Between December 2005 and June 2008, Plaintiff notified Defendants of the work it was performing through a combination of oral and written communications, including monthly updates and statements in the contract regarding what was and was not included.” Finding 27.

W. Finding that “The professional work performed by Plaintiff for Defendants had value and Defendants benefited from

the work performed by Plaintiff both pursuant to the contract and outside the terms of the contract." Finding 28.

X. Finding that "Between December 2005 and June 2008, Plaintiff provided invoices to Defendants for work performed pursuant to the contract and for additional work performed by Plaintiff for Defendants outside the scope of the contract." Finding 29.

Y. Finding that "Defendants did not notify Plaintiffs of any discrepancies or errors in billings and paid without complaint until Defendants decided to adopt a "hardline" at the of the Semiahmoo project." Finding 31.

Z. Finding that "Between December 2005 and October 2007, Defendants paid the amounts owed to Plaintiff without direction for the allocation of amounts, and did not clarify any allocations of payments when Plaintiff made inquiry to Defendants." Finding 32.

AA. Finding that "Payments were made to Plaintiff by Defendants using checking accounts of various defendant entities, all of which were controlled by Derek Stebner." Finding 33.

AB. Finding that "In approximately November 2007, Defendants stopped payment of amounts to Plaintiff, with one exception." Finding 34.

AC. Finding that Plaintiff performed authorized work for Defendants and timely invoiced Defendants accordingly through May 2008." Finding 35.

AD. Finding that "As of June 2008, Defendants owed Plaintiff the amount of \$17,454.83 for work performed pursuant to the contract." Finding 36.

AE. Finding that "As of June 2008, Defendants owed Plaintiff the amount of \$40,020 for additional work requested by Defendants and performed by Plaintiff outside the scope of the contract." Finding 37.

AF. Finding that "Of the \$40,020 owed by Defendants to Plaintiff for additional work, \$27,636.25 relates to authorized work on storm water issues and alternatives." Finding 38.

AG. Finding that "Of the \$40,020 owed by Defendants to Plaintiff for additional work, \$9,642.50 relates to the authorized tree survey." Finding 39.

AH. Finding that "Of the \$40,020 owed by Defendants to Plaintiff for additional work, \$2,741.25 relates to authorized work on sewer issue." Finding 40.

AI. Finding that "The contract between Plaintiff and Defendants provides that the prevailing party is entitled to recover reasonable costs and attorneys fees in the event of litigation." Finding 41.

AJ. Finding that "On June 16, 2008, Plaintiff duly executed claims of lien which were acknowledged pursuant to RCW 60.04.060." Finding 42.

AK. Finding that "Plaintiff incurred \$1,944.13 in recoverable expenses in this matter." Finding 46

AL. Finding that "Plaintiff incurred \$59,440.00 in attorney's fees recoverable expenses in this matter." Finding 47.

AM. Concluding that "The amounts billed by Plaintiff to Defendants for professional services pursuant to the contract and for additional professional services outside to scope the contract were reasonable." Conclusion of Law 1.

AN. Concluding that "The corporate entities were disregarded by Derek Stebner such that there is unity of ownership

and interest that the separateness of the corporate entities ceased to exist." Conclusion of Law 2.

AN. Concluding that "Pursuant to the contract, Derek Stebner is liable personally for the payment of all services performed pursuant to the contract by Plaintiff for the Defendant entities." Conclusion of Law 3.

AO. Concluding that "The Defendants are jointly and severally liable for all amounts owed by Defendants to Plaintiff." Conclusion of Law 4.

AP. Concluding that "Defendants are jointly and severally liable to Plaintiff in the amount of \$55,204.83 for work performed pursuant to the contract and additional work requested by Defendants and performed by Plaintiff outside the scope of the contract." Conclusion of Law 5.

AQ. Concluding that "Plaintiff is the prevailing party in this action." Conclusion of Law 6.

AR. Concluding that "Plaintiff is entitled to a judgment against Defendants in the principal amount of \$55,204.83, plus prejudgment interest in the amount of \$31,508.40, which is

calculated at the rate of 12% per annum from July 1, 2008, though April 1, 2013.” Conclusion of Law 7.

AS. Concluding that “Plaintiff is entitled to recover its reasonable costs and attorney's fees incurred in this action.”

Conclusion of Law 8.

AT. Concluding that “The amount of \$59,440.00 in attorney's fees expended by Plaintiff is reasonable.” Conclusion 9.

AU. Concluding that “The amount of \$1,944.13 in costs is reasonable.” Conclusion 10.

AV. Ordering that “Judgment shall enter against the Defendants, jointly and severally, in favor of Plaintiff in the principal amount of \$55,204.83, plus reasonable costs in the amount of \$1,944.13 and attorney's fees in the amount of \$44,440.00, plus prejudgment interest in the amount of \$31 ,508.40.” Order 1.

