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NOVEMBER 26, 2014
Court of Appeals
Division III
State of Washington

NO. 32377-3

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

PERFORMANCE CONTRACTING, INC.
Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

Appeal from the Superior Court for Lincoln County
Cause No. 13-2-00073-4

REPLY BRIEF OF APPELLANT

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STATUTES

RCW 49.17.150(1) 1

I. PCI ACTUALLY COMPLIED WITH THE STATUTORY REQUIREMENTS.

The Department does not contest the following key facts and law in support of PCI's position that it actually complied with the statutory requirements for perfecting its appeal:

1. RCW 49.17.150(1) only requires timely mailing not receipt. *PCI Brief at 16-19.*

2. PCI presented evidence it mailed the notice of appeal to the court and to all required parties supported by a Certificate of Service signed under penalty of perjury by legal assistant Laurel Barton. *CP 7. See PCI supporting declarations at CP 233-267.* PCI relied on the well-established principle that proof of mailing may be made by showing (1) an office custom regarding mailing, and (2) compliance with the custom in the specific instance. *See discussion of this principle in PCI Brief at 13-14.*[1]

[1] The Department criticizes this evidence by claiming the clerk who delivered the mail to the post office, Shontara Anderson, could not recall actually placing the envelopes in the mailbox. *Department Brief at 11.* That contention not only misstates Ms. Anderson's declaration testimony, *see CP 264-65*, it ignores the two elements of business custom evidence stated above. PCI's declarations clearly establish both elements and Ms. Anderson's testimony specifically shows compliance with the firm's custom in the specific instance.

3. The mailing was timely because it occurred on September 5, 2013, well before the expiration of the 30-day statutory deadline of September 16, 2013.

4. The court received and filed the notice of appeal on September 9, 2013, but the Board and Director (along with the AAG and PCI's Ohio counsel) did not receive the notice as mailed.

5. The Board and Department later received a duplicate of the notice of appeal within eight days of PCI receiving written notice of non-receipt and within two months of the statutory deadline for mailing the original notice of appeal.

6. The Department filed a motion to dismiss for lack of timely service.

7. In support of its motion to dismiss, the Department failed to offer any evidence or rebut in any way PCI's evidence of mailing. All it did was swear the Department and Board did not receive the notice of appeal as mailed.

8. The Department offered no evidence that it was prejudiced in any way by not receiving the notice of appeal as mailed or by later receiving the duplicate notice of appeal.

9. The trial court treated the motion to dismiss as one for summary judgment because of the supporting affidavits filed by both sides, but it did not conduct an evidentiary hearing.

10. At the conclusion of the hearing the court issued an oral ruling confirmed later by a written ruling denying PCI's motion for reconsideration concluding that because four parties did not receive the notice of appeal, "something happened to the letters before they got to the post office," *VRP at 28 cited in PCI Brief at 10*, and that the failure of delivery on the four parties "negate[s] the presumption and inference that the post office received these mailings." *CP 312(4-7) cited in PCI Brief at 11.* For that reason, the court dismissed the appeal.

The primary issue is whether the court's conclusion is warranted as a ruling on a motion for summary judgment. The Department supports the trial court determination as a "reasonable conclusion" based on the evidence before it. *Department Brief at 13.* Viewing the evidence in a light most favorable to PCI, as required on a motion for summary judgment, and for the following reasons, the Department is wrong.

The Department failed to address the recent *Klein* case that supports PCI. *Washington Federal Savings v. Klein*, 177 Wn. App. 22, 311 P.3d 53 (2013), *review denied* 179 Wn.2d 1019, 318 P.3d 280 (2014) (*cited and discussed by PCI in its Brief at pages 16-19*). The *Klein* court

held that when a statute requires only proof that a notice was mailed, not proof that it was received, evidence of non-receipt does not rebut proof of mailing. *Id. at 23*. Specifically, the court noted that when a legal assistant declares she has given notice by mailing, "it is reasonable to accept her statement as prima facie proof of mailing. To refute such a declaration, a creditor must do more than swear that the mail never arrived." *Id. at 31*. The Department never provided that proof and the trial court nevertheless erroneously sided with the Department.

