

No. 36353-4-II

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

CAMPBELL CRANE & RIGGING SERVICE, INC.

Respondent

v.

BERSCHAUER PHILLIPS CONSTRUCTION COMPANY
AND SAFECO INSURANCE COMPANY OF AMERICA

Appellants

APPELLANTS' BRIEF

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TABLE OF CONTENTS

I.	Assignment of Error	1
	The trial court erred in ruling that Campbell Crane, an equipment supplier and sub-subcontractor to a subcontractor to general contract Berschauer Phillips, did not have to give the supplier's notice required by RCW 39.08.065 to recover for the equipment portion of its claim	1
	<i>Issues Pertaining to Assignments of Error</i>	1
A.	Is an entity that provides equipment for use on a public work, but provides no labor on the project, a supplier or a subcontractor?	1
B.	Does a sub-subcontractor on a public work, with a supply component to its sub-subcontract, have to provide a supplier's notice under RCW 39.08.065 to recover the portion of its claim attributable to the supply (as opposed to the labor) portion of its sub-subcontract?	1
II.	STATEMENT OF THE CASE	1
III.	SUMMARY OF THE ARGUMENT	3
IV.	ARGUMENT	5
A.	Under Washington Law, People who Provide Equipment for Use on a Public Work, like People who Provide Materials for Use on a Public Work, are Suppliers not Subcontractors	7
B.	When a Sub-Subcontractor's Sub-Subcontract Includes both Labor and Supply, the Sub-Subcontractor Cannot Recover the Supply Portion of its Contract Amount from the Project Bond and Retainage Unless it Provided the General Contractor and the Owner a Supplier's Preclaim Notice	9

C.	Berschauer Phillips is Entitled to Its Fees on Appeal and Before the Trial Court	11
V.	CONCLUSION	12

TABLE OF AUTHORITIES

Table of Cases

<u>Better Financial Solutions, Inc. v. Caicos Corp.</u> , 117 Wn.App. 899, at 904-905, 73 P.3d 424 (2003)	7
<u>LRS Electric Controls, Inc. v. Hamre Const., Inc.</u> , 153 Wn.2d 731, 107 P.3d 721 (Wash. Mar 03, 2005)	3, 4, 9, 10, 11, 12, 13
<u>National Lumber & Box Co. v. Title Guaranty & Surety Co.</u> , 85 Wn. 660, 149 P. 16 (1915)	8
<u>Title Guaranty & Surety Co. v. First Nat. Bank</u> , 94 Wn. 55, 162 P. 23 (1916)	8
<u>United States Rubber Co. of California v. Washington Engineering Co.</u> , 86 Wn. 180, 140 P. 706 (1915)	8

Statutes

RCW 39.08	1
RCW 39.08.010	5, 7
RCW 39.08.030	5
RCW 39.08.065	4, 6, 9
RCW 60.04	5
RCW 60.28	6
RCW 60.28.011	6, 7
RCW 60.28.015	4, 6

Other

CR 11	11
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I. Assignment of Error

Assignment of Error

The trial court erred in ruling that Campbell Crane, an equipment supplier and sub-subcontractor to a subcontractor to general contractor Berschauer Phillips, did not have to give the supplier's notice required by RCW 39.08.065 to recover for the equipment portion of its claim.

Issues Pertaining to Assignments of Error

- A. Is an entity that provides equipment for use on a public work, but provides no labor on the project, a supplier or a subcontractor?
- B. Does a sub-subcontractor on a public work, with a supply component to its sub-subcontract, have to provide a supplier's notice under RCW 39.08.065 to recover the portion of its claim attributable to the supply (as opposed to the labor) portion of its sub-subcontract?

II. STATEMENT OF THE CASE

This case arises out of a project in Vancouver, Washington known as the "Firstenburg Community Center" (hereafter "Project"). This Project is a public work. The owner of the Project was the City of Vancouver. Berschauer Phillips Construction Company, (hereafter "BP") was the general contractor on the Project. As required by RCW 39.08, BP obtained a payment and performance bond for the Project. Pursuant to RCW 60.28, the City of Vancouver also retained a percentage of moneys otherwise due to BP for work on the Project. CP 47-48.