AW. Ruling or failing to rule on Dan Parson’s objection found at RP 278, Lines 2 – 3.

AX. In ruling or failing to rule on Dan Parson’s objection found at RP 279, Lines 4 – 8 and 10 - 12.

AY. In ruling or failing to rule on Dan Parson’s objection found at RP 280, Lines 8 – 22.

AZ. In ruling or failing to rule on Dan Parson's objection found at RP 282, Lines 11 – 23.

III – ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Is there substantial evidence that the outward expressions and acts of the parties constitute objective manifestations of intent that Derek Stebner be personally bound by the terms of the January 2005 contract? No.

B. Is there substantial evidence that the outward expressions and acts of the parties constitute objective manifestations of an intent that Derek Stebner be personally bound by the terms of the January 2007 memorandum regarding additional work on storm water and sewer designs? No.

C. Is there substantial evidence that Derek Stebner requested on his own behalf or received the benefit from the additional work on storm water and sewer designs? No.

D. Is there substantial evidence that Stebner requested on his own behalf or received the benefit from the tree survey? No.

E. Do Quantum Meruit, Quasi Contract, and Unjust Enrichment doctrines allow Jones to obtain compensation from a third party (Stebner) when the objective manifestations of intent

indicated that compensation would come from Canyon and Plantation? No.

F. Did Stebner disregard corporate entities such that there is a unity of ownership and that separateness of the corporate entities ceased to exist? No.

G. Was there substantial evidence to support judgment against any parties other than Canyon Holdings, Inc., Plantation Builders, LLC? No.

H. Did Jones plead sufficiently to put Derek Stebner on notice as to which, if and on what grounds any other entities of Derek Stebner's were targeted by Jones for judgment? No.

I. Did substantial evidence support a finding the findings segregating billing for storm water and sewer design work? No.

J. Should judgment against all Defendants be reversed, with the exception of Canyon Holdings, Inc., and Plantation Builders, LLC? Yes.

K. May judgment be entered against fictitious and non-existent entities? No.

IV – STATEMENT OF THE CASE

This case began as a billing dispute. The bill was for work performed by the engineering consultants (Jones Engineers, Inc., P.S., or “Jones”) on a development project in Semiahmoo, an area near Blaine, Washington. Ex. 2. In January 2005, Jones presented a “not to exceed” contract for land use consulting and engineering “necessary to complete the engineering plans for project . . .” Ex. 1. As of September of 2007, Jones had billed \$146,030 under that contract, and an additional \$32,000 for “Extra Work” on the project. Ex. 10. The bill came with a promise from Jones to present a budget for work needed to complete the project. Ex. 10. Jones never provided the budget, but did bill for over \$77,000 of extra work. Ex 2; RP 151.

The developers paid a total of \$188,633.92. Jones explained at the bench trial that its contracts generally start on a “not to exceed” basis and “evolve into a time and materials basis to respond to changes as they occur.” RP 217. The Court entered a judgment in favor of Jones for \$55,204.83, including costs,

attorneys' fees and prejudgment interest. The judgment totals \$133,097.36. CP 91.

Darcy Jones (President and owner of Jones Engineering, Inc., P.S.), testified that the January 2005 contract was with Derek Stebner. RP 35, Line 3; RP 27, Lines 20 – 21. The contract, including the signature line, was prepared by Darcy Jones with assistance of legal counsel:

Client: Derek Stebner Entities, et al

By: *Derek Stebner*

Name/Title: Derek Stebner
Owner

Ex. 1; RP 91, Lines 9 – 10, 13 - 16; RP 36, Line 10; RP 42, Line 21;
RP 102, Line 24.

Although Darcy Jones testified the January 2005 contract was with Derek Stebner individually, he had previously contracted with (and would continue to do so later) both "Stebner Entities" and "Stebner" on other matters. RP 220 – 221. For example:

BETWEEN: Jones Engineers, Inc., P.S., ("Jones")
AND: Derek R. Stebner ("Stebner")
AND: Stebner Real Estate, Inc., ("Stebner Entities")
a Washington Corporation;

Mercedes Holdings, Inc., a
Washington Corporation

Id.; Ex. 18.

Darcy Jones testified he did not know who the entities were. RP 98, Lines 17-18. At the time of trial Derek Stebner had approximately ten companies, but there was no entity named Derek "Stebner Entities." RP 272, Lines 7 – 11. When asked who Derek Stebner Entities were, Jones did not know:

Um, whatever the responsible entities are. I don't have those names on the top of my head.

