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73464-4

No. 73464-4-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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TERENCE RAYMOND JOHNSON,

Appellant,

v.

C & R ELECTRIC, INC., a Washington corporation,

Respondent.

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BRIEF OF RESPONDENT

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## INTRODUCTION

The heart of this case is whether a nonmoving party can defeat a Motion for Summary Judgment with conclusory statements, unsupported by specific facts. By law, the answer is no. The subject action involves two construction related projects whereby Respondent, C&R Electric (hereinafter “C&R”), a licensed electrical contractor, performed work at the request of Appellant Terence Johnson (hereinafter “Johnson”), at his SeaTac, Washington commercial property (hereinafter “Property”). For the first project, C&R obtained the permit and completed the electrical work to install a paint booth. While working on the project, Johnson hired C&R to make electrical repairs for Property damage caused by an apparent theft. Each project was billed separately. Johnson did not pay C&R for either project.

C&R thus recorded a mechanic’s lien against the Property and thereafter brought suit against Johnson for breach of contract, quantum meruit and to foreclose the lien. After a long litigation process caused by Johnson’s significant delays, such as evading service and filing an ultimately-abandoned bankruptcy, C&R moved for summary judgment.

In the declarations supporting Summary Judgment, C&R provided crystal clear evidence of the agreement with Johnson, its terms, C&R’s complete performance of the work to improve the Property, and Johnson’s failure to pay. Rather than directly refuting C&R’s factual allegations,

Johnson provided only conclusory statements that there was somehow no agreement between he and C&R, or that he was acting as the representative for his commercial tenant who should pay C&R. Ultimately, the only evidence offered by Johnson to raise an issue of fact, was his claim that the paint booth was not a “fixture” and therefore, C&R should not be able to enforce the lien on the related work.

The trial court properly ruled that Johnson failed to create a genuine issue of material fact regarding C&R’s breach of contract and quantum meruit claims and therefore entered a monetary judgment against Johnson for C&R’s work on the paint booth and electrical repairs. For the lien claims, the court found a single genuine issue of material fact as to whether the paint booth was a “fixture,” and therefore, the Summary Judgment Order only allowed C&R to foreclose its lien related to the electrical repair and not the paint booth work. The Court also properly awarded C&R its fees and costs under the mechanic’s lien statute. Johnson appeals the Court Order.

#### **COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Did the trial court properly grant summary judgment against Johnson with regard to the paint booth project when there were no genuine issues of material fact that (a) the parties agreed that C&R would work on that project on a time and materials basis; (b) C&R worked on the project as agreed; and (c) Johnson failed to pay C&R?

2. Did the trial court properly grant summary judgment against Johnson with regard to the electrical repairs project when there were no genuine issues of material fact that (a) Johnson asked C&R to work on that project, solely for Johnson's benefit; (b) C&R worked on that project as agreed; and (c) Johnson agreed to pay C&R on a time and materials basis but failed to do so?

3. Did the trial court properly award attorney fees when (a) C&R's claims for the two projects are related, (b) the lodestar method does not apply, and (c) even if the lodestar method applied, the proper remedy is remand for the sole purpose of allowing the trial court to enter findings of fact and conclusions of law supporting the award of attorney fees?

### **COUNTERSTATEMENT OF THE CASE**

#### **A. Background**

C&R is a fully licensed and bonded electrical contracting company, which provides services throughout King County, Washington. [CP 175]. Marc Gartin is the C&R President who has been a licensed journeyman electrician for over thirty years and has significant experience in providing electrical contracting services to both residential and commercial projects. [CP 175].

Johnson is the owner of the Property. [CP 88]. At the request of Johnson, C&R provided work to the Property related to electric power for a paint booth and the other involving electrical repairs. [CP 167]. When

Johnson failed to pay for the work, C&R recorded a mechanic's lien against the Property. [CP 190-193]. Thereafter, it filed suit against Johnson seeking a monetary judgment for both projects based on breach of contract and quantum meruit [CP 158-164]. C&R's suit also sought to foreclose the lien [CP 158-164].

**B. Plaintiff's Motion for Summary Judgment**

C&R ultimately filed a Motion for Summary Judgment setting a hearing date of February 27, 2015, seeking a judgment on all issues raised in its Complaint; namely a monetary judgment based on breach of contract and quantum meruit, as well as to foreclose the mechanic's lien. [CP 170]. C&R also sought interest, attorney fees, and costs. [CP 170]. In support of its Motion, C&R submitted two declarations, one from its President Marc Gartin, and the other from its attorney. [CP 175-233].

