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NO. 68738-7-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**BNCC, INC.,**

**Appellant**  
**(Defendant, Third-Party Plaintiff)**

**v.**

**ACCESS ELECTRIC SUPPLY, INC.**

**Respondent**  
**(Plaintiff, Third-Party Defendant)**

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**APPELLANT BNCC, INC.'S REPLY BRIEF**

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Ben D. Cushman  
Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia, WA 98501  
360/534-9183

Attorney for Appellant

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JL

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## I. INTRODUCTION

On November 16, 2011, the Trial court granted BNCC's Motion for Partial Summary Judgment and dismissed all of Access Electric's claims against BNCC. (CP 251-53.) In doing so, the Trial Court correctly noted that those claims had no basis in law. As a subtier subcontractor not in direct privity of contract with the general contractor (BNCC), the law provided two exclusive remedies to Access Electric – a statutory claim against the project bond, and a statutory claim against the retainage – which claims have a statutorily defined and required process. Access Electric failed to follow this process. Therefore, Access Electric lacked these claims. Rather than acknowledging that it lacked rights other than contractual rights to seek payment from the subcontractor with which it had privity of contract, Access Electric filed a shotgun complaint asserting a litany of claims against BNCC, all of which lacked merit. The Trial Court properly dismissed those claims.

BNCC thereafter sought an award of attorney's fees, costs and interest against Access Electric. There are at least two bases for such an award. First, Access Electric's claims were frivolous, entitling BNCC to attorney's fees under CR 11 and RCW 4.84.185. Second, Access asserted that it was a third-party-beneficiary of the contract between BNCC and

Kelly Electric (the subcontractor that failed to pay Access), thus exposing itself to attorney's fees if there is a contractual clause providing for award of attorney's fees in cases such as the one brought by Access. There is a clause providing for attorney's fees in cases brought by third-parties, including subtier subcontractors, against BNCC. This is a case brought by a subtier subcontractor against BNCC. Thus the contract provides for an award of fees, and Access Electric is subject to that clause by application of RCW 4.84.330, which is not discretionary.

Despite this, the Trial Court first erroneously denied this fee request and subsequently granted a dismissal of the fee request claim.

## **II. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

1. The trial court erred in failing to award fees to BNCC under CR 11 and RCW 4.84.185 and in subsequently dismissing that claim for attorney's fees.

2. The trial court erred in failing to award fees to BNCC under RCW 4.84.330 and in subsequently dismissing that claim for attorney's fees.

### III. RESTATEMENT OF THE CASE

BNCC is a general contractor primarily involved in public works in the State of Washington. BNCC contracted with Issaquah School District No. 411, to build Elementary School No. 15. BNCC subcontracted the electrical work to Kelly Electric, Inc. The subcontract included an indemnification addendum, stating:

Subcontractor agrees to defend, indemnify and hold harmless Contractor from any and all claims, demands, losses, and liabilities to or by third parties, arising from, resulting from, or connected with work performed or to be performed under this Subcontract by Subcontractor, its agents, employees and sub-tier subcontractors and suppliers of any tier, even though such claim may prove to be false, groundless or fraudulent, to the fullest extent permitted by law and subject to the limitations provided below.

The indemnification addendum specifically included attorney fees:

Defense cost recovery shall include all fees (attorneys and experts) and costs and expenses. In addition, Contractor shall be entitled to recover compensation for all of its in-house expenses (including materials and labor) consumed in its defense.

CP 40.

In turn, Kelly Electric entered a subtier contract with Access Electric for the supply of some electrical equipment. Kelly did not pay for this equipment. CP 1-5; 179-186.

On August 19, 2010, BNCC received a Notice of Claim Against Payment Bond:

NOTICE IS HEREBY GIVEN that the undersigned, Access Electric Supply, Inc., has a claim in the sum of \$49,866.00 against the bond taken from Babbit Neuman Construction Company for work performed by Access Electric Supply, Inc., on the Elementary School No. 15 Project.

