

No. 36353-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FILED
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CAMPBELL CRANE & RIGGING SERVICE, INC.

Respondent

v.

BERSCHAUER PHILLIPS CONSTRUCTION COMPANY
AND SAFECO INSURANCE COMPANY OF AMERICA

Appellants

APPELLANTS' REPLY BRIEF

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I. Assignment of Error

The trial court erred in ruling that Campbell Crane, a supplier of operated equipment (cranes) to a subcontractor to the 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 (the cranes) of its claim. The Court should have limited Campbell Crane's claim to the labor portion (the operator wages) only.

Issues Pertaining to Assignments of Error

- A. Does a sub-subcontractor on a public work 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?
- B. Is there a relevant distinction between "supplier of material" and "supplier of equipment" with regard to the notice requirement of RCW 39.08.065?

II. STATEMENT OF THE CASE

This case arises out of a public project in Vancouver, Washington: the "Firstenburg Community Center" ("Project"). This Project is a public work. Berschauer Phillips Construction Company ("BP") was the general contractor. The project was bonded and retainage was withheld as required by RCW 39.08 and RCW 60.28. CP 47-48.

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. BP's subcontractor, 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, but was not paid the full agreed price owed by Dynamic. CP 30; CP 32-33; CP 47-48; CP 55.

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 subcontract amount, including both the equipment rental costs and the labor costs. CP 1-22; CP 29. BP refused to pay for the equipment portion of the claim. 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. CP 60-62, RP 4/13/07, p. 15, l. 24 - p. 17, l. 13. This ruling is in error under the only case that directly considered the duty of a sub-subcontractor to provide a supplier's notice under the public works bond and retainage statutes: 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 legally indistinguishable from 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. The public works bond claim

statute requires that any person supplying a public work provide a supplier's notice.

Every person, firm or corporation furnishing materials, supplies or provisions to be used in the construction, performance, carrying on, prosecution or doing of any work for the state, or any county, city, town, district, municipality, or other public body, **shall, not later than ten days after the date of the first delivery of such materials, supplies, or provisions** to any subcontractor or agent of any person, firm or corporation having a subcontract for the construction, performance, carrying on, prosecution or doing of such work, deliver or **mail to the contractor a notice in writing stating** in substance and effect that such person, firm or corporation **has commenced to deliver materials, supplies or provisions** for use thereon, with the name of the subcontractor or agent ordering or to whom the same is furnished and that such contractor and his bond will be held for payment of the same, and that **no suit or action shall be maintained in any court against contractor or his bond** to recover for such material, supplies or provisions or any part thereof **unless the provisions of this section have been complied with.**

RCW 39.08.065 [emphasis added].

The public work retainage claim act is equally clear:

Every person, firm, or corporation **furnishing materials, supplies, or equipment** to be used in the construction, performance, carrying on, prosecution, or doing of any work for the state, or any county, city, town, district, municipality, or other public body, **shall give to the contractor of the work a notice in writing, which notice shall cover the material, supplies, or equipment furnished or leased during the sixty days preceding the giving of such notice as well as all subsequent materials, supplies, or equipment furnished or leased,** stating in substance and effect that such person, firm, or corporation is and/or has furnished materials and supplies, or equipment

for use thereon, with the name of the subcontractor ordering the same, and that a lien against the retained percentage may be claimed for all materials and supplies, or equipment furnished by such person, firm, or corporation for use thereon, which notice shall be given by (1) mailing the same by registered or certified mail in an envelope addressed to the contractor, or (2) by serving the same personally upon the contractor or the contractor's representative and obtaining evidence of such service in the form of a receipt or other acknowledgement signed by the contractor or the contractor's representative, and **no suit or action shall be maintained in any court against the retained percentage to recover for such material, supplies, or equipment or any part thereof unless the provisions of this section have been complied with.**

RCW 60.28.015

There are two questions presented in this case. First, does a subcontractor who performed labor as well as providing “materials, supplies or provisions” have to give a supplier’s notice to recover the supply component of their subcontract against the project bond and retainage? This question was answered in LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721 (2005), the only case to directly face the question. The answer is, “yes, a subcontractor must provide the notice to recover the supply component of the subcontract in a public works bond or retainage claim.”