The Gartin Declaration explains that in April of 2013, Johnson frantically appeared at C&R's office unannounced and without an appointment. [CP 176]. Johnson was alone and met with Gartin. [CP 176, CP 179]. According to Gartin's Declaration, Johnson explained at their meeting that "he had apparently been personally constructing a paint booth for one of his businesses at the Property, but had been doing so without an electrical permit." [CP 176]. As a result, the paint booth was "red-tagged." [CP 176]. The City of SeaTac demanded that Johnson obtain a permit. [CP 176]. Gartin thus explained in his Declaration that

at their meeting, Johnson confided that the City of SeaTac informed him that he should hire an electrical contractor to obtain the electrical permit and complete the paint booth project. [CP 176].

Gartin's Declaration goes on to state that based on the above, Gartin informed Johnson that C&R would do the work but the cost would not be cheap, especially since Gartin personally knew the inspector who would require strict compliance. [CP 176]. Gartin told Johnson that the work would be billed on a "time and materials" basis. [CP 176, 179]. In his Declaration, Gartin confirmed that he explained to Johnson that "time and materials" meant that "C&R will charge all the time for electricians on an hourly basis, as well as all materials used on the project." [CP 176].

Gartin's Declaration made it clear that at the meeting, it was determined that Johnson was personally responsible for paying for C&R's work on the paint booth and there was absolutely no discussion that Johnson's tenant was somehow responsible. [CP 179]. Gartin states that he would not have agreed to have C&R perform any work on the Property had he known that Johnson would "try to get out of paying by having some unknown tenant be responsible for it." [CP 179].

Ultimately, the Gartin Declaration clearly states that "Terry Johnson [i.e. Defendant Johnson] agreed to my terms while he sat in my office." [CP 177]. Per that agreement, C&R obtained the electrical permit for the paint booth project. [CP 182-183]. The permit named

Johnson's defunct company, "TRJ Development Inc." as the applicant, and "Terry Johnson" himself as the site contact. [CP 182-183].

Based on the above, C&R sent one of its electricians to the Property to "meet with Burandt (i.e. the electric inspector) and ascertain specifically all the work and materials required to perform the job" and to then "perform the work." [CP 177]. Per Johnson's request, C&R also had a representative present during all inspections by the City of SeaTac. [CP 177]. There were at least three inspections of the Property, and C&R had a representative present for each inspection. [CP 177]. Ultimately, C&R completed the paint booth project as agreed and obtained a full sign off approval by the SeaTac electrical inspector. [CP 177, 183].

While C&R was completing the paint booth project, someone apparently stole copper wire and severely damaged the electric service for the entire Property. [CP 178]. Gartin's Declaration thus provides that Johnson requested that C&R replace the stolen copper wire and perform other necessary electrical repairs. [CP 178]. C&R agreed and performed the work as requested as confirmed by Gartin's Declaration. [CP 178]. As with the paint booth project, the electrical repair project was "for the benefit of the Property at the specific bequest [i.e. request] of Terry Johnson." [CP 178]. Also, like the paint booth project, Gartin's Declaration states that the parties agreed that Johnson, and not an unknown tenant, would be responsible for payment. [CP 179].

C&R sent four invoices to Johnson for a total of \$7,506.30. [CP 178, 185-188]. Three of the invoices were for the paint booth project and totaled \$3,880.29 [CP 185, 186, 188]. The fourth invoice was for the electrical repair project in the amount of \$3,626.01. [CP 187]. Johnson paid none of them. [CP 179].

**C. Defendant's Response to Plaintiff's Motion**

As a preliminary matter, Johnson's first attorney withdrew, claiming that Johnson threatened to file a bar complaint and "insisted on my filing actions and motions whether I thought they were valid or not." [CP 45]. While Johnson objected, claiming that he needed time to file a bar complaint against his attorney and also sue him, the Court granted the withdrawal effective January 9, 2015. [CP 47]. Johnson thus met with a new attorney on February 2, 2015 (i.e. 25 days before the then-scheduled summary judgment hearing) who filed a Declaration to request a continuance. [CP 49]. C&R ultimately stipulated to a continuance to March 13, 2015. [CP 134]. Johnson and his new counsel thus had plenty of time to properly respond to the C&R Summary Judgment Motion.

In response, Johnson submitted two declarations, one from himself and one from his tenant, Antonio Lopez Miranda (hereinafter "Miranda"). [CP 62-95]. The first nine paragraphs of Johnson's declaration mainly concerned Johnson's alleged landlord-tenant relationship with his tenant. [CP 88-90]. In Paragraph 9 and 10 of his declaration, Johnson admits that

he “applied for a permit” for the paint booth, that he was unable to get a permit, and that the City of SeaTac informed him “that the permit would be granted ‘much faster’ if an electrical contractor were brought in to work on Antonio’s booth installation.” [CP 90-91]. These paragraphs are consistent with Paragraphs 3-4 of the Gartin declaration filed in support of Summary Judgment. [Compare CP 90-91 and 176]. Miranda’s declaration concurred that Johnson assisted him in “applying for an electrical permit” for the paint booth. [CP 64].

