No. 1029802

SUPREME COURT
OF THE STATE OF WASHINGTON

PARK SOUTH, LLC,

Respondent / Plaintiff,

v.

DENALI CONSTRUCTION, LLC; TAYLOR MOUNTAIN, LLC; and RICHARD LUDWIGSEN,

Petitioners / Defendants.

PARK SOUTH, LLC'S ANSWER TO PETITION FOR REVIEW

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SUMMARY

Petitioner Darren Ludwigsen ("Ludwigsen") signed a Real Estate Purchase and Sale Agreement – and integrated Settlement Agreement ("PSA-SA") on September 6, 2019, which resolves and disposes of all the issues between the Parties, and which the trial court refused to enforce. (Ex P-14)

The Court of Appeals held, *inter alia*, that the PSA-SA is valid and enforceable.

Attempting to manufacture a basis for further review under RAP 13.4(b), Petitioners broadly misstate the record: damages for the wrongful lis pendens were expressly sought at trial; and error was specifically assigned to the findings and conclusions supporting the trial court's award of $432,000 in damages for unjust enrichment.

Park South sought $491,083.13 in damages for the wrongful lis pendens, both in its trial brief (CP 1163-1164), and in closing argument, for the "period of the 14 months from May of '21 until now, that the lis pendens has been on the property." (RP at 304 *ll* 12-16)

Park South assigned error to, *inter alia*:

> **9.** Findings 14, 15, 16, 19, 20, 21, 22, 23, 24, and 25; TM / Denali Begin Work, and Billing For Work Completed. (Ex P-64, D-108, D-109, D-110, D-111, D-112, D-113)
>
> **10.** Findings 14 ~ 25; Conclusions 'D' 1, 2, 3, 4, and 5; 'F' 1, 2, 3, 4, 6, 7, and 10. AHBL Engineers Continued To Work For Taylor Mountain To Implement The Plat Modification. (Ex D-191, D-192, D-193, D-154, D-155, D-156, D-157, D-158)
>
> **11.** Findings 24, 25, 27, 28, 29, 31, 60, and 61; Conclusions 'D' 1-5; 'F' 1-10. Taylor Mountain Demanded $311,600 Increase to Contract Price, Park South Refused. (Ex D-145, D-114, P-10, D-115, P-2, P-67, D-126)
>
> **12.** Findings 25, 26, 27, 28, 29, 41, and 49; Conclusions 'C' 1; 'J' 1. Last day subcontractors worked was August 9, 2019. (Ex P-69, P-15, P-16, D-143)
>
> **13.** Findings 9, 20-23, 25-29, 31, 47-58, 60-61; Conclusions 'C' 1-17; 'E' 1-6; 'J' 1. Denali Filed Claim of Lien as to .9041 Parcel. Denali Filed Lis Pendens As to Five (5) Parcels It Performed No Work On. (Ex P-2, P-28, Supp. Desig. CP – SN 55 Exh. B Lis Pendens)

[Appellant's Brief at 7-9]

The PSA-SA is valid and enforceable, and comprehensively covers all of Petitioners' claims in the instant matter. The trial court erred in refusing to enforce the PSA-SA, and the Court of Appeals was correct to reverse that trial court

error. The Court of Appeals' Decision does not contradict published case law, and resolution of a private contract dispute among businesses does not implicate any matter of broad importance or public policy. For the reasons set forth *infra*, this Petition for Review should be denied.

STATEMENT OF THE CASE

A. November 18, 2018, Joint Venture Agreement ("JVA").

"Park South, LLC (hereinafter "Park South") and Taylor Mountain LLC (hereinafter "Developer"), [] enter into this contractual agreement[.]" [Ex. P-2 / D-106 at 1]

"Park South agrees to pay up to but not more than $1,000,000.00 [] to develop … Taylor Cottages Plat Phase 6 … in accordance with AHBL Engineers engineered plans and specifications[.]" [Ex. P-2 / D-106 at 1]

"The Developer shall be ultimately responsible for the faithful performance of all terms, covenants and conditions of this Agreement, notwithstanding the Developer's delegation to another of the actual performance of any covenant or conditions hereof." [Ex. P-2 / D-106 at 1.6.1]

"The Developer shall hold [] Park South harmless against any claims made by Developer's contractors." [Ex. P-2 / D-106 at 1.6.5]

"Park South agrees not to sell the Future Subdivision Land to a third party without, first, offering the Developer the sole and exclusive right to purchase the property from the Park South at the same price and under similar terms." [Ex. P-2 / D-106 at 1.9]

JVA is signed by Ludwigsen, who is Taylor Mountain's registered agent, on behalf of Taylor Mountain, and dated November 18, 2018. [Ex. P-2 / D-106 at 6]

B. November 20, 2018, Subcontract "To Develop… Phase 6… per Section 1.1 of the Joint Venture & Construction Agreement[.]"