CP 134. This was the first notice that BNCC had received from Access concerning its claims. Access had filed no pre-claim notice. As an equipment supplier, Access was obligated to provide a pre-claim notice. As a result, its statutory bond and retainage claim was improper and was properly denied by the bond company and BNCC. CP 140; CP 142.

On November 12, 2010, Access filed a complaint against BNCC, stating claims as follows:

5. BNCC entered in a subcontract agreement with Kelly Electric, (“the subcontract”). Under the terms of the subcontract, Kelly Electric was to perform electrical work and supply electrical equipment and materials in connection with the Elementary School No. 15 project.

6. The subcontract required that BNCC pay for all labor and materials provided under the subcontract. The subcontract also provided that such payments constitute a trust fund in favor of all materialmen and lower tier subcontractors.

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10. ... BNCC has not paid Access or Kelly Electric [pursuant to the terms of the subcontract] for the equipment which Access provided.

\*\*\*\*\*

13. BNCC would be unjustly enriched by being allowed to keep the monies that it received for the equipment provided by Access without paying Access or Kelly [pursuant to the terms of the subcontract] for that equipment.

\*\*\*\*\*

16. BNCC received progress payments from the Issaquah School District for work and materials performed and provided by BNCC's subcontractors and suppliers. Under the terms of the BNCC subcontract, those payments constituted a trust fund in favor of lower tier subcontractors and suppliers who are legally entitled to claim against subcontractors for work or materials provided under subcontract.

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21. Access is third party beneficiary to the subcontract between BNCC and Kelly Electric.

22. Access performed its contractual obligations. BNCC benefited from Access's performance.

23. BNCC breached its subcontract by failing to pay for the equipment and materials Access provided. Access would have benefited by BNCC fulfilling its obligations under the subcontract.

24. As third party beneficiary, Access is entitled to enforce the subcontract and compel payment by BNCC.

CP 1-5.

BNCC answered and counterclaimed on August 19, 2011. In its counterclaim, BNCC stated claims as follows:

8. Plaintiff has sued BNCC, making claims arising from the work performed under the subcontract.

9. Plaintiff failed to provide BNCC with preclaim notice, the only method provided for by law for a second-tier supplier to make claim against a general contractor for a subcontractor's failure to pay. Having failed to provide such preclaim notice, all of plaintiff's claims against BNCC are frivolous.

CP 6-11.

BNCC prayed for “interest, costs, and attorneys’ fees against Plaintiff as allowed by rule and statute, including CR 11 and RCW 4.84.185.” CP 11. Thereafter, BNCC successfully moved for summary judgment, seeking dismissal of all of Access’s claims against it. CP 12-19; CP 207-215; 239-246; CP 251-252. Next, BNCC unsuccessfully moved for summary judgment seeking an award of fees. CP 254-266; CP 274-307; 308-315; 321-322. Thereafter, Access Electric moved for Summary Judgment seeking dismissal of BNCC’s fee claim, which it had previously successfully resisted based on Access Electric’s assertion that a material factual dispute meant that a fee award was not ripe for summary resolution. CP 323-343. The trial court granted that motion, apparently without any legal analysis, but merely on the basis that any other ruling would not be “consistent” with the Court’s previous denial of BNCC’s Second Motion for Summary Judgment seeking fees. CP 371-372; (RP 4/13/2012, p. 17, l. 18 – p. 19, l. 15.)

#### IV. ARGUMENT

##### A. **The Standard of Review is *de novo***

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. Failor’s Pharmacy v. DSHS, 125 Wn.2d 488 at 493, 886 P.2d 147 (1994

"When a trial court rules as a matter of law, it must accept the [non-moving party's] evidence as true, and determine whether or not the [non-moving party] has a prima facie case." Spring v. Department of Labor and Industries, 96 Wn.2d 914, 918, 640 P.2d 1 (1982). The trial court should not make factual determinations or evaluate the non-moving party's evidence, except as may be necessary to favorably resolve conflicts appearing therein. *See* Spring v. Dept. L&I, 96 Wn.2d at 918.

