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DIVISION II

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STATE OF WASHINGTON

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NO. 39957-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES ALAN, LLC, et al.,

Appellants,

v.

MOUNTAIN WEST CONSTRUCTION, LLC,

Respondent.

BRIEF OF RESPONDENT MOUNTAIN WEST CONSTRUCTION,
LLC IN RESPONSE TO JAMES ALAN, LLC'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Real-estate developer David Milne (“Milne”) is the sole member of James Alan, LLC (“JA”). The subject development, as well as Milne’s other developments, are in financial collapse. While this is unfortunate, it provides no legal defense not to pay Mountain West, LLC (“Mountain West”) for the work it performed under written contract with JA. Milne/JA claimed to the trial court the change order work Mountain West performed was “not authorized.” Yet, it was undisputed that all change orders were signed by JA’s project managers, Mountain West twice wrote to Milne confirming they were signing change orders, and Milne wrote in response that he delegated construction management to them. Additionally, it was undisputed JA paid for the itemized change order work until it fell behind in payment. Based on these undisputed and document-supported facts, the trial court properly awarded summary judgment in favor of Mountain West and against JA for the unpaid contract amount of \$801,354.48. Mountain West requests this Court deny JA’s appeal, affirm summary judgment, and award Mountain West’s fees and costs.

II. STATEMENT OF THE CASE

A. Facts.

1. Contract.

JA owns an 18.2 acre property with the common address of 1830 Finn Hill Road, Poulsbo, Washington 98370, also known as Cook's Addition ("Property" or "Cook's Addition"). CP 450. Milne is the sole member of JA. CP 450-451. JA planned to develop the Property so it could be sold to Sound Built Homes, Inc. as 90 vacant, residential lots. CP 94. JA entered into a written contract with Mountain West, whereby Mountain West agreed to perform site preparation work at Cook's Addition for the fixed sum of \$2,440,977, subject to additions or subtractions as provided in the contract ("Contract"). CP 95. Site preparation work under the Contract included the demolition of an old home, clearing, excavating, grading, paving (road and street-side sidewalks), and constructing retaining walls. *Id.* The Contract's scope of work did not include items like installing an irrigation system, off-site sewer system, lighting structures, a sports court, or fencing, or performing landscaping work. *Id.*

2. Mountain West's Work and JA's Non-Payment.

Mountain West commenced work on the Property on May 14, 2007, and continued its work for almost a year, until April 21, 2008. *Id.*

When Mountain West ceased work, JA was seven months behind in payments. CP 95. More specifically, JA had not been current since September 2007, making partial payments in September and October 2007, full payment of the November 2007 invoice, no payments in December 2007, January 2008, and February 2008, and partial payments in March and April 2008. Mountain West recorded a materialman's lien on the Property for the remaining amount owed under the Contract. *Id.*

3. Change Order Work.

During Mountain West's work, JA requested numerous changes in the scope of work. *Id.* All changes were memorialized in written change orders, and signed by Jim James ("James") or Don Poe ("Poe"), JA's project managers. *Id.* Both Poe and James testified they were JA's project managers, were authorized and did sign the change orders, and discussed the change orders with Milne. CP 541-545, 547-549, 572-579. JA's engineer, Norman Olson, of N.L. Olson & Associates, testified James and Poe were the construction/project managers, he discussed various change orders with them, and he also discussed change orders directly with Milne. CP 589-592, 599.

Mountain West, on two occasions, wrote directly to Milne to confirm James and Poe were JA's project managers and were signing the change orders. CP 96-97, 141, 143. Milne confirmed in an email that

“construction management is delegated to these two individuals.” CP 97, 145. Milne did not deny sending this email to Mountain West. Additionally, Mountain West copied Milne with emails between Mountain West and Poe that discussed large-item change orders, and that they were being approved by Poe. CP 567-568, 550-553. Milne did not deny receiving these emails, nor did he allege he responded to the emails claiming that Poe should not be signing the change orders. Also, Poe identified himself in writing to Mountain West as Cook’s Addition’s “Project Manager.” CP 97, 147. Neither Poe nor Milne denied this.

A total of \$409,196.00 in change order work was performed by Mountain West. CP 95. The change orders, together with the original contracted amount, brought the total Contract to approximately \$2.85 million, excluding sales tax. *Id.* Until JA fell behind in payment, JA fully paid Mountain West’s invoices that specifically identified the amount and nature of change order work performed. CP 96.

4. Contract Completion Date.

The change orders cumulatively extended the completion date of the Contract from October 31, 2007 to April 23, 2008. *Id.* Each change order specifically identified the number of days the completion date was extended. CP 117-118, 125-132. For instance, one of the change orders provided, “15 Working Days is added to the contract to complete this

additional work.” CP 117. Other change orders were similarly worded, but with differing amounts of working days added to the completion date. CP 118, 125-132. Poe testified he was aware the change orders extended the Contract completion date, and he explained why the extensions were necessary (*i.e.*, time for permitting and to perform the work). CP 546-549.