RP 98. When asked, "[H]ow can we defend against a claim if you won't tell us who the entities are and what your basis of responsibility is," Jones answered,

I believe that's in the record. I just don't remember offhand.

RP 98.

Derek Stebner did not pay the invoices with a check written off a personal account. The general contractors, Big Sky Industries Limited and Plantation Builders, LLC, paid Jones' invoices by check, some of which were signed by Derek Stebner. RP 71, Ex

6; RP 273, Lines 18 – 22. One check came from the trust account of a law firm. Ex 6.

Darcy Jones understood that a person is distinct from a corporation that the person may own. RP 88, Lines 10 – 14; RP 27 – 29. He is well educated, with a Masters of Science in Regional Planning. RP 27. He has been in business on his own since 1988. RP 94, Line 6. Darcy Jones had worked for and owned corporations in this business for 30 years. RP 28. He testified that his father's Jones Engineers, Inc. was a completely different entity than his own Jones Engineers, Inc., RP 28 – 29. He was not just owner; he was president of the company. RP 27, Line 20. Darcy Jones incorporated Jones Engineers, Inc., P.S., in part to protect himself from personal liability. RP 95, Lines 7 – 10.

Darcy Jones knew what a personal guarantee was. RP 265, Line 14-20. Jones had in the past contracted with both Stebner and Stebner Entities. RP 221. Darcy Jones knew that a corporation owned the property, not Derek Stebner. RP 88; RP 273, Lines 16 – 22. Jones testified, "that was a specific term of mine to enter into this contract was that we bound Derek personally." RP 91, Lines 2

– 4. Yet, this intent was never discussed with Derek Stebner.

Jones was advised by counsel in the preparation of the signature line. RP 91; RP 103. Yet, instead of asking for Derek Stebner to sign as an individual, he drafted and proposed a contract with Derek Stebner Entities, et al. RP 91, Lines 13 – 16.

In January 2007, a memorandum contained a slight change: “Derek Stebner Entities et al, Owner,” was now “Derek Stebner Entities, et al, Owner.” Ex. 3. This memo was not designed to obtain a personal guarantee. It was drafted by Jones. RP 49. Jones did not intend for it to change the contracting parties - he thought Stebner was already personally liable on the January 2005 Contract. RP 35, Line 3; RP 91, Lines 2-4. It was drafted and signed to acknowledge authorization for storm water and sewer redesign. Ex. 3. Its purpose was merely to “set up a, you know, a mechanism – we set up an extra work authorization is what I’m – what it is.” RP 50, Lines 3 – 5. Derek Stebner was never asked to sign individually and Derek Stebner did not understand himself to be signing as an individual. RP 274, Lines 5 – 8, 18 – 21; RP 275, Lines 16 - 20. This one word change was a simple mistake; a typo.

Jones argued at trial that “there is an implied duty of the parties that when Jones Engineers is doing engineering work for Mr. Stebner and/or his entities that Mr. Stebner and/or his entities will pay for that work.” RP 333. Jones proposed, and the trial court entered findings of fact and conclusions of imposing liability on “Defendants.” CP 82 – 92. The court concluded, “The corporate entities were disregarded by Derek Stebner such that there is unity of ownership and interest that the separateness of the corporate entities ceased to exist.” CP 90, Conclusion of Law 2.

Judgment has only been entered against Derek R. Stebner, Stebner Entities, Canyon Holdings, Inc., and Plantation Builders, LLC. However, “the Defendants are jointly and severally liable for all amounts owed by Defendants to Plaintiff.” CP 90, Conclusion of Law 4. And, Defendants are listed as Derek Stebner, Jane Doe Stebner, Stebner Entities, Canyon Holdings, Inc., John and Jane Does 1 – 5; Doe Professional Liability Company 1 – 5; Doe Entities 1 – 20. “There is no actual company named Derek Stebner Entities” and the Doe entities and people are of course fictitious names, not representing any particular entity. CP 85, Finding of Fact 6.

V – ARGUMENT

A. Standard of Review

A trial court's conclusions of law are reviewed de novo. *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012). Appellate courts "review de novo a trial court's interpretation of a contract" *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn. App. 527, 530, 208 P.3d 1133, 1135 (2009), citing *In re Parentage of Smith–Bartlett*, 95 Wn.App. 633, 636, 976 P.2d 173 (1999); and *Petersen v. Schafer*, 42 Wn.App. 281, 285, 709 P.2d 813 (1985).

Challenged findings of fact are reviewed for substantial evidence. *Id.* The evidence must be substantial. *Helman v. Sacret Heart Hospital*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963). A "scintilla of evidence is insufficient," as is "theory or speculation." *Id.* "Substantial evidence is 'defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *McCleary v. State*, 173 Wn.2d at 514.