On these principles, the summary judgment in favor of Access Electric was improper and should be reversed by this Court with a remand for such further proceedings as are necessary. However, summary judgment in favor of BNCC on the merits was properly granted, and based on that ruling BNCC is entitled to fees (at least on the third-party beneficiary claim) as a matter of law. Therefore, this Court should reverse and remand for a determination and award of fees to BNCC.

**B. CR 11 and RCW 4.84.185**

The basic standard under both these rules is identical – a lawsuit is frivolous if a reasonable inquiry would show that it is not “well grounded in fact and is [not] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, [or] that it is [] interposed for any improper purpose.”

In this case, while Access Electric has a good claim against Kelly Electric, Access had no proper claim against BNCC. Despite that, Access sued BNCC on several specious claims, all of which were properly dismissed. In reaching that result, BNCC incurred substantial attorney's fees. BNCC is entitled to an award of attorney's fees so incurred.

[A] defendant drawn into an action without reasonable cause and subjected to claims against it that, considered as a whole, are frivolous, may be awarded expenses under RCW 4.84.185, regardless of the merit of the plaintiff's claims against other defendants.

Eller v. East Sprague Motors & R.V.'s, Inc., 159 Wn. App. 180, 194, 244 P.3d 447 (2010).

To recover fees, BNCC must simply show that Access Electric's claims were not well grounded in fact or law, or made with a good faith argument for the extension or modification of existing law. BNCC has so shown. Access Electric did not file a pre-claim notice. The statute reads:

[N]o suit or action shall be maintained in any court against the retained percentage to recover for such materials, supplies, or provisions or any part thereof unless the provisions of this section [requiring pre-claim notice] have been complied with.

RCW 60.28.015.

Access Electric's primary argument on appeal is that the decision to impose sanctions under CR 11 or RCW 4.84.185 is generally discretionary. BNCC agrees.

However, both CR 11 and RCW 4.84.185 prescribe a legal analysis which the Trial Court is to use when exercising its discretion. The Trial Court's discretion is to be applied only in the context of this analysis and only based on that analysis. In this case, the Trial Court did not conduct the prescribed analysis. This was error, and as a result any ruling on the fee request under CR 11 and RCW 4.84.185 was tainted by that error. The proper remedy is a remand with instructions that the Trial Court conduct the proper analysis and only then exercise its discretion. This might not change the outcome of the ruling, but BNCC is entitled to insist that any discretionary ruling against it be based on the proper legal and factual basis and analysis. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210 at 222, 829 P.2d 1099 (1992); Operating Engineers Pension Trust v. A-C Co., 859 F.2d 1336 at 1345 n. 13 (9<sup>th</sup> Cir. 1988).

Here, the Trial Court granted Access Electric's Motion for Summary Judgment merely because it believed that such a ruling, and no other ruling, would be "consistent" with its previous denial of BNCC's Second Motion for Summary Judgment. That basis is clearly improper, failing to apply any of the factors required in the Joseph Tree analysis. Consistency in error is worse than inconsistency – but that is what the Trial Court's ruling amounts to.

C. **Third-Party-Beneficiary Claim.**

RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

This statute applies here.

RCW 4.84.330 applies here and, unlike fees under CR 11 and RCW 4.84.185, fees under RCW 4.84.330 are not discretionary:

The language of RCW 4.84.330 is mandatory; it does not allow for an exercise of discretion in deciding whether to award fees. The only discretion is as to the amount. Farm Credit Bank v. Tucker, 62 Wn. App. 196, 207, 813 P.2d 619 (1991). The contract containing the attorneys fees provision must be central to the controversy. Hemenway v. Miller, 116 Wn.2d 725, 742, 807 P.2d 863 (1991).

CHD, Inc. v. Boyles, 138 Wn. App. 131, 140-41, 157 P.3d 415, 419 (2007).

The key issue on appeal is interpretation of the applicable subcontract clause providing for attorney's fees (the indemnification addendum). This is a pure legal matter of interpreting a written contract. The parties on appeal interpret the clause differently. This Court must

read the clause and determine which interpretation is correct. If BNCC's reading is right, then BNCC is entitled to fees and that award is mandatory.