Mountain West ceased work on April 21, 2008, two days before the extended Contract completion date. CP 96. When it ceased work, it had performed over 2.8 million in work (99.74% of the Contract was completed). *Id.* Mountain West was able to complete all of this work before the extended Contract date, notwithstanding the numerous documented owner delays. CP 96, 134. The only work remaining to be performed under the Contract and change orders was \$7,380 in storm pond work, which could not be completed at that time because it was in the rainy season. CP 96.

5. Property Upside Down/David Milne’s Financial Collapse.

JA has not completed development of Cook’s Addition, and Sound Built Homes declared JA in default and did not purchase the Property. CP 451, 457-459. Like many residential property developments in this current market, the debt exceeds the value of the Property, and Cook’s

Addition has sat idle and not fully developed for almost two years. CP 583.

Milne's other commercial developments are also in financial disarray. CP 452. In the last 14 months alone prior to entry of summary judgment in this lawsuit, Milne was personally named in at least six lawsuits in the State of Washington where his real estate developments are in default. CP 452, 461-513. The total alleged debt Milne owes in these lawsuits is approximately \$15.86 million. *Id.* He recently filed for Chapter 11 bankruptcy in the United States Bankruptcy Court of the Western District of Washington, cause number 09-23033-KAO. There are at least two more lawsuits where Milne is not personally named, but Milne's entity, David Alan Development, LLC ("DAD"), is indebted for an additional \$800,000. CP 452, 515-529. DAD filed for Chapter 11 bankruptcy in the United States Bankruptcy Court of the District of Arizona on January 21, 2009, but was dismissed on March 10, 2009, because Milne failed to provide any of the required documentation. CP 452. On or about October 2, 2009, DAD filed for bankruptcy in the United States Bankruptcy Court of the Western District of Washington, cause number 09-20235-SJS, and it was dismissed for failure to timely file schedules.

B. Procedural Background.

1. Dismissal of David Milne and DAD as Debtor Defendants.

On June 25, 2008, Mountain West commenced a lien foreclosure action against JA to recover \$801,354.48 of unpaid work it performed under the Contract. CP 3. Milne was personally named because there was uncertainty whether the written contract between Mountain West and JA was the operative contract, or another contract, in which “David Alan Development, LLC” was handwritten in the contract and Milne signed personally, was the effective contract. CP 813. Both contracts were signed by Milne/JA on the same date. CP 824-835. JA’s attorney argued the contract with JA was the effective contract (CP 799-800), Milne filed a declaration stating this (CP 17-18), and JA requested to have both Milne and DAD removed as defendants and as listed debtors on Mountain West’s lien. CP 799-800. The parties agreed the contract with JA was the operative contract, Mountain West amended its lien to not include Milne and DAD as debtors, and Milne was dismissed from the lawsuit (DAD remained as a defendant solely because it claimed deed of trust interest in the Property). CP 882-894.

2. Partial Summary Judgment Order Against JA.

On May 15, 2009, Mountain West filed a summary judgment motion against JA for the sum owed under the Contract and to foreclose

its materialman's lien. CP 75. On June 12, 2009, the trial court heard oral argument from the attorneys, did not sign any of the proposed orders, and took the matter under advisement. CP 667. On July 20, 2009, the trial court drafted and entered an order of partial summary judgment in favor of Mountain West and against JA. CP 238-239. The partial summary judgment also dismissed JA's claims. *Id.*

3. Grant of Reconsideration and Award of Summary Judgment Against JA.

On July 29, 2009, Mountain West filed a motion for reconsideration of the partial summary judgment. CP 240. The trial court determined that no oral argument would be heard on the motion, but that it would accept written opposition to the motion. CP 926. JA submitted no opposition, despite the court's request for briefing. *Id.* On September 18, 2009, the trial court granted Mountain West's motion for reconsideration, and entered an order granting summary judgment in favor of Mountain West and against JA for the full lien amount, \$801,354.58. CP 250-254. (The order contained the same language as the proposed order Mountain West served when it filed for motion for summary judgment).

JA has not appealed the trial court's entry of summary judgment against it. JA's Notice of Appeal is limited to the Order Supplementing/Amending Summary Judgment and Certifying Judgment as Final and Decree of Foreclosure. CP 295.

4. Order Supplementing/Amending Summary Judgment and Certifying Judgment as Final and Decree of Foreclosure.

On September 29, 2009, Mountain West filed a motion for attorneys' fees, costs, interest, to certify the summary judgment as final, and for a decree of foreclosure. CP 255. JA did not oppose the motion, nor did it appear at oral argument. The trial court granted Mountain West's motion. CP 290.

III. ARGUMENT

A. Standard of Review.

1. Summary Judgment.

The standard of review of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When determining whether a genuine issue of material fact exists, the court must view all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552,

192 P.3d 886 (2008). Questions of fact may be determined on summary judgment as a matter of law “when reasonable minds could reach but one conclusion.” *Owen v. Burlington N.*, 153 Wn.2d at 788.