The second question is whether a person who provides equipment to a public work is a supplier with regard to that equipment. In other

words, “Is construction equipment ‘materials, supplies, or provisions?’” Campbell Crane contends that equipment is not “materials, supplies or provisions” and that, therefore, an “equipment supplier,” unlike a “material supplier,” does not have to give the supplier’s notice. This argument is contrary to long-established case law, which established that equipment suppliers are suppliers and can make claims against the public works bond and retainage, just as material suppliers can. Equipment suppliers fought hard and won the same claim rights as material suppliers. However, with those same rights come the same duties – the first among these is to provide the notice. There is no privileged class of suppliers called “equipment suppliers” who are exempt from the usual notice obligations imposed on suppliers to public work projects.

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 dismissing the supply portion) and by

refusing to dismiss Campbell Crane's claims as unproven (given Campbell Crane's refusal to segregate labor from equipment).

IV. ARGUMENT

A. When a Sub-Subcontractor's Sub-Subcontract Includes both Labor and Supplies, 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.

There are two related questions Courts have asked in evaluating public works bond claims. First, is the claimant a proper claimant? Second, how much is the claimant entitled to recover? Put differently, is the claimant a person with claim rights under RCW 39.08 and, if so, what components of the claim are proper and payable? Both Campbell Crane and the Trial Court muddled these questions together – answering the first as if it also answered the second.

This is not the law in Washington. In Washington, a person can be a proper claimant as to part of their claim (labor), but not a proper claimant as to another part (supply).

Both the bond statute and the retainage statute are amenable to “plain language” construction. Both the bond statute and the retainage statute are unambiguous when requiring “Every person” who “furnish[es] ... equipment” (for retainage claims) or “furnish[es] ... supplies or provisions” (for bond claims) to provide a supplier's notice as a condition

precedent to their recovery against bond or retainage. Only claims for labor (worker's wages) escape the notice requirement of these statutes. Equipment is not labor.

LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721 (Wash. Mar 03, 2005) is exactly on point – and is the only case to directly face and answer the second of these questions. In LRS, the Supreme Court ruled that second-tier subcontractors (such as Campbell Crane) are required to provide the supplier preclaim notice as a condition precedent to their recovering for the supply portion of their claims.

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, concluding:

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. It may recover the labor portion of that claim, but only the labor portion, and must segregate out that portion of its claim.

Further, none of the cases cited by Campbell Crane stand for any applicable exception to the rule set forth in LRS. First, to the extent appellate decisions (such as National Concrete v. Northwest, 107 Wn. App. 657, 27 P.3d 1239 (2001)) or prior decisions (all of Campbell Crane's authority) are inconsistent with the last, best word of the Supreme Court on a subject (which is what LRS is), then the most recent Supreme Court decision on point must prevail.

However, in fact all of Campbell Crane's authority is reconcilable with the LRS decision, and distinguishable from the facts of this case (which is governed by LRS.) All of Campbell Crane's authority goes to answer the first of the questions with which this section began ("who is a proper lien claimant") and not the critical second question ("what components of the claim are proper and payable?").

The first of these distinguishable cases, Neil F. Sampson v. West Pasco, 68 Wn. 2d 172, 412 P.2d 106 (1966), is a clear case in point. In Sampson, a subcontractor who provided a crane and an operator made a retainage claim for the unpaid balance of the subcontract. This claim was challenged in its entirety as improper because the crane subcontractor had not provided a supplier's preclaim notice. The Court in Sampson correctly observed that because the crane subcontractor performed labor on the project, it was a proper claimant even though it had not provided the

notice. However, the Court in Sampson did not reach the question (because it was not asked) of whether the crane contractor's proper claim was limited to the labor portion of its arrearage to the exclusion of the unpaid equipment rental.

Sampson cites to and relies on the early case of Willett v. Davis, 30 Wn. 2d 622, 193 P.2d 321 (1948) for support. However, Willett is distinguishable in the same manner as Sampson. In Willett, the claimant was hired as a laborer and used a truck in his work. When he was unpaid, he filed a claim for both his labor and for the truck. The Court ruled that his claim was proper because he was a laborer – and that his claim for the truck rental was proper because suppliers are proper claimants and providing a truck for use on the job is a supplier activity.

