

68738-7

68738-7

NO. 68738-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BNCC, INC.,
Appellant
(Defendant, Third-Party Plaintiff)

v.

ACCESS ELECTRIC SUPPLY, INC.
Respondent
(Plaintiff, Third-Party Defendant)

BRIEF OF RESPONDENT ACCESS ELECTRIC SUPPLY, INC.

Michael H. Ferring
Ferring & DeLue LLP
600 Stewart Street, Suite 1115
Seattle, WA 98101
(206) 508-3804
Attorney for Respondent

01/08/10 6:10:10
2010-01-08 10:10:10
[Signature]

TABLE OF CONTENTS

	<u>PAGE</u>
I. STATEMENT OF THE CASE.....	1
II. ASSIGNMENTS OF ERROR.....	2
III. ARGUMENT.....	2
<i>There was no Error or Abuse of Discretion by the Trial Court in Refusing to Award Attorneys' Fees under CR 11 or RCW 4.84.185</i>	2
<i>Unjust Enrichment</i>	4
<i>Third Party Beneficiary</i>	5
<i>Trust Claim</i>	6
<i>BNCC is not Entitled to Attorneys' Fees Under RCW 4.84.330</i>	8
IV. CONCLUSION.....	11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>page</u>
<u>Bryant v. Joseph Tree, Inc.</u> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	3
<u>Consulting Overseas Management v. Shtikel</u> , 105 Wn.App. 80, 18 P.3d 1144 (2001).....	7
<u>Failor’s Pharmacy v. DSHS</u> , 125 Wn.2d 488, 886 P.2d 147 (1994).....	3
<u>Irwin Concrete v. Sun Coast Properties</u> , 33 Wn.App. 190, 653 P.2d 1331 (1982).....	5
<u>Lonsdale v. Chesterfield</u> , 99 Wash.2d 353, 361 662 P.2d 385 (1983).....	6
<u>North Pacific Plywood, Inc. v. Access Road Builders, Inc.</u> , 29 Wn.App. 288, 236, 628 P.2d 482 (1981).....	8
<u>Operating Engineers Pension Trust v. A-C Co.</u> , 859 F.2d 1336 (9 th Cir. 1988).....	3
<u>Stiles v. Kearney</u> , 168 Wn.App. 250, 277 P.3d 9 (2012).....	3, 4
<u>Watkins v. Restorative Care Center, Inc.</u> , 66 Wn.App. 178, 831 P.2d 1085 (1992).....	11
<u>Young v. Young</u> , 164 Wn.2d 477, 191, P.3d 1258 (2008).....	4-5

<u>Statutes</u>	<u>page</u>
RCW 4.84.185.....	2, 3
RCW 4.84.330.....	2, 8, 9, 10, 11
RCW 39.08.065.....	1

I. STATEMENT OF THE CASE

Respondent Access Electric Supply, Inc. (“Access”) is a company which sells electrical machinery and equipment. Access provided equipment to Kelly Electric, Inc. (“Kelly”) for a construction project for the Issaquah School District. Kelly was electrical subcontractor to Appellant BNCC, Inc. (“BNCC”), the general contractor to the School District. The equipment which Access provided was accepted and installed as part of the project and had a cost of \$49,866. BNCC was paid for the equipment by the school district, but Access never received payment.

Access sued Kelly and BNCC to obtain payment. The complaint against BNCC included causes of action for unjust enrichment, constructive trust and third party beneficiary. BNCC filed a Motion for Summary Judgment asking that Access’s claims be dismissed because Access had not filed the notice required by RCW 39.08.065. In granting BNCC’s motion for summary judgment, Judge Yu held that despite making “a compelling argument”, Access could not recover from BNCC because Access had not provided notice to BNCC before providing the equipment. (RP 11/16/2011, page 25, lines 9-11).

BNCC filed a second motion for partial summary judgment seeking the award of attorneys' fees under CR 11, RCW 4.84.185, and RCW 4.84.330. Judge Benton denied that motion. Although the effect of the ruling was to dismiss BNCC's counterclaim for fees, BNCC would not agree to dismiss the claim. Access then brought a motion for summary judgment dismissing BNCC's counterclaim for attorneys' fees and Judge Benton granted that motion.

II. ASSIGNMENTS OF ERROR

Respondent assigns no error to the ruling of the trial court and asks that the order of the trial court granting Respondent's Motion for Summary Judgment be affirmed.

III. ARGUMENT

There was no Error or Abuse of Discretion by the Trial Court in Refusing to Award Attorneys' Fees under CR 11 or RCW 4.84.185

Appellant alleges error by the trial court for refusing to award fees under CR 11 and RCW 4.84.185. Appellant goes on to explain the issues pertaining to that assignment of error, arguing that the trial court has only "bounded discretion" with respect to the denial of fees under CR 11 or RCW 4.84.185, and further argues that it is reversible error for the trial court to exercise its discretion without engaging in the "required legal

analysis.” Appellant provides little authority or argument in support of its position.