Dynamic International (hereafter “Dynamic”) was a subcontractor to BP on the Project. Campbell Crane “is a provider of fully maintained and professionally operated cranes that are rented on an hourly basis with a Campbell Crane operator.” CP 29; CP 32-33;CP 54. Dynamic retained Campbell Crane to provide operated equipment (cranes) for use on Dynamic’s scope of work on the Project. CP 29; CP 32-33; CP 47-48; CP 55. Pursuant to this sub-subcontract, Campbell Crane provided cranes to Dynamic. CP 30; CP 32-33; CP 47-48; CP 55. Campbell Crane was not paid for the price agreed between it and Dynamic for the operated cranes. CP 30;CP 32-33; CP 47-48.

Campbell Crane has never provided any supplier notice to BP or Vancouver on this Project. CP 55. Despite that, Campbell Crane made a bond and retainage claim for the entire amount it claimed was due from Dynamic under its sub-subcontract. CP 1-22; CP 29. BP agreed to pay the labor portion of Campbell Crane’s claim, provided Campbell Crane segregate labor from equipment. Campbell Crane refused to segregate the labor portion from the equipment portion of its claim and refused to accept less than its entire unsegregated claim amount. CP 25, ll. 22-23; CP 55.

Campbell Crane moved for summary judgment, seeking its entire contract balance. BP resisted, arguing that Campbell Crane, by failing to provide the supplier’s notice, was not entitled to recover the supply (equipment) portion of its claim. CP 25, l. 21; CP 34-45.

The Trial Court granted summary judgment, ruling that because Campbell Crane was a sub-subcontractor it did not have to give BP and Vancouver the supplier's notice to recover any part of its claim. CP 60-62, RP 4/13/07, p. 15, l. 24 - p. 17, l. 13. On Motion for Presentation, the Court refused to clarify its ruling beyond the Court's initial statement (at RP 4/13/07 p. 16, ll 9-20) that Campbell Crane is entitled to pursue a bond and retainage claim including a supplier component (equipment) because Campbell Crane is a specialized subcontractor performing labor as well as providing equipment. RP 6/22/07, p. 38, l. 14 - p. 40, l. 6. This ruling is contrary to the clear holding of LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721 (Wash. Mar 03, 2005) (reversing a Court of Appeals decision applying an argument identical to that made by Campbell Crane and accepted by the Trial Court in this case).

III. SUMMARY OF THE ARGUMENT

Campbell Crane is a supplier of equipment that failed to provide the required supplier preclaim notice. Historically, it was unclear whether suppliers of equipment (as opposed to suppliers of materials) had bond and retainage claims on public works because the equipment, unlike the materials, are not incorporated into the work. However, this matter has been resolved, and Washington courts have ruled that equipment suppliers on public works have the same right as material suppliers on public works to make bond and retainage claims *provided they comply with the*

procedural requirements the bond and retainage statutes impose on supplier claimants. Under both the public work payment bond act (RCW 39.08.065) and the public work retainage act (RCW 60.28.015), suppliers have to provide a special pre-claim notice as a condition precedent to their having an enforceable claim against the project bond and retainage.

However, the requirement to give the suppliers notice is not limited to pure suppliers. It also applies to sub-subcontractors to subcontractors to the extent there is a supply component to the sub-subcontract. Washington Courts make a clear distinction between the labor component of a sub-subcontract (which can form the basis of a proper bond and retainage claim without preclaim notice) and the supply component of a sub-subcontract (which cannot be collected from the project bond or retainage unless the sub-subcontractor gave the general contractor and owner a proper supplier preclaim notice). This distinction is set forth in the clear rules announced in LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721 (2005). Further, under the LRS principles, Campbell Crane's bond and retainage claim would be limited to only the amount claimed for labor after all payments received by Campbell Crane have been applied to the amount it claims for labor.