> THIS … Subcontract, is made between: DEVELOPER: TAYLOR MOUNTAIN LLC[,] 3020 Issaquah-Pine Lake Road # 394, Sammamish, WA 98075[,] And: SUBCONTRACTOR: **DENALI CONSTRUCTION**[,] **3020 Issaquah-Pine Lake Road # 394**, **Sammamish, WA 98075**[,] … Email: **info@denaliinternational.com**[,] Contact: **Darren Ludwigsen**
> The DEVELOPER (herein referred to as DEVELOPER), for the full, complete, and faithful performance of this SUBCONTRACT, agrees to pay the SUBCONTRACTOR in the amount of **One Million Dollars (Sl,000,000.00) plus sales tax**

> **where applicable** subject to increase or decrease only by written change order.
> Job: **To Develop Taylor Cottages Phase 6 to finished lots per Section 1.1 of the Joint Venture & Construction Agreement, Attached hereto as Exhibit A and all attachments to said Agreement attached as Attachment A**[.]
> …
> SUBCONTRACTOR: DENALI CONSTRUCTION[,] By: [signature] Printed Name: Darren Ludwigsen[.]

[Ex. P-3 / D-144] (**emphasis** in original)

Incorporated as part of the JVA and the Subcontract was a "cash flow budget" [see D-108], as follows:

Activity	18-Nov	18-Dec	19-Jan	19-Feb	19-Mar	19-Apr	19-May	19-Jun	19-Jul	19-Aug	Total
Preconstruction & Permits	$ 18,000.00	$ 12,000.00									$ 30,000.00
Engineering/Surveying	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 5,000.00	$ 50,000.00
Mobilization	$ 30,000.00	$ 30,000.00									$ 60,000.00
Clearing		$ 23,250.00									$ 23,250.00
Mass Excavation			$ 154,000.00	$ 124,000.00	$ 98,000.00				$ 67,500.00	$ 67,500.00	$ 511,000.00
Sewer				$ 58,000.00	$ 30,000.00				$ 18,000.00		$ 106,000.00
Storm					$ 48,000.00	$ 20,000.00			$ 6,800.00		$ 74,800.00
Water						$ 70,000.00			$ 15,000.00		$ 85,000.00
Crossing Culverts									$ 42,000.00		$ 42,000.00
Final Grade									$ 30,000.00	$ 20,200.00	$ 50,200.00
Final Sub-Base Prep									$ 48,665.00		$ 48,665.00
Curb/Gutter/Sidewalk Concrete									$ 97,216.14		$ 97,216.14
Paving Prep									$ 10,000.00		$ 10,000.00
Paving										$ 83,700.00	$ 83,700.00
Waste Fill Export									$ 50,000.00	$ 50,000.00	$ 100,000.00
Close out										$ 10,000.00	$ 10,000.00
Total	$ 53,000.00	$ 70,250.00	$ 159,000.00	$ 187,000.00	$ 181,000.00	$ 95,000.00	$ 5,000.00	$ 5,000.00	$ 390,181.14	$ 236,400.00	$ 1,381,831.14
										BUDGET	$ 1,000,000.00
										DELTA - ACTUAL	$ (381,831.14)

[Ex. D-148]

C. Ludwigsen Sent Park South Invoices; Park South Wrote Checks To Taylor Mountain At Ludwigsen's Direction.

The first Invoice sent to Park South under the JVA, dated December 20, 2018, was issued by Ludwigsen on "Denali

Construction" letterhead. [Ex. D-108] Each of the line items states that it is "per approved cash flow budget". [Id.]