The clause reads:

Subcontractor agrees to defend, indemnify, and hold harmless Contractor for any and all claims...by third parties arising from ...work performed...under this Subcontract...even though such claim may prove to be...groundless..., to the fullest extent permitted by law....

CP 40.

The indemnification addendum also specifically defines defense cost recovery as including "all fees (attorneys and experts) and costs and expenses." CP 40.

Access Electric argues that this clause is inapplicable to third party claims when the third party claimant is a subtier subcontractor or supplier. There is nothing in this clause providing for any such limitation. Access Electric further argues that the clause, even though it provides for a recovery of attorney's fees, does not relate to "attorney's fees incurred to enforce the contract." There is nothing in the clause providing for this limitation either. On its face, the clause provides for an award of fees incurred defending against claims relating to the subcontract brought by a third party. Access Electric is a third party to the subcontract. Access

Electric, by asserting a third-party-beneficiary claim (albeit an improper third-party-beneficiary claim) required BNCC to incur the costs of defense of a claim relating to the subcontract brought by a third-party. The clause applies and provides for the mandatory award of attorney's fees and other costs to BNCC.

Further, that entitlement to attorney's fees runs against Access Electric, not merely against Kelly Electric. In Washington, third-party litigants cannot assert improper contract rights and claims with impunity. Asserting a claim for contract rights exposes the party asserting them to contractual attorney's fee provisions even if the contract does not apply or even exist. Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn. App. 188, 194-97, 692 P.2d 867 (1984). If the Plaintiff could have recovered contractual attorney's fees if the Plaintiff had prevailed on the claim, then a prevailing defendant is entitled to fees. Third-party-beneficiaries are entitled to contractual attorney's fees if they prevail. Deep Water Brewing, LLC, v. Fairway Res. Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024, 230 P.3d 1038 (2010). Therefore Access Electric is also exposed to the attorney's fees incurred by BNCC in its successful defense.

C. **Fees on Appeal**

RAP 18.1 allows the award of attorney fees on appeal if authorized by applicable law. A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. Marassis v. Lau, 71 Wn. App. 912, 920, 859 P.2d 605 (1993). For the reasons stated above, BNCC requested and continues to request an award of fees on appeal as well as fees below.

**V. CONCLUSION**

Access Electric would have had a remedy against BNCC for the breaches by either Kelly Electric, Inc., or South County Builders, Inc., dba Kelly Electric under the public works bond and retainage statutes if it had submitted a proper pre-claim notice. Access failed to do so. These are exclusive remedies. The statute is very clear: “no suit or action shall be maintained in any court against the contractor or his or her bond to recover for such materials, supplies, or provisions or any part thereof unless the provisions of this section have been complied with.” RCW 39.08.065.

Despite this clear prohibition, Access filed a frivolous suit asserting multiple improper claims against BNCC. All of those claims were foreclosed; and all of these claims were properly dismissed.

However, the Trial Court's subsequent refusal to award fees to BNCC was improper.

While the Trial Court had discretion under CR 11 and RCW 4.84.185, it was an abuse of discretion for the Trial Court to fail to follow the prescribed legal analysis for such fee awards. The remedy is to remand to the Trial Court with instructions that it perform the proper analysis.

The Trial Court's refusal to award fees under RCW 4.84.330 is a different matter and requires no remand. Such an award is mandatory. This Court should simply reverse the Trial Court and award fees incurred by BNCC on appeal and below.

SUBMITTED this 7<sup>th</sup> day of November, 2012.

CUSHMAN LAW OFFICES, P.S.



Ben D. Cushman, WSBA #26358  
Attorney for Appellant BNCC, Inc.

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On November 7, 2012, I caused the foregoing document to be sent through Legal Messengers Inc., for filing with this Court and service upon the party as listed below:

Attorney for Respondent Access Electric  
WSBA ##19399  
Michael H. Ferring  
Ferring & DeLue LLP  
600 Stewart St., Suite 1115  
Seattle, WA 98101-1242



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Doreen Milward, Paralegal

Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia, WA 98501  
360/534-9183