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).

Thus, in Willett, the claimant was entitled to recover both as a subcontractor and as a supplier. Campbell Crane was similarly entitled to recover both as a subcontractor and as a supplier. However, to perfect and

preserve its claim as a supplier, under the LRS decision, Campbell Crane had to provide a supplier's preclaim notice. Campbell Crane failed to do so and, therefore, lost its right to recover as a supplier, although Campbell Crane retains the right to recover the labor portion of its claim (if that portion of the claim were properly segregated).

Campbell Crane cites to early case of Sutherland v. Smith, 123 Wash. 518, 212 P.2d 1060 (1923) for further support. However, this case is completely unlike the current case. In Sutherland, the Court made specific findings that the claimant was a construction laborer making a claim for day wages. The claimant's job was to haul materials – but the fact that labor involved materials was not interesting (most construction labor does), and that fact does not change the right of a subcontractor to recover a labor claim without providing a supplier's preclaim notice.

The final case relied on by Campbell Crane is National Concrete Cutting v. Northwest GM Contractors, 107 Wn.App. 657, 27 P.3rd 1239 (2001). This case was at the center of the arguments in the supplemental briefing attached hereto – and Appellant cannot improve on the arguments of the prevailing parties in LRS.

Again, 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 portion of its claim.

B. There is No Distinction Between “Suppliers of Material” and “Suppliers of Equipment” under the Bond and Retainage Act.

Campbell Crane raises the novel argument that “equipment suppliers” are a privileged class of suppliers, distinct from “material suppliers.” An apparent privilege of this class is to have the right to make a claim as a supplier without having provided the required supplier’s preclaim notice. There is no legal support for this position whatsoever.

When the statutes were first interpreted, it was an open controversy whether “equipment suppliers” were suppliers at all. 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.” Both statutes protect people providing labor or materials, but equipment suppliers are not so clearly protected.

This ambiguity caused much early litigation. In those cases, “equipment suppliers” won the right to 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).).

These 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".)

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 provided labor on the Project, but Campbell Crane's contract was not for labor only. The primary portion of Campbell Crane's scope of work was for rental of specialized construction equipment (cranes). Campbell Crane has an undeniable (and undenied) right to recover for the labor portion of its sub-subcontract (crane operator wages). However, Campbell Crane's right to claim against the bond and retainage is limited to the labor portion of its claim.

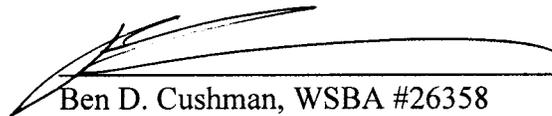
Further, under the LRS decision, all moneys received by Campbell Crane must be first credited against that labor portion. It is unlikely that Campbell Crane has any unpaid labor on this Project. Having a vacuous claim is fully presented, Campbell Crane chose to keep its position superficial and general, but that claim remains ultimately specious.

When a party asserts a specious claim, that claim should be dismissed. The Trial Court should have dismissed Campbell Crane's claim. Instead, it accepted the claim and imposed a judgment against BP. This decision is clear error, and is contrary to the law announced in LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721 (2005), which is the only case to actually reach and decide the issues raised in this matter. 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 21st day of December, 2007.

CUSHMAN LAW OFFICES, P.S.

A handwritten signature in black ink, appearing to read 'Ben D. Cushman', is written over a horizontal line.

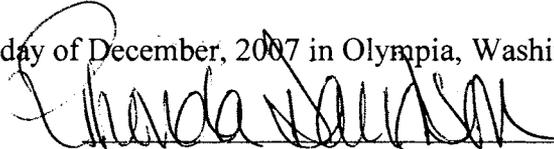
Ben D. Cushman, WSBA #26358
Attorneys for Berschauer Phillips

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on **December 27, 2007**, I caused to be served a true copy of the foregoing by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 949 Market Street Tacoma, WA 98402	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
copy:	Albert Schlotfeldt Quinton Posner Duggan Schlotfeldt & Welch, PLLC P.O. Box 570 Vancouver, WA 98666-0570	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile

Signed this 27th day of December, 2007 in Olympia, Washington.



Legal Assistant

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BY
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OLYMPIA, WA