Pursuant to the JVA, Park South subtracted 5% retainage, and paid the balance due of $66,737.50, via check written to Denali. [See Ex. D-107, D-108]

Shortly thereafter, via email, Park South was directed to "Please make all future checks payable to: Taylor Mountain LLC". [Ex. D-107]

On January 20, 2019, Ludwigsen sent Park South a Denali invoice for $137,750, for payment pursuant to the above 'approved cash flow budget'. [Ex. D-109, D-148]

On February 20, 2019, Ludwigsen sent Park South a Denali invoice for $112,100, for payment expressly pursuant to "January Cash Flow" and "Feb Cash Flow". [Ex. D-110, D-148]

On March 20, 2019, Ludwigsen sent Park South a Denali invoice for $131,100, for "Taylor Mountain – Phase 1" [D-110, D-148]

On April 20, 2019, Ludwigsen sent Park South a Denali invoice for $209,950, seeking payment for line items from the 'cash flow budget'. [Ex. D-112, D-148]

On May 28, 2019, Ludwigsen sent Park South a Denali invoice for $57,672.14, but only $20,100 were allowable pursuant to the JVA. [See Ex. D-113, P-2 at 1.1] Park South subtracted $25,000 for the line item "Earnest Money", and $12,572.14 for the cost of permits and traffic studies incurred prior to the date the JVA was signed, and paid the $20,100 actually owed. [Ex. D-113]

D. Ludwigsen Demands $313,600 Increase To Contract Price; Park South Refuses.

On June 24, 2019, Ludwigsen sent Park South an email in which he demanded payment of the remaining $292,012.50 of the $1,000,000 budget under the JVA, plus an additional $311,600, above the $1,000,000 contract price, in order to complete the project. [Ex. D-114, D-115] On June 26, 2019, Park South responded to Ludwigsen's email:

> I want to be accommodating but, at the outset, there were two buyers for this property. I went with you because of our relationship. Now I'm providing funds in which to complete a development where you agreed to sell finished lots to an arranged buyer. We agreed to meet certain qualification in which to make this happen. We have $292,012.50 remaining. At this time, I am unable to undertake any variations.

[Ex. D-115]

Recall that on May 28, 2019, Ludwigsen included within a Denali invoice to Park South $12,572.14 for the cost of permits and traffic studies incurred prior to the date the JVA was signed. In an "Invoice" dated "07/20/2019" with "DUE DATE 08/05/2019", Ludwigsen re-billed Park South $12,572.14 expressly for the same disallowed line items on the May 28, 2019, Invoice. [Ex. P-11]

Then, in a second "Invoice" dated "07/20/2019" with "DUE DATE 08/05/2019", Ludwigsen billed "$497,176.53" for a single line item: "Change of Conditions Imposed by Spokane County. Refer to Work Estimate Attached hereto for detailed breakdown." [Ex. D-12] No "Work Estimate" was attached. [Id.]

Spokane County "imposed" no "change of conditions", and Ludwigsen repudiated this contention, and many other allegations, as part of the Purchase and Sale Agreement and Settlement Agreement he executed and which became effective on September 6, 2019. [Compare Ex. P-13 with P-14 at 10 *ll* 6-13]

Ludwigsen wrote in an email dated August 5, 2019, "today is the first day we have pulled of the job." [Ex. P-69]

E. The Parties Execute the September 6, 2019, Purchase and Sale Agreement and Settlement Agreement [PSA-SA].

"Buyer is purchasing the property, expressly, on an "as-is" basis." [Ex. P-14 at 11 *ll* 6-9]

"Buyer herby [sic] gives written notice to seller that the property meets all of the conditions as intended." [Ex. P-14 at 8 *ll* 5-6]

> All previous agreements and contractual obligations between the parties, including those expressed by and contained in the Joint Venture & Construction Improvement Agreement between Park South LLC, Taylor Mountain LLC and Denali Construction LLC, **are superseded and supplanted by this agreement upon the execution of this agreement contract**.

[Ex. P-14 at 11 *ll* 12-16]

F. Ludwigsen Failed to Obtain Financing.

Ludwigsen failed to fund the property transaction, as noted by the escrow agent. [Ex. P-22, P-23] The escrow agent, pursuant to the written directions, released the $25,000 in earnest money to Park South after the December 16, 2019, closing date. [Ex. P-22, P-23]

Thereafter, Ludwigsen pretended the September 6, 2019, PSA-SA did not exist, when recording the lien and the lis pendens encumbering Park South's real property and clouding title to the same.

G. Ludwigsen Recorded a Lien Claiming "$770,995.00… as allowed for by contract."

On April 7, 2020, Ludwigsen recorded a Claim of Lien, stating that "PERSON INDEBTED TO THE CLAIMANT: Park South LLC" owes "$770,995.00 … as allowed for by contract." [Ex. P-28]

Recall that as of June 24, 2019, Ludwigsen wrote that Park South had already paid him "$707,987.50 (95% of [$]745,250)". (Ex. D-114)

Ludwigsen claimed the last date on which labor was performed was "January 8, 2020", conveniently, exactly 90 days prior to the date of recording. [Id.]