Campbell Crane has never differentiated between labor and equipment. Without this differentiation, Campbell Crane cannot prove that it is owed any amount for labor. Without such proof, Campbell Crane cannot maintain its bond and retainage claims. BP sought to have Campbell Crane's claims dismissed on this basis, and the Trial Court doubly erred: first by entering judgment in favor of Campbell Crane for its entire claim amount (rather than limiting that award to the labor portion) and by refusing to dismiss Campbell Crane's claims as unproven (given Campbell Crane's obdurate refusal to segregate out the labor portion of its claim).

IV. ARGUMENT

The Bond and Retainage Acts, respectively, provide for a substitute lien action on public works (as public property cannot be liened under RCW 60.04, the private work lien act). Both the Bond and Retainage Acts limit this right to defined and described classes of people involved in public works. The bond statute describes these persons as "laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work" (RCW 39.08.010.) RCW 39.08.030 expressly limits the right to claim against the bond to people in

these categories. Further, RCW 39.08.065 expressly requires that suppliers and materialmen (as opposed to laborers and subcontractors) provide a notice of performance as a condition of the claim. “Equipment suppliers” are supplier claimants under this language.

The Public Work Retainage Statute (RCW 60.28) has similar limitations. Retainage claimants are limited to persons “performing labor or furnishing supplies toward the completion of a public improvement” RCW 60.28.011. Again, suppliers and materialmen must provide a special notice, for the reasons stated above. RCW 60.28.015. “Equipment suppliers” suppliers under the statute.

A bond and retainage claimant:

is entitled to obtain payment under RCW 39.08.010 and RCW 60.28.011 only if it is a proper claimant under those public works lien statutes. *See Better Fin. Solutions, Inc. v. Transtech Elec., Inc.*, 112 Wash.App. 697, 703, 51 P.3d 108 (2002), *review denied*, 149 Wash.2d 1010, 69 P.3d 874 (2003). This depends on whether [the claimant] is within the class that the statutes aim to protect. *See Thompson v. Peninsula Sch. Dist. No. 401*, 77 Wash.App. 500, 505, 892 P.2d 760 (1995); *TPST Soil Recyclers of Wash. Inc. v. W.F. Anderson Constr., Inc.*, 91 Wash.App. 297, 300, 957 P.2d 265 (1998) (“Statutory benefits are extended only to those who clearly come within the statute's terms”). As lien statutes are in derogation of the common law, we strictly construe them. *Lumberman's of Wash., Inc. v. Barnhardt*, 89 Wash.App. 283, 286, 949 P.2d 382 (1997).

Both statutes specify the protected class. The bond statute for contractors on public works projects, RCW 39.08.010, requires that the contractor “pay all laborers, mechanics,

and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work.” The retainage statute, RCW 60.28.011, confers a lien in favor of “[e]very person performing labor or furnishing supplies toward the completion of a public improvement contract” against the contractor's retainage bond or the public body's retained amount. RCW 60.28.011(2). Under the retainage statute, a “[p]erson” is “a person or persons, mechanic, subcontractor, or materialperson who performs labor or provides materials for a public improvement contract, and any other person who supplies the person with provisions or supplies for the carrying on of a public improvement contract.” RCW 60.28.011(12)(b).

Better Financial Solutions, Inc. v. Caicos Corp., 117 Wn.App. 899 at 904-905, 73 P.3d 424 (Wn.App. Div. 2 Jul 29, 2003)reconsideration denied (Aug 29, 2003)

A. Under Washington Law, People who Provide Equipment for Use on a Public Work, like People who Provide Materials for Use on a Public Work, are Suppliers not Subcontractors.

Historically it was unclear whether the provision of equipment for use performing a public work allowed the person providing the equipment to make bond or retainage claims. The bond statute, RCW 39.08.010, protects “laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work.” The retainage statute, RCW 60.28.011, protects “[e]very person performing labor or furnishing supplies toward the completion of a public improvement contract” against the contractor's retainage bond or the public body's

retained amount. In both cases the statutes clearly protect people providing labor or materials, but equipment is not clearly mentioned in either statute.