The Department supports the trial court's decision by arguing it is "highly improbable" the post office would lose four separately addressed envelopes sent to four different locations. *Department Brief at 14*. But the trial court acknowledged the fallibility of the post office, *VRP 12(1-6) cited in PCI Brief at 26*, and the Department never presented any evidence of infallibility. Instead, and without any supporting evidence, the trial court speculated on the possibility that something happened to the letters before they got to the post office. The Department never addressed PCI's argument that it defies logic and common sense to believe PCI did "something" that explains the non-delivery of the letter to the parties when it is uncontroverted that the letter to the court was received and all of the letters were mailed on the same day, at the same time, at the same post office mail slot by the same person. *PCI Brief at footnote 7 on page 26,*

citing CP 263-265. Further, the trial court's conclusion is not warranted by the evidence before the court or by a reasonable inference from the evidence. *See arguments in support of those points in PCI Brief at 26-28.*

The Department's argument to the contrary should be rejected. It argues that the court's conclusion is a reasonable inference to draw from the facts and that neither the superior court nor this court has to accept as true allegations that are contradicted by the record and which no reasonable fact finder would believe, citing *Scott v. Harris*, 550 U.S. 372 (2007). *Department Brief at 14.* The standard on summary judgment, however, is that the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *See PCI Brief at 29-30 for law governing summary judgments.* Further, PCI did not make allegations, but instead submitted facts that were uncontroverted. This is not like the situation presented in *Scott v. Harris* where the plaintiff's account of a confrontation with police was conclusively refuted by a video tape recording of the event.[2] In sum, the trial court erred by granting summary judgment dismissing PCI's appeal.[3]

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[2] *Scott v. Harris*, 550 U.S. at 381: "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."

[3] At the very least, the correct action would have been to reserve the issue for trial. *Neuson v. Macy's Dept. Stores, Inc.*, 160 Wn. App. 786, 795-96, 249 P.3d 1054 (Div. 3,

II. PCI SUBSTANTIALLY COMPLIED WITH THE STATUTORY REQUIREMENTS.

The Department misstates the facts and misconstrues the doctrine of substantial compliance. While arguing correctly that "noncompliance with a statutory deadline is not substantial compliance," *Department Brief at 15*, the Department ignores the fact that PCI complied with the deadline by mailing the notice of appeal well before the deadline.[4] It then argues that since PCI did not serve the Board or the Director within 30 days, it did not substantially comply. *Id. at 16*. But the Department knows and has acknowledged that actual service is not required within 30 days.[5]

The Department disputes that *Graves v. Vaagan Bros. Lumber, Inc.*, 44 Wn. App. 908, 781 P.2d 895 (1989) is applicable and analogous as PCI contends. There, the court held that Graves' mailing of his notice of appeal to the court which, for some reason, failed to receive it substantially complied with the statutory time limit. *Id. at 913-14*. The

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2011), *review denied* 172 Wn.2d 1005 (2011)("Macy's evidence of mailing and receipt [of materials necessary to opt out of arbitration] and Ms. Neuson's evidence of non-receipt becomes a question of fact for the trier of fact. *Kuby v. Travelers Protective Ass'n of Am.*, 109 Wash. 453, 457, 187 P. 335 (1920); *Malloy v. Drumheller*, 68 Wash. 106. 117, 122 P.2d 1005 (1912); *Automat Co. v. Yakima County*, 6 Wn. App. 991, 995-96, 497 P.2d 617 (1972).")

[4] *See PCI Brief at 6*, entries for 8/7/13 and 9/5/13: the 30-day deadline was September 16, 2013 and PCI mailed the notice on September 5, 2013.