After recounting the above, Johnson’s declaration jumped from describing the need for C&R’s services to when “C&R came to the site”; completely leaving out the meeting with Gartin which resulted in the agreement between the parties. [CP 91]. In this regard, C&R’s first appearance on the Property was described in paragraph 6 of the Gartin declaration. [CP 177]. Again, in between Johnson’s need for C&R’s services and C&R’s electrician first appearing at the Property, was the critical April 2013 meeting where Gartin asserts the parties’ oral agreement was formed. [CP 176-177].

Johnson’s Declaration does not mention or refute the meeting with Gartin. [CP 91]. He thus did not deny Gartin’s description of the parties’ discussion during that meeting, or that he, and not some third party, agreed to pay for C&R’s work on the paint booth project during that meeting. [CP 91]. Johnson simply did not mention the April 2013 meeting and did

not explain how C&R came to know that work was needed on the Property. [CP 91]. The Miranda Declaration (again, Johnson's tenant) likewise did not deny the occurrence of the April 2013 meeting. [CP 65]. Of course, Miranda's failure to mention the meeting is consistent with Gartin's declaration that only Johnson was present. [CP 178-179].

The only interaction with C&R described by both Johnson and Miranda, is the incident when C&R sent its electrician to the Property to meet with Johnson and apparently his tenant to review "the scope of the work." [CP 91; see also CP 65]. This description of the meeting appears in paragraph 11 of Johnson's declaration and paragraph 9 of Miranda's declaration. [CP 65, 91]. Paragraph 6 of Gartin's declaration also mentioned the incident stating that the C&R electrician came "to the Property to...ascertain specifically all the work and materials required to perform the job." [CP 177].

Miranda's Declaration claims that "it was made completely clear to C&R's representative that the work would be on behalf of a tenant, not for TRJ or Johnson." [CP 65]. Miranda did not, however, claim that he or his business agreed to pay for the paint booth project. [CP 65]. In other words, Miranda's declaration did not contradict Gartin's declaration, which stated that Johnson and not a tenant, agreed to pay for the paint booth project. [CP 176]. Miranda also claims in paragraph 10 in his declaration that "(n)o contract, verbal or written, nor prices for time and

materials were ever discussed.” [CP 65]. The claim is not surprising, as Miranda was not present at the April 2013 meeting when Johnson and C&R reached their oral agreement. [CP 176, 178-179].

Johnson’s Declaration claimed in paragraph 11 that while Gartin asserted that the paint booth project would be “difficult, cumbersome, and expensive,” Johnson believed that the project would be “a casual, minor job.” [Compare CP 91 and 176]. Johnson did not, however, state that the invoiced amounts were incorrect or unreasonable. To the contrary, he acknowledged that even \$9,500 (an amount higher than the total amount invoiced) may be reasonable compensation for the work that C&R performed. [CP 216].

Ultimately, none of Johnson’s statements in his Declaration, contradicted or refuted Gartin’s declaration. For example, Johnson asserted that the tenant Miranda agreed to be “fully responsible” for the paint booth work in the commercial lease with Johnson. [CP 93]. Gartin does not deny that Johnson may have a lease with a tenant, but C&R was not a party to it. [CP 69]. Johnson also alleged that he did not receive written notice that he would be liable. [CP 92]. This is obvious, as the agreement with C&R is oral. [CP 176-177]. Ultimately, Johnson’s responsive declarations did not refute Gartin’s assertion that the parties met in C&R’s office in April 2013 and agreed that C&R would do the work on the paint booth in exchange for Johnson paying on a “time and

materials” basis. [CP 176-177].

In the C&R Reply in Support of Summary Judgment, it explained that “when Johnson’s ‘evidence’ is examined, there is no factual dispute that Johnson agreed to pay for the C&R work on a ‘time and materials’ basis.” [CP 234-239]. The Reply carefully dissected Johnson’s opposition and noted most importantly, that he made no mention of the meeting with Gartin or refutation of Gartin’s description of the parties’ agreement concerning the electrical repair project. [CP 235].