With respect to the “bounded discretion” that a trial court is alleged to have with respect to the awarding of fees, the Appellant provides no explanation for that argument and cites no authority for that proposition. With respect to the “required legal analysis” that it argues must be applied, Appellant cites cases which do not support its argument. Both the *Bryant* case and the *Operating Engineers Pension Trust* case dealt with review of the imposition of sanctions, not review of the denial of sanctions as is the case here.

The Appellant seeks to have this court revisit the denial of sanctions through application of an improper standard, i.e. de novo review. It cites one case in support of its argument, *Faylor’s Pharmacy v. DSHS*, 125 Wn.2d 488, 886 P.2d 147 (1994), a case which did not deal with sanctions. The law in Washington is clear; the imposition of sanctions under CR 11 and RCW 4.84.185 is reviewed for an abuse of discretion. *Stiles v. Kearney*, 168 Wn.App. 250, 277 P.3d 9 (2012). It is self-evident that the denial of sanctions would not be reviewed more strictly by an appellate court, thus the proper standard for this Court to apply is whether the trial court abused its discretion in refusing to impose sanctions.

A trial court abuses its discretion only if its order is manifestly unreasonable or is based on untenable grounds, *Stiles, supra*. By any standard Respondent provided clear basis and rationale for its causes of action at the trial court level in at least three instances and there was no abuse of discretion. Respondent's response in opposition to the BNCC Motion for Partial Summary Judgment sets out on pages 3-7 a detailed explanation and analysis of the causes of action raised in the complaint. (CP 209-213). Pages 6-8 of Respondent's Response in Opposition to the BNCC Second Motion for Summary Judgment, again explain in detail the legitimacy and bases for its causes of action. (CP 279-281). Finally, pages 3-5 of Respondent's own Motion for Summary Judgment again lays out the justification and rationale for the causes of action set out in the complaint. (CP 325-327).

Respondent's complaint included causes of action under theories of unjust enrichment, third party beneficiary, and constructive trust. Each is explained below.

Unjust Enrichment

Under Washington law, a claim for unjust enrichment is established when 1) the defendant receives a benefit 2) the received benefit is at plaintiff's expense, and 3) the circumstances make it unjust for the defendant to retain the benefits without payment. *Young v. Young*, 164

Wn.2d 477, 191, P.3d 1258 (2008). Subcontractors may pursue recovery through unjust enrichment even when lien claims are unsuccessful. *Irwin Concrete v. Sun Coast Properties* 33 Wash App 190, 653 P.2d 1331 (1982)

It is undisputed that Respondent's claim satisfies the first two conditions. BNCC clearly received a benefit. They received approximately \$50,000 worth of electrical equipment and were paid for the equipment by the school district but did not pay either their electrical subcontractor or Access, the supplier of the equipment. By any measure that is a benefit received.

The second condition for unjust enrichment is also met. The benefit received by BNCC was at Access' expense. Access is out of pocket approximately \$50,000. Finally, Respondent presented ample explanation as to why it was unjust for BNCC to retain the payment.

Third Party Beneficiary

The subcontract between BNCC and Kelly required that Kelly perform the electrical work on the project, that BNCC pay Kelly the subcontract price and that Kelly pay for all labor, equipment and supplies. The subcontract also specifically provides that the payments by BNCC to Kelly constitute a trust fund in favor of lower tier subcontractors and materialmen such as Access. Had BNCC paid Kelly for the equipment

which Access provided, the payment would have been in trust for the benefit of Access.

Access asserted a cause of action as a third party beneficiary based on the language in the subcontract. Had the parties complied with the terms of the subcontract, Access would clearly have benefitted. The rule was explained by the Supreme Court in *Lonsdale v. Chesterfield* 99 Wash 2d 353, 361, 662 P.2d 385 (1983). Where the Court quoted from *Vikingstad v. Baggott* 46 Wash 2d 494, 282 P.2d 824 (1955):

So long as the contract necessarily and directly benefits the third person, it is immaterial that this protection was afforded..., not as an end in itself, but for the sole purpose of securing to the promisee some consequent benefit or immunity. In short, the motive, purpose, or *362 desire of the parties is a quite different thing from their intention.

The Court went on to explain that determination of third party benefit's status depends on whether "performance under the contract would necessarily and directly benefit the petitioners." The Court concluded that the third party beneficiary claim was valid. Likewise, in this case, performance of the subcontract agreement would have necessarily and directly benefited Access, so their third party claim was legitimate.

Trust Claim

As noted, the subcontract between BNCC and Kelly required that

BNCC make progress payments to Kelly and specifically provides that those progress payments are a trust for the benefits of lower tier subcontractors and materialmen such as Access.

Based on the language of the subcontract, Respondent argued that an express trust was created with respect to progress payments made by BNCC to Kelly. Coupling that language with the other factors such as payment (and non-payments) by BNCC show both the contract and equity required that a constructive trust be imposed for the benefit of Access. A constructive trust is an equitable remedy that compels restoration when one party gains something which in equity and good conscience he should not be permitted to hold. *Consulting Overseas Management v. Shtikel* 105 Wash App 80, 18 P.3d 1144 (2001).