B. No substantial evidence supports a finding that the objective manifestations of the parties' intentions was to contract with Derek Stebner as an individual.

1. The January 2005 contract plainly states that the obligated parties were "entities."

Jones failed to produce any evidence that either it or Derek Stebner objectively manifested, through outward expressions or acts, any intention that Derek Stebner would be personally bound. It is fundamental that the party who seeks to enforce a contract must prove the contract was formed. In *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Washington follows the objective manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn. 2d 493, 504, 115 P.3d 262, 267 (2005). "The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from their outward expressions and acts, and not from an unexpressed intention." *Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).

In 2005, the Washington Supreme Court explained Washington's approach to contract interpretation in detail:

In *Berg*, we concluded that extrinsic evidence was admissible to aid in understanding the parties' intent with respect to the meaning of "gross rentals."

Unfortunately, there has been much confusion over the implications of *Berg*.

In *Hollis*, we sought to clarify the meaning of *Berg*: Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule announced in *Berg* has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis v. Garwall, Inc., 137 Wash.2d 683, 693, 974 P.2d 836 (1999) (citations omitted). . . . *In re Marriage of Schweitzer*, 132 Wash.2d 318, 327, 937 P.2d 1062 (1997) ("context rule" cannot be used to show intention independent of the instrument); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash.App. 73, 60 P.3d 1245 (2003) (admissible extrinsic evidence does *not* include evidence of a party's unilateral or subjective intent as to contract's meaning). . .

We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wash.App. 634, 637, 745 P.2d 53 (1987). We do not interpret what was intended to be written but what was written. *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wash.2d 337, 348–49, 147 P.2d 310 (1944), *cited with approval in Berg*, 115 Wash.2d at 669, 801 P.2d 222.

In re Hearst Communications, 154 Wn.2d at 502 – 504.

Specifically as applied to the issue of whether the parties intended for an individual to be bound by his signature, the law is applied as follows:

The role of the court is to ascertain the mutual intention of the contracting parties, and the burden of proving such mutual intention rests upon the plaintiff. [Citations omitted.] Here, plaintiff is urging that we infer defendant's intent and thus, the mutual intent of both parties, from evidence that only establishes plaintiff's intent—an intent that was never communicated to defendant. This we cannot do. The unexpressed understanding of one of the contracting parties as to the meaning of language is generally of no legal significance. [Citations omitted.] Therefore, the subjective intent of [the loan officer] as to the scope of the guaranty, unexpressed and uncommunicated to defendant, does not sustain plaintiff's burden of proof of the parties' mutual intent.

Seattle First Nat. Bank v. Hawk, 17 Wn.App. 251, 255 – 256, 562 P.2d 260 (1977).

A document ostensibly obtaining a personal guarantee will be strictly construed against the drafter, and against the finding that a personal guarantee was intended by all parties. *Id.* Here, the court specifically found that “Derek Stebner signed the contract as “owner” of Derek Stebner Entities . . .” RP 85.

2. The January 2007 memorandum was not intended to add Derek Stebner as a party to the contract.

The January 2007 memorandum, construed strictly, does not bind Stebner personally. The memorandum provides that sewer

and storm water systems will be redesigned on a time and materials basis. Ex. 3. All other "terms and conditions established in our existing contract for this project dated December 27, 2005 will remain in effect." Ex. 3. Yet, without any discussion or explanation, one tiny word was dropped out of the signature line, changing it from "Derek Stebner Entities, et al, Owner" to "Derek Stebner et al, Owner." Ex. 3.

It is a fundamental rule that guarantors can be held only upon the strict terms of their contract, as a contract to answer for the debt of another must be explicit and is strictly construed. *Simpson Logging Co. v. Northwest Bridge Co.*, 76 Wash. 533, 137 P. 127 (1913); *W. T. Rawleigh Co. v. Langeland*, 145 Wash. 525, 261 P. 93 (1927). If a contract is equally susceptible of two or more constructions, it should be construed against the party using the language. *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wash.2d 911, 468 P.2d 666 (1970); *Wilkins v. Grays Harbor Community Hosp.*, 71 Wash.2d 178, 427 P.2d 716 (1967); *Guy Stickney, Inc. v. Underwood*, 67 Wash.2d 824, 410 P.2d 7 (1966). In other words, where language is ambiguous, the party selecting, drafting, and presenting the contract of guaranty containing such misleading language should suffer any consequences. *National Bank v. Equity Investors*, 86 Wash.2d 545, 555, 546 P.2d 440 (1976).

Seattle-First Nat. Bank v. Hawk, 17 Wn. App. 251, 256, 562 P.2d 260, 263 (1977).