**D. Summary Judgment Hearing and the Court’s Decision**

On March 20, 2015, the summary judgment hearing was held. [CP 137]. Attorney Charles Horner appeared at that summary judgment hearing and argued on behalf of Johnson. [CP 137]. After hearing the parties’ oral arguments, the court granted C&R’s Motion for Summary Judgment with the exception of the lien foreclosure claim related to only the paint booth project. [CP 138-141]. The Court Order entered a monetary judgment against Johnson for \$7,506.30, as invoiced for the paint booth project and the electrical repair project. [CP 139]. The court also ruled that mechanic’s lien related to the electrical repairs of \$3,626.01 shall be foreclosed against the Property. [CP 140]. Further, the court awarded C&R \$20,000 in attorney fees. [CP 138]. Johnson filed an appeal of the Order. [CP 138-141].

**E. The Procedural History Created Substantial Attorney's Fees**

C&R incurred over \$20,000 in attorney fees because of the substantial work due entirely to significant delays and roadblocks created by Johnson throughout the litigation. [CP 198]. At the very beginning, it was impossible to serve Johnson with process, requiring C&R to serve him by publication. [CP 215]. Johnson later sent a letter to C&R's attorney, making excuses. [CP 215]. The letter admitted the following:

Nonetheless, 1. Work was done to Johnson property, 2. that did have value. 3. which should be compensated. C&R, Johnson's, and T&C, agree on at least this much. We will offer the full lien amount, interest, at least from an equitable viewpoint (should have been paid long ago) and costs of service. We are thinking that amount would be in the neighborhood Of \$9,500.00

[CP 216]. After Johnson was finally served, C&R filed a motion for summary judgment (not the one that the trial court ruled upon). [CP 169]. On the eve of the hearing, Johnson filed bankruptcy. [CP 169]. Johnson then failed to make two plan payments which resulted in dismissal of the bankruptcy after six months [CP 226]. Thereafter, C&R filed the subject motion for summary judgment. [CP 165-174]

The attorney fees incurred to overcome Johnson's procedural hurdles were significant. [CP 173]. Thus, what might otherwise have been a simple collection action ballooned into messy litigation in state and federal bankruptcy court. [CP 173, 229]. By the time summary judgment was entered, C&R had incurred \$20,000 in attorney fees. [CP 198]. Upon

entry of summary judgment, C&R foreclosed its lien on the Property. [See CP 240-241]. The Sheriff's Sale was scheduled for July 10, 2015. [CP 240-241]. Johnson filed his second bankruptcy on July 9, 2015, one day before the Sheriff's Sale, thereby staying it. [CP 242-243].

## **ARGUMENT**

### **A. Standard of Review on Appeal**

Respondent agrees that the Court reviews orders granting motions for summary judgment *de novo*. Kelley v. Centennial Contractors Enters., Inc., 169 Wn.2d 381, 386, 236 P.3d 197 (2010). The Court of Appeals may affirm a trial court ruling based on “any correct ground, even though that ground was not considered by the trial court.” Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

The standard of review for an award of attorney fees is abuse of discretion. Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). The trial court has “broad discretion” in fixing fees. Id.

### **B. Non-Moving Party Must Refute Material Facts With Specificity To Defeat Summary Judgment**

Summary judgment is properly granted when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Division One of the Washington Court of Appeals provides guidance for how a nonmoving party can

establish a genuine issue of material fact to avoid summary judgment as follows:

An affidavit does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Id.* at 359, 753 P.2d 517. Likewise, ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact. *Id.* at 359-60, 753 P.2d 517; *Kennedy v. Sea-Land Serv. Inc.*, 62 Wash.App. 839, 856, 816 P.2d 75 (1991).

Snohomish Cty. v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184, 1188 (2002).

Washington law provides numerous examples of statements insufficient to raise a genuine issue of material fact. For example, a nonmoving party's failure to deny an allegation raised by the moving party obviously cannot create a genuine issue of material fact. CR 56(c). In addition, opinions as to credibility of evidence presented by the moving party will not raise a genuine issue of material fact. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-61, 753 P.2d 517, 519-20 (1988) (merely describing the moving party's evidence as an "exaggeration" is insufficient to raise a genuine issue of material fact).

Further, mere disagreement with the moving party's conclusions without offering specific contrary evidence will not defeat summary judgment. *Id.* In this regard, when the moving party provides evidence that the nonmoving party was fired for "noncooperation based upon

specific incidents,” the nonmoving party may not defeat summary judgment by claiming only that he was “not uncooperative.” Id. Rather, the nonmoving party must deny the specific incidents described and offered into evidence by the moving party. Id.

In addition, denying an alleged fact based on lack of recall is insufficient to defeat a motion for summary judgment. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 430–31, 38 P.3d 322, 328 (2002). All these cases stand for the proposition that, to raise a genuine issue of material fact to defeat summary judgment, the nonmoving party must directly deny or refute the specific allegations of the moving party and may not rely on (1) opinions as to credibility, (2) unsubstantiated alternate conclusions, or (3) lack of recall.