This ambiguity in the statute was the gravamen of much early litigation concerning the statute. The outcome of this litigation was that equipment providers can make bond and retainage claims as suppliers (National Lumber & Box Co. v. Title Guaranty & Surety Co., 85 Wn. 660, 149 P. 16 (1915); Title Guaranty & Surety Co. v. First Nat. Bank, 94 Wn. 55, 162 P. 23 (1916).), but people who provide tools cannot (United States Rubber Co. of California v. Washington Engineering Co., 86 Wn. 180, 149 P. 706 (1915)).

However, the cases also make clear that equipment providers are suppliers and must make claims as suppliers. That is, equipment providers must give the supplier's preclaim notice.

We have always held that, within the purview of Rem.Rev.Stat. § 1129, the rental of equipment is neither labor performed nor materials furnished. Hall v. Cowen, 51 Wash. 295, 98 P. 670; Hurley-Mason Co. v. American Bonding Co., 79 Wash. 564, 140 P. 575. On the other hand, we are fully aware that equipment rental is lienable as 'supplies' within the purview of Rem.Rev.Stat. § 1159 (United States Fidelity & Guaranty Co. v. E. I. DuPont De Nemours & Co., 197 Wash. 569, 85 P.2d 1085).

Willett v. Davis, 30 Wn.2d 622 at 635-636, 193 P.2d 321 (1948) (holding that equipment is not properly included in subcontractor's public works bond and retainage claim as "labor and materials" but is properly claimed as "supplies".)

B. When a Sub-Subcontractor's Sub-Subcontract Includes both Labor and Supply, the Sub-Subcontractor Cannot Recover the Supply Portion of its Contract Amount from the Project Bond and Retainage Unless it Provided the General Contractor and the Owner a Supplier's Preclaim Notice.

LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721 (Wash. Mar 03, 2005) is exactly on point. In LRS, the Supreme Court answered the question of whether second-tier subcontractors are excused from the supplier preclaim notice for the supply portion of their sub-subcontracts. "RCW 39.08.065. The first question presented is whether a party who supplies both materials and labor, but is not in privity of contract with the prime contractor, must provide written notice of the materials furnished to the project under RCW 39.08.065." LRS at 738. The Supreme Court, reversing a Court of Appeals decision, ruled that a second-tier subcontractor cannot recover for the supply portion of its contract without providing the proper supplier's preclaim notice.

In sum, we hold that the preclaim notice in RCW 39.08.065, required to recover on a materials claim against

a contractor's bond, is not rendered irrelevant merely because the claimant provides both materials and labor. Nothing in the plain and unambiguous language of the statute indicates that the legislature intended such a result. Thus, we conclude that RCW 39.08.065 was at all times applicable to Tyko, and Tyko's failure to provide timely notice is a complete bar to recovery on its \$9,017 materials claim against Hamre's contractor's bond.

LRS at 741-742.

The Supreme Court then turned to the retainage claim. The Court concluded:

As with the contractor's bond, the Court of Appeals mistakenly failed to identify Tyko as a third party, stating as follows: “But again, the language of the statute suggests to us that the materials, of concern, are those coming from some third party.” Tyko was in fact a third party. Moreover, there is no indication that the legislature intended to establish an “actual knowledge” exception to the preclaim notice required for recovery against the retained percentage. Accordingly, Tyko was subject to the preclaim notice requirement and is barred from recovering against the retained percentage.

LRS at 743 (citation to decision below omitted).

The LRS decision leaves no uncertainty about this rule of law.

The preclaim notice requirements in RCW 39.08.065 and RCW 60.28.015 apply to every person, firm, or corporation furnishing materials, supplies, or provisions/equipment to be used in the construction, performance, carrying on, prosecution, or doing of any work on a public works project. Tyko provided materials for the HVAC system that were incorporated into the hospital project and represented approximately 55 percent of Tyko's contractual obligation. Accordingly, under the plain language of RCW 39.08.065 and RCW 60.28.015, Tyko was subject to the preclaim

notice requirements and its failure to provide such notice is a bar to recovery on the materials claim. Tyko's alternative argument that it applied payments received from Hamre on a pro rata basis between materials and labor fails because Tyko never established a materials claim against Hamre and Tyko has been fully compensated for its labor claim. For these reasons, we reverse the Court of Appeals, reinstate the judgment of the superior court, and award Hamre its request for attorney fees and costs under RCW 4.84.250-290.