Ludwigsen never produced any invoice for either Denali or Taylor Mountain purporting to detail work performed on January 8, 2020, or on any date after the September 6, 2019, PSA-SA was executed. And of course, Ludwigsen knew as of April 7, 2020, that on September 6, 2019, Ludwigsen had signed

the PSA-SA which expressly extinguished the JVA. [See Ex. P-14 at 11 *ll* 12-16]

H. Ludwigsen Recorded a Lis Pendens Encumbering Not Just The Parcel Under Development, But Also Five (5) Nearby Undeveloped Parcels Owned by Park South.

RCW 4.28.320 describes the effect of recording a lis pendens:

> From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such [lis pendens] to the same extent as if he or she were a party to the action.

RCW 4.28.320.

A lis pendens recorded against another's real property has "the effect of clouding the title to real property." RCW 4.28.328(1)(a). The lis pendens in the instant matter encumbers not only the parcel containing the development, but also five (5) other parcels of undeveloped land owned by Park South, and states that "The object of said action is for breach of a joint venture agreement concerning property owned by Plaintiff and to foreclose a mechanic's lien on Plaintiff's property." [Ex. P-29]

The lis pendens is signed by Ludwigsen on behalf of Denali. [Id.]

Ludwigsen was aware, on May 4, 2021, that Ludwigsen had signed the September 6, 2019, PSA-SA, which extinguished all prior contracts and claims, including the above-referenced "joint venture agreement".

I. Park South Sought, *inter alia*, $491,083.13 At Trial For Lis Pendens Damages.

Plaintiff's Trial Brief, under the heading "RELIEF REQUESTED AND DAMAGES", requested the following relief:

Wherefore, Park South seeks the following relief at trial:

1. **Cancellation of the Lis Pendens.**
   - *a.* Cancellation of the Lis Pendens, removing encumbrance on property.
   - *b.* Damages caused by the Lis Pendens: Interest at the statutory contract rate [12%] on the previously-agreed sales price of $3,273,887.50, for the 15-month duration of the Lis Pendens (May 4, 2021 ~ Trial (August 22, 2022) = $392,866.50 / year; $32,733.88 / month = **$491,083.13** total for 15 months.
   - *c.* Costs, expenses, and attorney's fees expended in seeking cancellation of the Lis Pendens. [P-14, page 4, paragraph 'o']
2. **Cancellation of the Lien.**
   - *a.* Costs, expenses, and attorney's fees expended in seeking cancellation of the Lien. [P-14, page 4, paragraph 'o']
3. **Charges And Assessments Levied Before Closing.**

Vendor	Amount	Cumulative Subtotal
IPEC	**$17,009.65** (plus 12% interest (per annum)	**$17,009.65** (sans interest)
Aggregate Resource Drilling, LLC	**$123,206.00** (plus 12% interest (per annum))	**$140,215.65** (sans interest)
Pape Machinery, Inc.	**$40,603.23** (plus 12% interest (per annum))	**$180,818.88** (sans interest)
Denali Construction, LLC	**$12,572.14**	**$193,391.02** (sans interest)

Denali Construction, LLC	**$497,176.53**	**$690,567.55** (sans interest)
AHBL, Inc. Engineers	**$32.062.05** (plus 12% interest (per annum)	**$722,629.60** (sans interest)
AHBL, Inc. Engineers	**$40,057.91** (plus 12% interest (per annum)	**$762,687.51** (sans interest)
Ludwigsen / Park South / Denali	**$61,369.96** + $79,072.14 + $497,176.53 = $637,618.63	**$824,057.47** (sans interest)
Denali Construction, LLC	**$261,246.33**	**$1,085,303.80** (sans interest)
ATS, Inc.	**$25,012.50** (plus 12% interest (per annum)	**$1,110,316.30** (sans interest)

Total of Charges and Assessments: $1,110,316.30

[non-Denali = $277,951.34]

4. **Costs, Expenses, and Attorney's Fees [to date]:**

   a. Costs and Expenses: **$2,098.63**

   b. Attorney Time: **301 hours** (lodestar rate = $250/hour)

5. **Pre-Trial Damages:**

- **Lis Pendens Damages = $491,083.13**
- **Unpaid Charges and Invoices = $1,110,316.30**