Summary judgment may certainly be granted on oral agreements. See, e.g., Venwest Yachts, Inc. v. Schweickert, 142 Wn. App. 886, 892, 176 P.3d 577, 579 (2008). Although Johnson cites cases in an attempt to suggest otherwise, his cases simply support the general principle that only a genuine issue of material fact can defeat summary judgment. Duckworth v. Langland, 95 Wn. App. 1, 6-7, 988 P.2d 967, 969 (1998); Garbell v. Tall’s Travel Shop, Inc., 17 Wn. App. 352, 355, 563 P.2d 211, 212 (1977). Johnson’s cited cases merely clarify that both the existence and terms of an oral agreement are material facts in cases involving such agreements. See Duckworth, 95 Wn. App. at 6-7 (denying summary

judgment when oral agreement's **existence** is disputed); Garbell, 17 Wn. App. at 355 (denying summary judgment when oral agreement's **terms** are disputed). Thus, summary judgment is properly granted on an oral agreement when there is no genuine dispute as to the oral agreement's existence and terms.

C. **The Court Properly Granted Summary Judgment, As There Were No Genuine Issues of Material Fact**

1. **Johnson Failed to Refute the Declaration of Marc Gartin, Which Establishes the Existence and Terms of the Parties' Oral Agreement as to the Paint Booth Project**

Marc Gartin's Declaration describes in detail the formation of the parties' oral agreement at their first meeting in April of 2013 and the terms of that agreement. [CP 176]. At that meeting, Gartin and Johnson discussed and agreed upon all the terms as set forth in the Gartin Declaration including: 1) The project involved obtaining a permit for and completing the paint booth project, which had been "red-tagged" by the SeaTac electrical inspector; 2) C&R would perform the work on a "time and materials" basis, meaning that "C&R will charge all the time for electricians on an hourly basis, as well as all materials used on the project;" 3) The charges would be fair and reasonable for the industry; and 4) Johnson would pay for the work. [CP 176]. The invoices were indeed billed on a time and materials basis, corroborating Gartin's account. [CP 185-188]. Johnson did not pay. [CP 179].

Since C&R established the existence and terms of the oral agreement and Johnson's breach by his failure to pay, Johnson had the burden as the non-moving party to refute C&R's assertions with his own specific facts. Snohomish Cty., 115 Wn. App. at 224. Johnson failed to meet his burden. He did not even mention the April 2013 meeting with Gartin which set forth the terms of the agreement. [CP 90-91]. As described above, the only specific facts provided by Johnson (e.g. that C&R sent its electrician to the Property to finalize the scope of the work) were actually consistent with Gartin's account.

Johnson also made a conclusory statement as follows: "[T]here was no agreement, verbal or written, between C&R and either TRJ or T&C." [CP 92]. Such conclusory language is similar to Grimwood where the moving party provided specific facts showing that the non-movant was fired for being uncooperative, and the non-moving party responded that he was simply cooperative. Grimwood, 110 Wn.2d at 360. In that case, the non-moving party even provided some proof that others had praised his work. Id. at 358-360. Nonetheless, the Grimwood Court granted summary judgment because the non-movant failed to specifically refute the movant's alleged specific incidents. Id. at 360. The court explained that the result may be different had, for example, the non-movant said that he had, in fact, completed all employee evaluation forms when [movant]

said he did not. Id. Similarly, Johnson's failure to refute the Gartin's alleged specific incident, i.e. the agreement reached at April 2013, is fatal.

Johnson also asserted that "there had never been any discussion of price, hourly rates, value of work, or other terms of agreement." [CP 91-92]. The claim that there was no discussion of price, hourly rates, or value of work is consistent with Gartin's declaration. [CP 176]. Gartin informed Johnson that the work would be done on a "time and materials" basis, but Gartin did not state that he discussed specific prices or hourly rates. [CP 176]. Johnson's assertion that no "other terms of agreement" had been discussed is not only vague, but also contradicts his own declaration, where he mentioned at least having discussed the scope of the work with C&R. [CP 91]. In any event, Johnson's sweeping assertion does not suffice to defeat summary judgment because it did not specifically deny Gartin's assertions. [CP 90-91]. Significantly, Johnson never denied his agreement to be billed on a time and materials basis.

Johnson's conclusion that his tenant, not Johnson, should pay C&R likewise fails because it is unsupported by specific facts. [CP 92]. Though Johnson mentioned a lease between he and the tenant, C&R was not a party to the lease and was thus not bound by it. [CP 69]. Not even the tenant states or admits that he agreed to pay C&R for the paint booth work. [CP 62-67]. Since Johnson's statement that the tenant should pay

C&R is merely conclusory and is unsupported by fact, it does not create a genuine issue of material fact. Snohomish Cty., 115 Wn. App. at 224.