The word "Entities" was dropped from the contract by mutual mistake or scrivener's error, and should not be interpreted as changing the parties to the contract. *Nadreau v. Meyerotto*, 35 Wn. 2d 740, 743, 215 P.2d 681, 682 (1950). The clear and convincing evidence was that the memo was not designed to obtain a personal guarantee: the drafter did not intend for it to change the contracting parties - he thought Stebner was already personally liable on the January 2005 Contract. RP 35, Line 3; RP 27, Lines 20 – 21. Stebner was not asked to provide a personal guarantee did not understand himself to be signing as an individual. RP 274, Lines 5 – 8, 18 – 21; RP 275, Lines 16 - 20.

This one word change was a simple mistake, a typo. "Where both parties have an identical intention as to the terms to be embodied in a proposed written contract and a writing executed by them is materially at variance with such intention, a court of equity will reform the writing so as to make it express the intention of the parties if, as in the instant case, innocent third persons will not be unfairly affected thereby." *Nadreau v. Meyerotto*, 35 Wn. 2d at 743.

Parol evidence is admissible to show mutual mistake. *Nadreau v. Meyerotto*, 35 Wash.2d 740, 215 P.2d 681; *Bacon v. Gardner*, supra. Thus, the true intention of the parties can be determined, and from that intention, existing at the time of the transaction, it will be determined whether a mutual mistake actually existed.

Bergstrom v. Olson, 39 Wn. 2d 536, 543, 236 P.2d 1052, 1056 (1951).

The alternative explanation is that Jones purposefully snuck the language into the January 2007 memorandum, in which case Derek Stebner would not be bound personally since only Jones would know of Stebner's unilateral mistake. *Puget Sound Nat. Bank v. Selivanoff*, 9 Wn.App. 676, 681, 514 P.2d 175 (1973). Derek Stebner did not understand himself to be signing as a guarantor, nor did Jones ever ask Stebner to sign on as a guarantor; the stated purpose of Exhibit 3 was merely to "set up a, you know, a mechanism – we set up an extra work authorization." RP 50, Lines 3 – 5. RP 274, Lines 5 – 8, 18 – 21; RP 275, Lines 16 - 20.

The rule applied in a variety of factual patterns is that a defendant is not liable under a contract executed by him as a result of his material unilateral mistake of fact or law if the plaintiff knows of the defendant's

mistake. Potucek v. Cordeleria Lourdes, 310 F.2d 527 (10th Cir. 1962), cert. denied, 372 U.S. 930, 83 S.Ct. 875, 9 L.Ed.2d 734 (1963); Geremia v. Boyarsky, 107 Conn. 387, 140 A. 749 (1928); Peterson v. First Nat'l Bank, 162 Minn. 369, 203 N.W. 53, 42 A.L.R. 1185 (1925); Rushlight Auto. Sprinkler Co. v. Portland, 189 Or. 194, 219 P.2d 732 (1950); Cofrancesco Const. Co. v. Superior Components, Inc., 52 Tenn.App. 88, 371 S.W.2d 821 (1963). See Haviland v. Willets, 141 N.Y. 35, 35 N.E. 958 (1894). The same rule applies when the plaintiff is charged with knowledge of the defendant's mistake. Hester v. New Amsterdam Cas. Co., 268 F.Supp. 623 (D.S.C.1967); C. N. Monroe Mfg. Co. v. United states, 143 F.Supp. 449 (E.D.Mich.1956); Ex Parte Perusini Const. Co., 242 Ala. 632, 7 So.2d 576 (1942); Hudson Structural Steel Co. v. Smith & Rumery Co., Supra. See generally Annot., 59 A.L.R. 809, 815-17 (1929); 3 A. Corbin, Contracts ss 610; **179 616; 619 (1960); Restatement of Contracts ss 71; 472(1)(b); 503, comment A; 505 (1932); L. Simpson, Contracts s 42, at 66 (2d ed. 1965); 9 J. Wigmore, Evidence s 2416(2) (1940); 13 S. Williston, Contracts ss 1573; 1578; 1582; 1583; 1584; 1597, at 603 (3d ed. 1970).

Puget Sound Nat. Bank v. Selivanoff, 9 Wn.App. at 681.

C. No substantial evidence supports a legal conclusion or factual finding that the "corporate entities were disregarded by Derek Stebner such that there is a unity of ownership and interest that the separateness of the corporate entities cease to exist."

A corporation exists as an organization distinct from the personality of its shareholders. *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947). While "(t)he corporate form is of course frequently utilized to limit the personal liability of its officers, directors and shareholders...as a general rule, the corporate entity will be respected by the courts." *American Discount Corp. v. Saratoga West, Inc.*, 13 Wn.App. 890, 893, 537 P.2d 1056, 1058 (1975). Separate corporate entities should not be disregarded solely because one is unable to pay. *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410-411, 645 P.2d 689, 693 (1982) citing *Morgan v. Burks*, 93 Wn.2d 580, 582, 611 P.2d 751 (1980).