LRS at 744-745.

Campbell Crane was obligated to provide a preclaim notice to recover for the equipment portion of its claim. It did not. Therefore, it is not entitled to recover for that equipment portion of its claim. Rather, it must divide its claim between the labor portion and the equipment portion of the claim, apply payments received to the labor portion, and pursue a bond an retainage claim only for the remaining labor balance. Campbell Crane refused to do this accounting. This amounts to a total failure of proof on Campbell Crane's claim. The Trial Court should have dismissed the claim. Instead, the Trial Court erred and granted Campbell Crane summary judgment on its claim. This Court should reverse and remand this case for dismissal of the Campbell Crane claim.

C. Berschauer Phillips is Entitled to Its Fees on Appeal and Before the Trial Court.

Just as Hamre was entitled to fees, so is BP. BP is also entitled to fees under CR 11. As pled, Campbell Crane's claim is vacuous, even

frivolous. To the extent Campbell Crane has a valid claim, that claim is limited to the labor portion of its contract remaining after payments have been applied to pay for labor. BP remained willing to pay any segregated labor claim. Campbell Crane's proper claim, based on the cause of action pled, is *de minimis* (well under \$10,000). However, without segregating the labor portion of its claim, Campbell Crane's entire claim is frivolous under the LRS decision. In either case, BP is entitled to fees.

V. CONCLUSION

Campbell Crane was a sub-subcontractor on the Project, but Campbell Crane's contract was not for labor only. A substantial portion (in fact, the primary portion) of the sub-subcontract was for rental of very expensive and highly specialized construction equipment (cranes). On those facts, Campbell Crane was, at best, a second-tier subcontractor with a substantial supply portion to its contract. In such case, Campbell Crane's right to claim against the bond and retainage would be limited to the labor portion of its claim.

Further, all moneys received by Campbell Crane would have to be credited against that labor portion, and Campbell Crane would have bond and retainage rights only to the extent of the unpaid labor claim. On these facts, it is unlikely that Campbell Crane has any unpaid labor on this

Project. Faced with the fact that its claim was empty if properly presented, Campbell Crane chose to roll the dice and present the Court with an unsegregated, and therefore, improper claim.

When a party asserts a claim without lawful right, that claim is subject to dismissal. The Trial Court should have dismissed Campbell Crane's claim as empty and unproven. Instead, it accepted the unsegregated claim and imposed a judgment against BP in clear violation of the law announced in LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721 (2005).

On the undisputed facts of this case, BP and its bond were entitled to a summary judgment of dismissal, even though Campbell Crane is the moving party. The Trial Court erred in refusing to dismiss Campbell Crane's claims. This Court should remedy that error, reverse the Trial Court's decision, award fees on appeal to BP, and remand this case for dismissal of Campbell Crane's claim and for a further award of BP's fees incurred below.

Respectfully Submitted this 10th day of October, 2007.

CUSHMAN ~~LAW~~ OFFICES, P.S.



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Attorneys for Berschauer Phillips

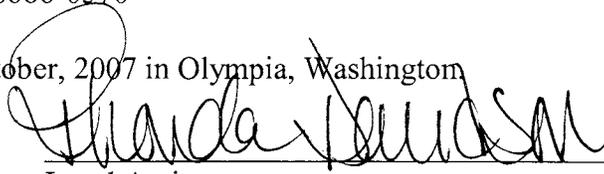
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on **October 10, 2007**, I caused to be served a true copy of the foregoing by the method indicated below, and addressed to each of the following:

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Signed this 10th day of October, 2007 in Olympia, Washington



Legal Assistant

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