  [non-Denali = $277,951.34]
- **Pre-Trial Costs and Expenses = $2,098.63**
- **Pre-Trial Attorney's Fees = $75,250.00**

Pre-Trial Total = $1,678,748.06

[Total excluding the Denali invoices = $846,383.10]

(CP 1163-1164)

Then, in closing argument, Park South sought the above-listed amounts, including "$491,000" for the "period of the 14 months from May of '21 until now, that the lis pendens has been on the property." (RP at 304 *ll* 12-16)

ARGUMENT

A. Park South Requested $491,083.13 at Trial for Lis Pendens Damages.

Respondents are incorrect in their claim that 'Park South Failed To Show Damages At Trial Connected To Lis Pendens'.

As quoted above, this contention is answered by CP 1163 ("Relief Requested and Damages… 1. Cancellation of Lis Pendens… $491,083.13") RP 304 ("…approximately $491,000"), and by RP at 304 *ll* 12-16, specifically "$491,000" for the "period of the 14 months from May of '21 until now, that the lis pendens has been on the property."

B. Unjust Enrichment Requires Conferring a Benefit, and Retention of the Same Being Unjust. Ludwigsen Signed the September 6, 2019, PSA-SA, After Which He Never Conferred Any Benefit Upon Park South, And The Absence Of Invoices For Work And Requests For Progress Payments Demonstrate No Benefit Was Retained, Either.

Petitioners claim Denali is "not a party" and therefore Denali has an unjust enrichment claim.

Recall that as of June 24, 2019, Ludwigsen wrote that Park South had already paid him "$707,987.50 (95% of [$]745,250)". (Ex. D-114)

Recall as well, the September 6, 2019, PSA-SA, by its express terms, became effective the moment Ludwigsen executed it, regardless of whether he later supplied a separate written acknowledgement labelled "Denali": "**All previous agreements and contractual obligations**… **are superseded and supplanted by this agreement upon the execution of this agreement contract**." [Ex. P-14 at 11 *ll* 12-16]

First, pursuant to ¶1.6.1 and ¶1.6.5 of the JVA, quoted *supra*, Taylor Mountain must indemnify Park South against Denali. [Ex. P-2 / D-106 at 1.6.1, 1.6.5]

Second, as summarized in the Decision:

> *Although Denali technically did not sign the agreement or an accompanying acknowledgment, Denali cannot justly be deemed unaware of the agreement's terms.* Seattle Mortg. Co., Inc. v. Unknown Heirs of Grey*,* 133 Wn.App. 479, 498, 136 P.3d 776 (2006) *(noting liability for unjust enrichment "attaches only when the circumstances of the benefit would make it unjust to keep it"). The 2019 PSA was signed by Denali's sole owner, Richard Ludwigsen.* (P.13).

The 2019 PSA-SA, by stipulation, was admitted into evidence. (RP 5 - 8). Ludwigsen is ½ owner of Taylor Mountain, and the sole owner of Denali. [Ex P- 14; RP at 66:1 – 2] As the

sole principal of Denali, Ludwigsen had complete control and authority to bind Denali. RCW 25.15.151(2). With that authority, Ludwigsen chose to interject Denali into the 2019 PSA-SA and made various representations on Denali's behalf that Park South relied upon. [Ex P-14]

Viewing the 2019 PSA-SA as a whole, the sole principal of Denali represented that Denali had no claims against Park South. Ludwigsen's representation on behalf of Denali to that effect is enforceable and the trial court erred in not enforcing the representation. Respondents admit that the 2019 PSA-SA extinguished all of Taylor Mountain's claims against Park South. (Respondents' Brief p. 9).

In the 2019 PSA-SA, Ludwigsen, in paragraph 1, represented as follows:

> Buyer acknowledges the invalidity of and disclaim all allegations against Park South, LLC, expressed in the letter, dated August 07, 2019, sent by Darren Ludwigsen to Park South's legal representative, Michael Whipple, described in paragraphs 1-3 in section entitles "Sale of Unfinished Lots;" **and acknowledge neither Taylor Mountain LLC and/or Denali Construction LLC or its principals have incurred any harm or damages as a result of any actions or inactions of Park South LLC.** Denali Construction LLC is to provide

> a separate, written, signed statement in support of these acknowledgements.

[Ex P-14] (emphasis added).