While the trial court may not have provided any detailed analysis of its consistent rejection of Appellant's argument, the record at the trial court level contained adequate bases for the trial court's rejection of BNCC's request. It should be noted that even the cases which BNCC cites stand only for the proposition that findings are necessary in cases where a trial court intends to impose sanctions; the cases do not support the claim that such findings are necessary if sanctions are denied.

BNCC is not Entitled to Attorneys' Fees Under RCW 4.84.330

Appellant's final assignment of error is their argument that the addendum provision of their subcontract with Kelly entitled them to recover attorneys' fees under RCW 4.84.330. The trial court correctly rejected that argument.

It settled Washington law that absent a contractual provision, statute, or well recognized principle of equity to the contrary, a prevailing party has no right to recover attorneys' fees. *North Pacific Plywood, Inc. v. Access Road Builders Inc.*, 29 Wn.App. 228, 236, 628 P.2d 482 (1981). BNCC attempted to avoid the well-established general rule and recover under RCW 4.84.330 by misconstruing the statute and the subcontract between BNCC and Kelly Electric.

RCW 4.84.330 is a statute which provides that a unilateral attorneys' fees provision in a contract must be applied bilaterally:

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.

The statute covers a contract which "specifically provides" that attorneys' fees incurred "to enforce the provisions of such contract" shall

be awarded to one of the parties. The subcontract agreement between BNCC and Kelly does not contain such provision, is not covered by RCW 4.84.330, and does not entitle BNCC to recovery.

Lacking an attorneys' fees clause in the subcontract, BNCC relies on the Indemnification Addendum as the basis for its argument. The Indemnification Addendum to the Subcontract includes the following pertinent language:

Subcontractor agrees to defend, indemnify and hold harmless Contractor from [sic] 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 [sic] permitted by law and subject to the limitations provided below.

Subcontractor's duty to indemnify Contractor shall not apply to liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of Contractor or its agents or employees. Subcontractors [sic] duty to indemnify Contractor for liability for damages arising out of [sic] of the bodily injury to persons or damage to property caused by or resulting from the concurrent negligence or (a) Contractor or its agents or employees, and (b) Subcontractor or its agents or employees and sub-tier subcontractors and suppliers of any tier shall apply only to the extent of negligence of Subcontractor, its agents, employees and sub-tier subcontractor and suppliers of any tier.

...

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.

The indemnification requirement of the subcontract is not a provision covered by RCW 4.84.330. It is a clause which requires indemnification from third party personal injury or property damage claims arising from work performed by Kelly. It does not relate to attorney's fees incurred to enforce the contract. The only reference to attorney fees is the definition of defense costs which are not even mentioned in the basic indemnification provision. Since the subcontract does not contain a unilateral attorneys' fees clause, RCW 4.84.330 is not applicable.

There are critical distinctions between this case and those cited by BNCC. The cases which they cite involve attorneys' fees provisions which are covered by RCW 4.84.330, and situations in which the attorneys' fees provision was enforced against one of the parties to the contract or agreement which contained that provision. This is a case with no contract provision covered by the statute and an attempt to misconstrue that contract and enforce the contract against a non-party to the agreement.

In their motion BNCC argues, without explanation, that had Access prevailed in its claims it would have been entitled to recover attorneys' fees. That statement is incorrect. The indemnification clause upon which BNCC relies simply does not cover the situation presented by this case and would not support a claim by Access for recovery of fees. Access did not request attorneys' fees in its complaint because there is no

basis for recovery of attorneys' fees.

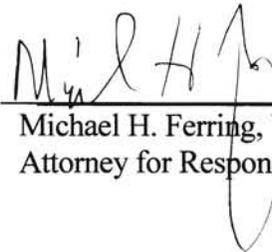
The correct rule to be applied in this situation was set out in *Watkins v. Restorative Care Center, Inc.*, 66 Wn.App. 178, 831 P.2d 1085 (1992), wherein the Court denied a request for attorneys' fees from a non-party to the contract, pointing out that "it would be both unfair and contrary to law to enforce the attorneys' fees provision negotiated between the Pavloffs and RCC against the Watkins, who were strangers to the agreement." The subcontract between BNCC and Kelly does not include language covered by RCW 4.84.330 so BNCC's attempt to create an attorneys' fee provision and enforce it against Access, also a stranger to the agreement, must fail.

IV. CONCLUSION

For the reasons set out herein, this appeal should be denied and the actions of the trial court affirmed.

SUBMITTED this 8th day of October, 2012.

FERRING & DELUE LLP



Michael H. Ferring, WSBA #19399
Attorney for Respondent

DECLARATION OF SERVICE

I, INGA SHIGETANI, declare under penalty of perjury under the laws of the State of Washington, that on October 8, 2012, I caused to be served on the person(s) listed below in the manner shown:

BRIEF OF RESPONDENT ACCESS ELECTRIC SUPPLY, INC.

DATED this 8th day of October, 2012.

FERRING & DELUE LLP



Inga Shigetani

SERVICE LIST

Attorneys for Defendants BNCC:

Ben D. Cushman, WSBA #26358
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

- United States Mail, First Class
- Legal Messenger
- Facsimile
- E-mail