Unless "fraud or manifest injustice is perpetrated upon third persons who deal with the corporation, the corporation's separate

entity should be respected." *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn. 2d 400, 405, 562 P.2d 244, 247 (1977). The mere fact that corporations share officers, employees, a physical site, and common ownership of stock is insufficient to justify disregarding the separate corporate identities. *Minton v. Ralston Purina Co.*, 146 Wn.2d at 398, 47 P.3d 556 (2002); *One Pacific Towers Homeowners' Ass'n v. HAL Real Estate Investments, Inc.*, 108 Wn.App. 330, 350-51, 30 P.3d 504. The plaintiff must show that one corporation's separate legal identity has been lost to the other, with evidence that the funds and property interests of the corporations are commingled, the entities have failed to observe corporate formalities, or that one is undercapitalized. *Homeowners' Ass'n*, 108 WnApp. at 350-51, 30 P.3d 504. Further, the plaintiff must show that the corporation intended to work a fraud upon the plaintiff. *Minton*, 146 Wn..2d at 398, 47 P.3d 556; *Homeowners' Ass'n*, 108 Wn.App. at 350, 30 P.3d 504.

“The alter ego theory, upon which the trial court [appears to have] pierced the corporate veil and imposed personal liability upon Bergstrom, is applied when the corporate entity has been disregarded by the principals themselves so that there is such a

unity of ownership and interest that the separateness of the corporation has ceased to exist." *Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d 548, 553, 599 P.2d 1271, 1273-74 (1979). In *Grayson*, the Supreme Court held that the trial court's finding that the sole shareholder operated his roofing company as his alter ego was not supported by substantial evidence. The court reasoned, "a corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person." *Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d at 553. With "no evidence in this case that corporate records or formalities were not kept . . . [or] an overt intention by Bergstrom to disregard the corporate entity," there was no substantial evidence that the company operated as the owner's alter ego. *Id.* As in *Grayson*, Stebner's corporate entities contracted with Jones and there is no evidence that corporate records or formalities were not kept.

D. Quantum meruit, quasi contract, and unjust enrichment cannot be a basis for the trial court's determination of personal liability because Derek Stebner did not request or receive the benefit of the work.

The contract was with Derek Stebner's Entities. Likewise, any authorization any benefit outside the contract provided was with the entities. The 2005 memo was not a personal request. Plaintiffs failed to present substantial evidence that Stebner ever personally requested the tree survey. Neither did Stebner receive the benefit: the work was done on properties owned by the developer. Just as Jones failed to pierce the corporate veil under its contract theory (see above), so it fails to pierce the veil under its quasi contract, quantum meruit, and unjust enrichment theories. *Chandler v. Washington Toll Bridge Auth.*, 17 Wn. 2d 591, 603, 137 P.2d 97, 102 (1943).

Washington recognizes two classes of implied contracts: those implied in fact and those implied in law. *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 164-65, 776 P.2d 681 (1989); *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 137 P.2d 97

(1943). Contracts implied in fact arise from circumstances that show mutual consent and an intent to contract. *Lynch v. Deaconess*, 113 Wn.2d at 165, 776 P.2d 681; *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d at 600, 137 P.2d 97. Contracts implied in law-also called quasi contracts-arise from an implied legal duty and are not based on consent. *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d at 600. 'Quasi contracts are founded on the equitable principle of unjust enrichment which simply states that one should not be 'unjustly enriched at the expense of another.' *Lynch v. Deaconess*, 113 Wn.2d at 165, 776 P.2d 681(quoting *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wn.2d 363, 367, 301 P.2d 759 (1956)).

Generally, a party to an express contract may not bring an action on an implied contract relating to the same matter. *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d at 604. Because the obligation to pay for the engineering consulting services in this matter arose from a contract, any suit for rent owed must arise from the contract, not from an implied duty of a third party, Derek Stebner, to pay. *Chandler*, 17 Wn.2d at 605, 137 P.2d 97. In *Chandler*, the Washington Supreme Court held, as a matter of law,

that although the Washington Toll Bridge Authority doubtlessly benefited from Chandler's engineering services in the construction of a bridge, Washington Toll Bridge Authority was not liable. *Id.*, at 609. The court reasoned that because of the contract with franchisors, Chandler should not have expected to have been remunerated by the Washington Toll Bridge Authority, with whom Chandler had no contract. *Id.*, at 604. The court explained:

In Restatement of the Law of Restitution, p. 461, § 112, the rule is stated as follows: 'A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.'