Ludwigsen again interjected representations on behalf Denali into paragraph 9 of the 2019 PSA-SA that:

> All previous agreements and contractual obligations between the parties, including those expressed by and contained in the Joint Venture & Construction Improvement Agreement between Park South LLC, Taylor Mountain LLC and Denali Construction LLC, are superseded and supplanted by this agreement upon the execution of this agreement contract.

[Ex P-14]

The fact Ludwigsen breached his promise to provide a separate, written, signed statement acknowledging its agreement does not provide Denali with a free pass. Ludwigsen made representations on behalf of Denali that were contained in the 2019 PSA-SA and he bound Denali to those representations, because: "All previous agreements and contractual obligations … are superseded and supplanted by this agreement upon the execution of this agreement contract."

To find otherwise would mean that Ludwigsen would benefit from his elaborate shell game involving his two LLCs.

"The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. *Estate of Dempsy by and through Smith v. Spokane Washington Hospital Company LLC*, 1 Wn. App. 2d 628, 637, 406 P.3d 1162 (2017). Waiver can be expressed or implied with an express waiver being governed by its own terms. *Matter of Estate of Petelle*, 195 Wn.2d 661, 665, 462 P.3d 848 (2020).

In the 2019 PSA-SA, Ludwigsen represented,

> **Buyer** attests that Buyer had full and ample opportunity to thoroughly review, inspect, and evaluate the Property and any improvements, and is completely satisfied with the status and condition of the Property and **fully acknowledges that the Buyer is purchasing the property, expressly, on an "as-is" basis. Buyer expressly waives its right to receive any disclosure statements including those described under RCW 64.06.010.**

[Ex P 14 ¶¶ 7-8] (emphasis added).

This matter was commenced in 2020.

At trial in 2022, Ludwigsen claimed for the first time, and based on nothing more than his word, that funding fell through for the purchase of the property because an unspecified "lender"

wanted 'more information on the water access issue'. [RP, 56:25; 57:1 – 24; p. 58:1 – 9] Ludwigsen did not explain why he conducted no due diligence on the water access issue prior to the 2018 PSA or while working on the property pursuant to the Joint Venture Agreement. [Id.]

The 2019 PSA-SA expressly provides that Taylor Mountain was purchasing the property "as-is" and that Taylor Mountain waived all disclosure statements. Taylor Mountain's express waiver of the disclosure statements, including those described in RCW 65.06.010, demonstrates that Park South was not in breach of the agreement. The best evidence rule, ER 1002, requires the original writing, or copy pursuant to ER 1003 when a party is attempting to prove the "contents" of such writing. *Rhyne v. Bates*, 35 Wn. App. 529, 531, 667 P.2d 1131 (1983). "This rule exists because the nature of certain documents is often such that the exact words are of more than average importance, particularly in operative or dispositive instruments, since a slight difference in words may mean a great difference in rights." *Id.*

Park South presented the best evidence, the 2019 PSA-SA, which was admitted into evidence. The 2019 PSA-SA contemplated and expressly waived disclosure statements.

C. Ludwigsen Wasn't a Subcontractor, He Was The Developer And The General Contractor. Then, On September 6, 2019, Ludwigsen Signed the PSA-SA, Which "Superseded and Supplanted" "All Previous Agreements and Contractual Obligations Between the Parties, including … Denali Construction LLC" "Upon the Execution of This Agreement Contract."

Ludwigsen contends that 'a subcontractor has the right to bring a claim of unjust enrichment against a property owner.' Except Ludwigsen and his alter ego LLCs were not subcontractors; they were the Developer and the General Contractor.

> *"Ordinarily, a property owner who retains a general contractor assumes no "direct obligation" to the general contractor's subcontractors.* Del Guzzi Constr. Co., Inc. v. Global Nw. Ltd., Inc., 105 Wn.2d 878, 886-87, 719 P.2d 120 (1986). *If anyone had a duty to tell Denali to stop working on the jobsite once the joint venture agreement was terminated, it was Taylor Mountain. To the extent Denali was unaware it needed to stop work on the project, its claim is against Taylor Mountain, not Park South."* (P.14-15).

A party to a contract is bound by the provisions of the contract and may not disregard the same and bring an action on an implied contract relating to the same matter. *Boyd v. Sunflower Props*., LLC, 197, 149, 389 P.3d 626 (2016). Unjust enrichment and quantum meruit are equitable remedies available in absence of a contractual relationship. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

On September 6, 2019, Ludwigsen signed the 2019 PSA-SA which expressly superseded and supplanted the Joint Venture Agreement. [Ex P-14] As discussed above, in the 2019 PSA-SA Ludwigsen acknowledged that Denali had no claims against Park South, and the PSA-SA became effective once Ludwigsen signed it. [Ex P-14].