Further, it is noteworthy that nowhere does Johnson ever deny that C&R actually performed the work. Neither Declaration that he submitted in opposition to summary judgment even mentioned the issue [CP 62-95]. There is thus no dispute on this point. Likewise, Johnson did not dispute that the work was satisfactory and resulted in the project being finally approved by the City electrical inspector. [CP 176, 183].

In sum, Gartin set forth specific facts regarding the oral agreement's existence and terms. Johnson failed to refute the existence or terms of the oral agreement with his own specific facts. Thus, the oral agreement is established. It is undisputed that Johnson failed to pay. Thus, the court properly granted C&R summary judgment for Johnson's breach of their oral contract for the paint booth project.

2. Johnson Also Failed to Refute the Existence and Terms of the Parties' Oral Agreement as to the Electrical Repair Project

As for the electrical repair project, Johnson did not refute that he asked C&R to perform the work. [CP 178]. Johnson's only discussion on the topic in his Summary Judgment Response states:

In its invoices, C&R did not segregate its charges for the work it performed on the booth and related equipment from its charges for work on the building itself related to the copper wire repair. [CP 60].

This statement is inadequate to raise a genuine issue of material fact as it is conclusory and did not set forth any specific facts. Snohomish Cty., 115 Wn. App. at 224. Johnson did not specify which charges on the electrical repair invoice he claims were actually for the paint booth. [CP 60]. Johnson attempts to “correct” the deficiency by querying specific items on the electrical repair project invoice for the first time on appeal. [App. Br. p. 21]. His appellate brief states,

Of the work described in the “Work Ordered” section of the invoice, only the “Refeed Service with 4/0 Copper Wire” relates to replacement of the copper wire within the building that had been stolen. The remainder of the work items describe work performed on the paint booth – “Replace, drill, and tap new lugs,” “repair splices,” “pull ground wire to compressor,” and “wire intake fan.” None of this was lienable work.

[App. Br. p. 21]. There is of course no basis for alleging that “new lugs”, repair splices” or “pull ground wire to compressor” were not actually related to the electrical repair. Regardless, these assertions did not appear in Johnson’s summary judgment submission. [Compare App. Br. p. 21 and CP 60]. It is well-established that the Court of Appeals should “review the record *de novo* and exercise [the Court’s] own independent analysis of the **same record** as was before the trial court.” See Butler v. Craft Eng Const. Co., Inc., 67 Wn. App. 684, 691, 843 P.2d 1071, 1077 (1992) (citing other cases) (emphasis added). Therefore, it is inappropriate for Johnson to raise new, specific objections in his appellate

brief and those objections should not be considered. See RAP 2.5(a).

Since there was no genuine issue of material fact as to the existence or terms of the oral agreements for the two projects, the Court rightfully granted summary judgment against Johnson in the amount of \$7,506.30. [CP 138]. The Judgment should be affirmed.

**D. Quantum Meruit Also Supports the Trial Court’s Decision**

In addition to breach of contract, C&R’s Motion for Summary Judgment sought relief under the doctrine of quantum meruit. Quantum meruit is the method of “recovering the reasonable value of services provided under a contract implied in fact.” Young v. Young, 164 Wn.2d 477, 485, 191 P.3d 1258, 1262–63 (2008). The elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work. Id. at 486.

C&R clearly established all three elements with its evidence submitted on Summary Judgment. In fact, Johnson himself admitted that: “1. work was done to Johnson property, 2.that did have value. 3.which should be compensated.” [CP 216]. His admission alone is sufficient to establish the three elements of quantum meruit. Further, his admission is corroborated by Johnson’s admissions elsewhere that he requested both that C&R work on both the paint booth project and the electrical repair project. [CP 91, 216; App. Br. p. 14].

As a result, C&R may recover for the reasonable value of its services. Young, 164 Wn.2d at 485. C&R’s Marc Gartin testified in his Declaration that “the rates charged by C&R for an electrician are fair and reasonable for the industry.” [CP 178]. Johnson did not rebut the statement. Further, C&R provided invoices to show the exact reasonable value of the work performed on the two projects. [CP 178, 185-188]. Johnson did not argue that the amount billed was incorrect or unreasonable. Johnson did assert that the paint booth project would be “valued at a \$1,000” based on the electrical permit. [CP 91]. However, as stated by Gartin in his Declaration, that figure was only an estimate made at the very beginning of C&R’s involvement and was not a binding fixed fee. [CP 182]. Thus, even if assuming *arguendo* that the parties did not have an oral agreement, the trial court’s ruling to award a monetary judgment of \$7,506.30 against Johnson should be affirmed based on quantum meruit.