Cases falling within the exception to this rule generally occur when the person performs the noncontractual duty of another to supply necessities to a third person, or performs another's duty to a third person in an emergency. The rule has also been applied when it has appeared that one has performed another's duty to the public, or has preserved another's life, health, property or credit. In all of these instances, however, it must appear that the service performed was rendered with intent to ask remuneration therefor.

Id.

E. Even if Stebner were personally liable for work requested under the January 2007 memorandum, the amounts attributed to the memorandum for storm water and sewer are not supported by substantial evidence.

The January 2007 memorandum is only for time and materials for storm water and sewer redesign. Ex. 3. All other “terms and conditions established in [the] existing contract for this project dated December 27, 2005 will remain in effect.” Ex. 3. There is no evidence that Stebner made a personal request for the tree survey. The trial court found that \$27,636.25 and \$2,741.25 are owed by Derek Stebner for storm water and sewer work, respectively. Although Exhibit 4 was referenced by Darcy Jones, no testimony or evidence, including Exhibit 4 supports storm water and sewer figures or the related figures in Findings of Fact Numbers 36 through 40. See RP 238 – 239.

Because Jones failed to submit evidence of the amount owed specifically under the January 2007 memorandum, Jones is not entitled to judgment against Derek Stebner. Submitting a bill for the total amount does not satisfy the plaintiff’s burden to

"segregate and prove" the amount owed under each theory of liability. *Modern Builders, Inc., of Tacoma v. Manke*, 27 Wn.App. 86, 95, 615 P.2d 1332 (1980).

In *Modern Builders*, the plaintiff billed for extra work, outside the original contract under a theory of quantum meruit. *Modern Builders*, 27 Wn.App. at 95. Only \$2,100 was supported by documentation. *Id.* The appeals court therefore reversed the trial court finding and held that the plaintiff was entitled only to the \$2,100. *Id.* The court reasoned,

In order to compensate the performing party for costs incurred because of extra work, the performing party may recover these costs plus a reasonable profit in quantum meruit. *Dravo Corp. v. Municipality of Metropolitan Seattle*, supra 79 Wash.2d at 221, 484 P.2d 399; *Bignold v. King County*, supra 65 Wash.2d at 826, 399 P.2d 611. 13 Am.Jur.2d s 19; 17 Am.Jur.2d Contracts s 353 (1964). See generally *Losli v. Foster*, 37 Wash.2d 220, 222 P.2d 824 (1950). However, the burden is on the performing party to prove the costs of extra work.

Id.

F. Even if Derek Stebner were liable for work requested under the January 2007 memorandum he would not be liable for the judgment amount of \$55,204.83, or attorney fees, or prejudgment interest on that amount.

Liability under quantum meruit, quasi contract, and unjust enrichment would be limited to the work that Derek Stebner personally asked for. Even if Derek Stebner personally asked for the work in the January 2007 Memorandum (storm water and sewer redesign), that request does not support an award of \$55,204.83 against Stebner. Because liability under quantum meruit, quasi contract, and unjust enrichment does not merit an award of prejudgment interest, the fee award against Stebner must be reversed.

Liability for quantum meruit, quasi contract, and unjust enrichment does not support an award of prejudgment interest.

Modern Builders, 27 Wn.App. 86, 96, 615 P.2d 1332, 1339 (1980).

Prejudgment interest may be recovered only if a claim is liquidated or otherwise computed by a fixed standard in the contract without reference to extrinsic evidence. E. g. *Prier v. Refrigeration Eng'r Co.*, 74 Wash.2d 25, 32, 33, 442 P.2d 621 (1968). By its very nature, an award of damages based upon quantum

meruit is not liquidated and is not readily ascertainable in the parties' contract. Therefore, prejudgment interest may not be awarded when a labor and materialmen's lien is set by quantum meruit.

Id.

Likewise, because the services are outside the contract, no award of attorneys' fees is appropriate. Even if they were, since Jones failed to segregate time spent on the issues he did not prevail on, it is not entitled to fees. *Hume v. Am. Disposal Co.*, 124 Wn. 2d 656, 673, 880 P.2d 988, 997 (1994). A fee award is not appropriate if both parties prevail on major issues. *Rowe v. Floyd*, 29 Wn.App. 532, 535, 629 P.2d 925 (Div. 3, 1981). At the very best, Jones is only entitled to "attorney fees for the claims [it] prevail[ed] upon, and likewise awards fees to the defendant[s] for the claims [they] prevailed upon; the fee awards are then offset." *Marassi v. Lau*, 71 Wn. 11 App. 912, 917, 859 P.2d 605, 608 (Div. 1, 1993), *abrogated on other grounds by Wachovia SBA Lending Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

G. The judgment against the non-existent entity, Stebner Entities, and findings and conclusions allowing judgment against other fictional names must be reversed.