Respondents contend that Park South never directed Denali to stop working on the site, and therefore Park South was unjustly enriched. First, Park South didn't need to tell Ludwigsen to "stop working", because Denali does not claim to be owed money for any work performed on or after September 6, 2019, and because Denali admits it never sent any invoice demanding payment for work performed on or after September 6, 2019.

Second, the September 6, 2019, PSA-SA, signed by Ludwigsen, extinguished all prior contracts, including the JVA.

In *Irwin Concrete, Inc. v. Sun Coast Properties, Inc*., 33 Wn. App. 190, 194-195, 653 P.2d 1331 (1982), the owner told the subcontractor that he had to work in order to receive funds, the owner told the subcontractor that the work was secure, and that the subcontractor certified its completed work to the owner. No similar facts are present in the record in the case at hand.

D. Ludwigsen Falsely Claims Park South Failed To Assign Error.

Ludwigsen claims that the trial court found that Park South had failed to pay $432,000 for work completed which was uncontested on appeal. This contention is false. See Appellant's Brief at pp. 7-9. As set forth in Appellant's Brief:

> 9. Findings 14, 15, 16, 19, 20, 21, 22, 23, 24, and 25; TM / Denali Begin Work, and Billing For Work Completed. (Ex P-64, D-108, D-109, D-110, D-111, D-112, D-113)
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> Demanded $311,600 Increase to Contract Price, Park South Refused. (Ex D-145, D-114, P-10, D-115, P-2, P-67, D-126)
> 12. Findings 25, 26, 27, 28, 29, 41, and 49; Conclusions 'C' 1; 'J' 1. Last day subcontractors worked was August 9, 2019. (Ex P-69, P-15, P-16, D-143)
> 13. Findings 9, 20-23, 25-29, 31, 47-58, 60-61; Conclusions 'C' 1-17; 'E' 1-6; 'J' 1. Denali Filed Claim of Lien as to .9041 Parcel. Denali Filed Lis Pendens As to Five (5) Parcels It Performed No Work On. (Ex P-2, P-28, Supp. Desig. CP – SN 55 Exh. B Lis Pendens)

(See Appellant's Brief at 7-9)

Ludwigsen represented that "Buyer" would not incur any additional expenses or obligations with regard to or related to the Property after the execution of the agreement. [Ex P-14 ¶11]

Despite these representations, Ludwigsen, as another example of his corporate shell game, personally signed Denali's Lien against Park South in an attempt to get around his obligations under the 2019 PSA-SA.

Ludwigsen admits that Denali sent no bills on or after September 6, 2019. (Respondents' Brief p. 23)

If Denali admits it sent no bills on or after September 6, 2019, then Denali should not have recorded a lien against Park South's property.

Taylor Mountain and Denali, in the 2019 PSA-SA, expressly waive and disclaim all allegations against Park South for any claims existing prior to September 6, 2019. Further, the PSA-SA allocates responsibility for claims arising after September 6, 2019, to Taylor Mountain.

Ludwigsen's corporate shell game assertion that it was Ludwigsen's **other** company filed the lien is disingenuous. As quoted above, Ludwigsen expressly bound both of his companies when he signed the PSA-SA.

E. "Upon [Ludwigsen's] Execution of" the September 6, 2019, PSA-SA, "All Previous Agreements and Contractual Obligations Between the Parties" Were "Superseded and Supplanted". Ludwigsen Had No Legal Basis, on May 4, 2021, to Record the Lis Pendens.

Ludwigsen claims the lis pendens was 'substantially justified.' Yet, Ludwigsen knew that Ludwigsen signed the September 6, 2019, PSA-SA, as of that date. Ludwigsen had no basis to claim, two years later, that the expressly extinguished and superseded November 18, 2018, JVA entitled him to record a lis pendens against five (5) unrelated parcels.