**E. The Trial Court Properly Awarded Attorney Fees**

1. The Two Projects Shared Common Facts

The Court ultimately awarded all the fees incurred by C&R because C&R successfully obtained an order to foreclose its mechanic’s lien (i.e. as to the electrical repair work). [CP 138]. Washington case law provides that a prevailing party in a mechanics lien case is entitled to attorney’s fees and costs. Griffith v. Maxwell 20 Wash. 403, 55 P. 571

(1898); Generaux v. Petit 172 Wash. 132, 19 P.2d 911 (1933). The statute itself further provides that the Court may grant the prevailing party its attorney's fees and costs. See RCW 60.04.181(3). In his appellate brief, Johnson alleges that it was improper for the trial court to award attorney fees for legal work not related to the electrical repair project lien. The contention does not justify a reversal of the court's award.

Most importantly, the trial court has "broad discretion" in fixing fees. Schmidt, 115 Wn.2d at 169. Discretionary decisions of the trial court will not be disturbed on appeal "except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Structurals Nw., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 718, 658 P.2d 679, 683 (1983).

With the above in mind, Johnson claims that the court can only award fees incurred in pursuing just the lien claim related to the electrical repair. The argument fails because long established law provides:

Statutory attorney fees awarded to a prevailing party should not be denied or reduced when the party was not successful on only one of several related claims. *Winans*, 52 Wash.App. at 101; *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40 (1983). Reductions in fees are appropriate only when the fees are unreasonable because they were generated by claims that were distinct in all respects from successful claims. *Hensley*, 461 U.S. at 440, 103 S.Ct. at 1943. First Union was unsuccessful in an appeal regarding proper verification of the notice of claim of lien. But that claim was related to the lien foreclosure action on which it prevailed. The court

did not abuse its discretion in the award of attorney fees to First Union and Trust.

Schumacher Painting Co. v. First Union Mgmt., Inc., 69 Wn. App. 693, 702, 850 P.2d 1361, 1366 (1993).

Here, the paint booth project and electrical repair project were related. Although they were billed separately, C&R brought a single action for both projects. [CP 158-164]. The complaint did not distinguish between the two projects in its claim for lien foreclosure. [CP 161]. The lien foreclosure was based on a Claim of Lien which covered the amount invoiced for both projects. [CP 190].

The two projects also shared common facts, such as the circumstances in which Johnson first hired C&R's services, the fact that both projects were performed on the Property, and the fact that both were billed on a time and materials basis. [CP 177-179]. The two projects occurred simultaneously at one point, though the work performed for the two projects differed. [CP 187-188]. All these facts show that the two projects were sufficiently related, such that the trial court properly granted attorney fees incurred for both of them. That is, the claim for the paint booth project was not "distinct in all respects" from the claim for the electrical repair work, as would require a reduction in the amount of fees. Schumacher Painting Co., 69 Wn. App. at 702.

The mechanic lien statute's plain text also supports the trial court's decision. That statute, RCW 60.04.181(3) states that "The court may

allow the prevailing party in the **action**... attorneys' fees and necessary expenses incurred by the attorney in the superior court...as the court or arbitrator deems reasonable.” RCW 60.04.181(3) (emphasis added). Thus, since this action involved both projects, it is reasonable for the court to award attorney fees for both projects.

Further, RCW 4.84.250 supports the court’s award of attorney fees. Again, the Court of Appeals may affirm a trial court ruling based on “any correct ground, even though that ground was not considered by the trial court.” Nast, 107 Wn.2d at 308. RCW 4.84.250 applies to cases when the amount in controversy is less than \$10,000. RCW 4.84.250. The amount in controversy here was less than \$10,000; specifically, it was \$7,506.30, the amount of the invoices. [CP 162]. The purpose of RCW 4.84.250 is “to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims.” Kingston Lumber Supply Co. v. High Tech Dev. Inc., 52 Wn. App. 864, 867, 765 P.2d 27, 29 (1988). Since C&R obtained a judgment in the full amount sought, C&R was properly awarded attorney fees under RCW 4.84.250. The result is fair because Johnson acknowledges that C&R performed the work as promised, but Johnson did not pay C&R but instead used litigious

maneuvers, such as the abandoned bankruptcy, to delay and deny C&R payment for the work performed.<sup>1</sup>

2. If the Lodestar Method Applies, Remand is Proper to Address Only the Lack of Findings

As a preliminary matter, the lodestar method for determining fees does not apply to every case. Case law indicates that the lodestar method “is not required in all contexts,” especially ones involving equitable considerations. In re Guardianship of Decker, 188 Wn. App. 429, 447, 353 P.3d 669, 677 (2015). Quantum meruit is an equitable remedy, so to the extent attorney fees were awarded under RCW 4.84.250 based on quantum meruit, no lodestar analysis would be required. CKP, Inc. v. GRS Const. Co., 63 Wn. App. 601, 615, 821 P.2d 63, 71 (1991) (stating that quantum meruit is an equitable remedy).