Derek Stebner testified at the time of trial that he had roughly 10 entities. RP 272, Lines 7 – 11. Jones did not join and prove a case against any parties beyond the two named parties, who Derek Stebner testified were parties to the contract. The trial court found that there is no single entity called "Derek Stebner Entities." Jones did not know which, if any, other entities were parties to the contract. RP 98; Finding of Fact 6. Nonetheless, the findings and conclusions apply to, and direct that judgment shall be entered jointly and severally against, all "Defendants," including "Stebner Entities," "John and Jane Does," "Jane Doe Stebner," and "Doe Entities."

Judgment against these fictitious entities is not supported by substantial evidence and must be reversed. RP 98. It should go without saying, that the burden to prove a case against a defendant, is on the plaintiff. Jones failed to prove a case against any Defendants other than Canyon Holdings, Inc., and Plantation

Builders, LLC. As briefed above, Jones has failed to pierce the corporate veil.

Due process requires that Derek Stebner be given reasonable notice and an opportunity to be heard. U.S. Const., Am. 14; Wash. Const. Art. 1, § 3. Washington requires the plaintiff to plead "a concise statement of the claim and the relief sought." *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 84, 178 P.3d 936, 945 (2008). "A complaint fails to meet this standard if it neglects to give the opposing party 'fair notice.'" *Id.* As trial counsel asked, "How can [Derek Stebner] defend against a claim if you won't tell us who the entities are and what your basis for responsibility is?" RP 98. Jones provided no answer at trial *Id.* In contrast, Jones' attorney argued in closing,

Your Honor, we have a longstanding relationship, Jones Engineers does, with Mr. Stebner, has been through many different projects; in fact, I think the testimony was that there was six projects at one particular time. And so, there is an implied duty of the parties that when Jones Engineers is doing engineering work for Mr. Stebner and/or his entities that Mr. Stebner and/or his entities will pay for that work.

RP 333, Lines 15 – 22.

Findings, conclusion and judgment against the fictitious names and non-entities must be reversed. If the judgment is not reversed, could judgment attach to a newly created company? Derek Stebner may be placing companies at risk if he buys a share in them; his ability to business such forming partnerships or corporations with others could be adversely affected. It may be difficult for him to obtain financing if a piece of property is owned by a company. He may have a wife in the future, who, unbeknownst to her has already has a judgment against her.

CR 54(a)(1) provides that "a judgment is a final determination of the parties in the action." The findings and conclusions could be read to support the filing of judgment against an open ended list of "Defendants." The findings and conclusion are not drafted in language that is clearly final. The judgment is entered against "Stebner Entities." If counsel's closing argument is an indication, this could mean any of Derek Stebner's entities: also not adequately final.

CR 54(a)(1)'s definition also requires that judgment be against a party. Similarly plain language has been interpreted by

the courts under RCW 4.22.070 (regarding joint and several liability in actions involving fault). In *Anderson v. City of Seattle*, the Washington Supreme Court held that a “defendant against whom judgment is entered . . . must be a named defendant in the case when the court enters its final judgment.” 123 Wn.2d 847, 852, 873 P.2d 489 (1994).

The only defendants against whom judgment may be entered in this matter are the named defendants who are parties to the contract: Canyon Holdings, Inc. and Plantation Builders, LLC. CP 11 (First Amended Complaint). “A person is not liable to the plaintiff at all, much less jointly and severally, if he or she has not been named by the plaintiff.” *Koste v. Chambers*, 78 Wn.App. 691, 695, 899 P.2d 814, 816 (1995) P.2d 489, *citing*, *Mailloux v. State Farm Mut. Auto. Ins. Co.*, 76 Wn.App. 507, 513, 887 P.2d 449 (1995). Further, a plaintiff loses the ability to join a defendant “if the plaintiff’s delay is due to inexcusable neglect. *N. St. Ass’n v. City of Olympia*, 96 Wn. 2d 359, 368-69, 635 P.2d 721, 726 (1981).

H. Appellant is Seeks Costs and fees on this appeal.

Appellants seek fees and costs for this appeal. RAP 18.1 and RCW 4.84.330.

VI – CONCLUSION

For the above reasons, the findings of fact, conclusions of law, and judgment against Derek Stebner, Stebner Entities, Jane Doe Stebner, John and Jane Does 1 – 5, and Doe Entities 1 – 20 should be reversed.

DATED this 7th Day of October, 2013

Law Office of Edward S. Alexander



Edward S. Alexander, WSBA#33818
Attorney for Appellants

CERTIFICATE OF MAILING

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 7th day of October 2013, to the following counsel of record at the following address:

Counsel for Respondent:
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