> *The joint venture agreement between Taylor Mountain and Park South terminated on September*

> *6, 2019. Given its sole member signed the agreement terminating the joint venture, Denali certainly knew about this change in events even though it never signed a separate acknowledgment. There is no evidence that Park South said or did anything to encourage Denali to work on the project after September 6, 2019. Yet Denali did not record its claim of lien until April 7, 2020. This fell far outside the 90-day filing window. The lien was therefore invalid.* (P. 16).
>
> *In this context, a substantial justification means a "reasonable, good faith basis in fact or law for believing they have an [ownership] interest in the property.*" *… Here, Taylor Mountain's purported interest in the property was its right of first refusal under the joint venture agreement and Denali's purported interest was its lien. But as set forth above, the joint venture agreement – including the right of first refusal – was extinguished by the 2019 PSA. And as previously explained, Denali's lien was filed far outside the 90-day statutory limitation period. Given these fundamental defects, neither Taylor Mountain nor Denali had a substantial legal basis for recording the lis pendens."* (P.18).

F. Denali Had Neither "an interest or a right to acquire an interest in the real property against which the lis pendens was filed", Meaning the Lis Pendens is Without Legal or Factual Basis.

Ludwigsen contends that a lien entitled him to file a lis pendens. But the lien was never valid, and because Ludwigsen signed the September 6, 2019, PSA-SA, neither he nor his LLCs

had either an interest in, or the right to acquire an interest in Park South's real property. Consequently, the lis pendens recorded on May 4, 2021, was invalid *ab initio*.

G. "Upon [Ludwigsen's] Execution of" the September 6, 2019, PSA-SA, "All Previous Agreements and Contractual Obligations Between the Parties" Were "Superseded and Supplanted". Ludwigsen Had No Legal Basis, on April 7, 2020, to Record the Lien.

A lien is a creature of statute and a derogation of common law, and the lien statutes must be construed strictly to determine whether a lien attaches. *Estate of Haselwood v. Bremerton Ice Arena, Inc*. 166, Wn.2d 489, 498, 210 P.3d 308 (2009). A notice of lien must be filed no later than ninety (90) days after a person has ceased to furnish labor, professional services, materials, or equipment. RCW 60.04.091. The lien must include the name of the person indebted to the claimant. RCW 60.04.091(1)(c). A lien for furnishing labor, professional services, materials, must be for the contract price of the labor, professional services, and materials and must be furnished at the instance of the owner. RCW 60.04.021.

No evidence was presented at trial that Park South directed Denali to work after September 6, 2019, when the 2019 PSA-SA

was signed, and no evidence was presented at trial that Park South directed Denali to work on January 8, 2020. Pursuant to RCW 60.04.091 and RCW 60.04.021, Denali did not file a valid lien as any work it performed did not come at instance of the owner and all invoices for work performed by Denali occurred prior to January 2020, more than ninety (90) days prior to the lien filing.

Moreover, pursuant to Ludwigsen's ongoing corporate shell game, Denali's lien does not comply with RCW 60.04.091(c) since the subcontract was between Ludwigsen's companies Denali and Taylor Mountain. The lien erroneously claims that Park South was indebted to Denali. [Ex P-28] The lien, which Ludwigsen personally signed on behalf of Denali, fails to include the prime contractor, Ludwigsen's company Taylor Mountain, which should also have been listed on the lien pursuant to RCW 60.04.091(c). [Ex P-28] RCW 60.04.091(c) requires that the claimant list the name of the person indebted, which would have been Taylor Mountain, the general contractor. In addition to Taylor Mountain being responsible for any lien placed on the property by Denali pursuant to the 2019 PSA-SA,

by not listing the prime contractor (Ludwigsen's company) on the lien, Ludwigsen affected Park South's ability to recover from Taylor Mountain pursuant to RCW 60.04.151.

> *There is no evidence that after execution of the 2019 PSA, Park South either encouraged Denali to work on the project or silently acquiesced in such work. ... Denali points to an August 10, 2019, email exchange between Patrick Kofmehl and Josh Nicholson, Richard Ludwigsen's business partner at Taylor Mountain, where Mr. Kofmehl commented he 'would like to see this project completed.' Ex. D-266. Mr. Kofmehl's email does not indicate Park South encouraged Denali to keep working on the project. For one thing, the email was not directed at Denali. But more importantly, the email predated the 2019 PSA, whereby Taylor Mountain agreed to stop work, by at least several weeks.* [D.14]

H. Attorney's Fees and Expenses Pursuant to RAP 18.1(j).

Respondent Park South was awarded costs and contractual attorney's fees by the Court of Appeals in its Decision. Pursuant to RAP 18.1(j), Park South requests an award of the costs and attorney's fees expended in preparing and filing this Answer to the Petition for Review.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Review, and should award Respondent Park South its costs and reasonable attorney's fees.

Per RAP 18.17(c)(10), this Answer has 4,998 allowable words.

KSB LITIGATION

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