There is also at least one case where the Court of Appeals has ruled that a trial court did not abuse its discretion in awarding \$5,500 in attorney fees under the mechanic’s lien statute when the attorney simply submitted a declaration stating that the client incurred \$5,526.50 in attorney fees. Lumberman's of Washington, Inc. v. Barnhardt, 89 Wn. App. 283, 292, 949 P.2d 382, 386 (1997).

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<sup>1</sup> Johnson’s intent to delay is corroborated by his former attorney, Kenneth Rossback, who wrote, “He [Johnson] insisted on my filing actions and motions whether I thought they were valid or not.” [CP 229]. Unsurprisingly, Johnson did not pay his attorney either. [CP 229].

If the lodestar analysis applies and is strictly construed, then it requires the moving party to state the “number of hours worked” and the court to enter “findings of fact and conclusions of law.” Mahler v. Szucs, 135 Wn.2d 398, 434-5, 957 P.2d 632, 652 (1998). C&R concedes that its materials did not clearly state the number of hours worked and that the court entered no express findings of fact or conclusions of law. [CP 140, 198]. Thus, if the Court of Appeals requires the trial court to perform the lodestar analysis, then remand on that issue is appropriate to give the trial court an opportunity to perform the analysis and enter findings of fact and conclusions of law. Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn. App. 409, 416, 157 P.3d 431, 436 (2007). Nonetheless, the trial court’s ruling that C&R is entitled to all the reasonable fees incurred against Johnson on all the claims should be affirmed.

**F. C&R Should Be Awarded Attorney Fees Under RAP 18.1**

RAP 18.1 allows the Court of Appeals to award a party attorney fees “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before...the Court of Appeals.” RAP 18.1(a). The mechanic’s liens statute allows an award of attorney fees for the prevailing party at the court of appeals.” RAP 18.1(a). A prevailing party is one that “substantially prevails on its claims.” Peterson v. Koester, 122 Wn. App. 351, 364, 92 P.3d 780, 786 (2004). Here, C&R should be the substantially prevailing party, as C&R should prevail on all

its claims, except for possible remand for the sole purpose of allowing the trial court to enter lodestar findings of fact and conclusions of law. Hence, C&R should be awarded attorney fees under RAP 18.1.

Conversely, Johnson should not be awarded fees under RAP 18.1. RAP 18.1 is clear that a request for fees under that rule must be raised in its own separate section in the opening brief. RAP 18.1(b). Johnson did not ask for attorney fees under RAP 18.1 in his appellate brief. Thus, Johnson's failure to ask for attorney fees in his opening brief constitutes a waiver of such fees. See Gardner v. First Heritage Bank, 175 Wn. App. 650, 677, 303 P.3d 1065, 1079 (2013) (denying attorney fees where prevailing party failed to devote a section of its opening brief to attorney fees as required by RAP 18.1(b)). Further, Johnson is not the substantially prevailing party and is not entitled to attorney fees.

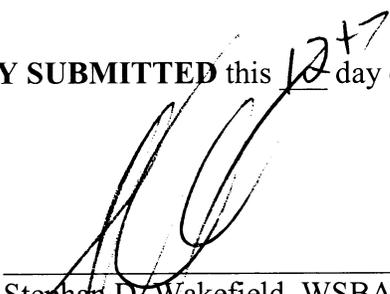
### **CONCLUSION**

The court properly granted summary judgment on both the paint booth project and the electrical repair project. C&R made a prima facie case of its entitlement to payment from Johnson and the amount of that payment due. In response, Johnson made unsupported conclusory statements and raised facts that did not actually conflict with, or contradict C&R's assertions. Since Johnson failed to create a genuine issue of material fact and C&R is entitled to relief as a matter of law, the trial court's order granting summary judgment should be affirmed.

Further, the trial court's decision to award attorney fees incurred for the entire action should be affirmed, as the projects were related. In this regard, if the trial court awarded attorney fees based on equitable grounds, then no lodestar analysis is needed and the award should be affirmed. Otherwise, if a lodestar analysis is required, then the court of appeals should remand on that sole issue to allow the trial court to enter findings of fact and conclusions of law, as required by the lodestar method.

Finally, C&R should be awarded attorney fees under RAP 18.1.

**RESPECTFULLY SUBMITTED** this 12<sup>th</sup> day of September, 2016.



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