[5] *See Department Brief at 11*: "PCI correctly notes that service is effective upon placing the notice of appeal in the mail." *See also PCI's Brief at 14 -19* for discussion of the cases supporting this proposition.

same is true here where PCI mailed its notice to the required parties, thus complying with the statutory mandate, but because of some unknown procedural irregularity, the mail was not delivered as intended. The Department contends that, unlike *Graves*, "the evidence shows" that PCI's mailing never reached the mailbox. *Department Brief at 17.* As argued in the section above, PCI contends the trial court's conclusion to that effect is erroneous and is not supported by any fair consideration of the evidence before it. *Graves* is controlling and should be applied to rule that PCI substantially complied with the statute.

III. EQUITABLE CONSIDERATIONS SHOULD BE APPLIED TO ALLOW PCI'S APPEAL TO PROCEED TO THE MERITS.

PCI argues that Washington's policy of resolving disputes on the merits and principles of equity and justice mandate reversal. *PCI Brief at 23-25.* The Department argues the doctrine of equitable tolling is applicable and bars equitable considerations, citing *Danzer v. Dep't of Labor & Indus.*, 104 Wash. App. 307, 16 P.3d 35 (2000), *as amended (Jan. 19, 2001), review denied* 143 Wn.2d 1020 (2001). *Department Brief at 17-20.* That doctrine is not applicable to this appeal. *Danzer* acknowledged the doctrine had never been applied to a WISHA appeal and looked to similar federal cases involving OSHA violations, *Capital City Excavating Co. v. Donovan*, 679 F.2d 105 (6th Cir. 1982) and *Sec'y of*

Labor v. Barretto Granite Corp., 830 F.2d 396, 398-401 (1st Cir. 1987). Those cases deal with the failure of an employer to appeal an OSHA citation to the Commission within the strict limited time set by regulation and involve the unique reasons for that time limit. *Barretto Granite* at 399 ("ensuring employer compliance with the notice of contest deadline fixes the length of time employees may be exposed to a potentially hazardous situation by compelling prompt confrontation and abatement of violative conditions"). *Danzer* involves the same type of administrative appeal (from the Department's corrective notice of redetermination) within the same short time period.

By comparison, our case involves an appeal to court after the administrative appeal process is complete. The considerations for application of equitable tolling do not apply in that context. Rather, the clear equitable principles cited by PCI apply to this appellate process. *Graves*, *supra*, 55 Wn. App. at 912 ("[o]ther cases also indicate the general trend toward leniency concerning compliance with the necessary steps for invoking appellate jurisdiction") *discussed at PCI Brief at 22; see also PCI Brief at 23-25, 31.* Contrary to the assertion by the Department, these principles will not *always* permit untimely appeals to proceed to the merits. Equity implies discretion and consideration of the unique facts and circumstances before the court. Such consideration will

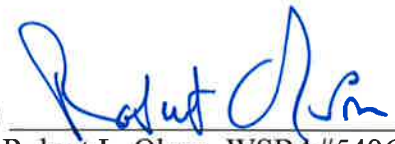
not result in *all* cases being allowed to proceed. But when the facts and circumstances justify relief, as they do here, the court has the discretion to apply equity to allow the appeal to proceed.

IV. CONCLUSION

For these reasons and the reasons provided by PCI in its Opening Brief, PCI respectfully requests this Court to reverse the summary judgment dismissing its appeal and allow the case to be considered on the merits.

Respectfully submitted this 26th day of November, 2014.

SCHLEMLEIN GOETZ FICK & SCRUGGS, P.L.L.C.

By: 

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DECLARATION OF SERVICE

I, Marlene Tibke, do hereby declare that;

1. I am an employee of Schlemlein Goetz Fick & Scruggs, P.L.L.C., and am now, and at all times material hereto was, a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-referenced action and competent to testify hereto.

2. On the date set forth below, I caused to be served a copy of the foregoing Reply Brief of Appellant upon the following party in the manner indicated:

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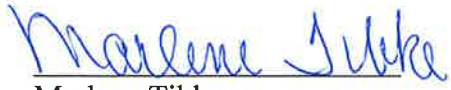
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 26th day of November, 2014.



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