B. The Trial Court Did Not Error in Ruling Mountain West Was Entitled to Summary Judgment.

JA’s sole basis for its appeal is Poe allegedly was not authorized to sign change orders, and because Milne submitted a declaration that Poe was not authorized, that should constitute a genuine issue of material fact to prevent entry of summary judgment. JA, however, cannot rely on a declaration considered at face value; issues of material fact cannot be raised by merely claiming contrary facts. *Meyer v. Univ.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). As to the issue of agency on summary judgment, it has been ruled that if the facts are susceptible to only one interpretation, agency can be resolved as a matter of law. *McCurley Chev. v. Rutz*, 61 Wn. App. 53, 57, 808 P.2d 1167 (1991).

No reasonable mind could reach one conclusion on the change order issue because of the following undisputed and document-supported facts:

- 1) Mountain West twice wrote directly to Milne to confirm James and Poe were JA’s project managers and were signing the change orders. Milne sent a confirming email. Undisputed.
- 2) Mountain West copied Milne with emails between Mountain West and Poe that discussed orders, and that they

were being approved by Poe. Milne raised no objection. Undisputed.

3) When Poe approved one of the change orders, he identified himself, in writing, as Cook's Addition's "Project Manager." Undisputed.

4) Until JA fell behind in payment, JA fully paid Mountain West's invoices that specifically identify the amount and nature of change order work performed. Undisputed.

Not only are the foregoing undisputed facts and emails/letters supportive of summary judgment, but both Poe and James testified they were JA's construction managers, signed the change orders, were authorized to sign, and discussed them with JA's engineer and/or Milne. JA's engineer also testified James and Poe were the construction managers, and he discussed various change orders with them or directly with Milne. Mountain West will discuss each of the four undisputed facts in more detail, as well as the testimony from Poe, James and Olson.

1. It Was Undisputed Mountain West Twice Confirmed in Writing with Milne that He Had Appointed James and Poe as JA's Project Managers and They Were Signing the Change Orders.

On September 21, 2007, Steve Davis, the general manager for Mountain West, wrote a letter directly to Milne to re-affirm that all change orders were being submitted to JA's project managers, James or Poe, for their review and signature. The letter provided:

As you know from your field representatives the contractual work is proceeding along. You also know from

your people, along with that work there have been a number of changes and additions to the original scope of work. These changes and additions have been approved by your representatives, and per my September 5th letter, we have forwarded to your office the breakdowns of those items.

As of this date we have not received any questions, comments or concerns regarding these items from your office therefore we must assume that the approvals given to MWC [Mountain West Construction] by your field representatives is meeting with your approval as well. As we have done in prior months, MWC will continue to include the charges for these changes and additions in our monthly billings to you under the "Change Order Summary" section.

If you have any concerns or disagreement with our understanding of how the change orders are being approved please contact me immediately. If this is not your understanding, MWC will cease all additional work items until all issues are cleared up and resolved. If we do not receive any notice from you, we will proceed as outlined in the prior paragraph and we will expect to be paid for the approved changes and additions. CP 141.

Mr. Davis wrote a follow-up letter to Milne on October 11, 2007,

which provided, in pertinent parts:

Per your instructions, all decisions and changes related to the Cooks Addition project in Poulsbo will be run through Don Poe, Jim James and at times Norm Olson. These individuals have the authority to make the decisions required to move this project forward and David Alan Development agrees to be bound by their decisions...

If this understanding is not correct notify me at my office in writing immediately. CP 143.

Subsequently, Milne responded in a November 17, 2007, email to

Mr. Davis:

I find profitable projects and get them financed, the construction management is delegated to these 2 individuals [Poe and James] who, I believe, do a good job. CP 145.

Milne claimed in a declaration he did not “recall” receiving the letters. CP 189. It has been expressly held that the submission of a declaration denying receipt of a document is insufficient to defeat summary judgment unless specific facts are introduced to show why there was no delivery. *Hansen v. United States of America*, 7 F.3d 137, 138 (9th Cir. 1993). Milne introduced no specific facts, and therefore his “I do not recall” response was insufficient to raise the genuine dispute needed to preclude entry of summary judgment.

Moreover, Milne did not deny sending the email to Mountain West confirming he delegated construction management to Poe and James, but instead claimed that his email was “taken out of context.” CP 189. Milne’s email speaks for itself.

These writings alone show there is no genuine dispute regarding the signed change orders. The undisputed writings do not end here.

2. It Was Undisputed Milne Received Emails Between Poe and Mountain West Where Poe's Approval of the Change Orders Was the Topic.

Milne was copied with emails between Mountain West and Poe that referred to large-item change orders, and that they were being approved. On February 6, 2008, Poe sent an email to Douglas Freeman at Mountain West, copying David Milne, and wrote the following:

The cost breakdown you sent to me for the ongoing sediment and erosion control on the Cool [sic] Addition Project for January totaling \$39,733, was approved and sent on with the draw for this month's invoice submitted by MWC, January 30. The major part of this cost (68%) was labor to cover and stabilize the site as required by the SWPPP and to comply with the stormwater permit for this project. Thank you for submitting the detailed breakdown of this additional cost. CP 568.

In another example, on January 2, 2008, Mr. Freeman at Mountain West sent an email to Poe and Norm Olson, copying Milne, and wrote:

After reviewing the plans I have priced several items that have changed [a breakdown of the items is omitted]... This combined together for a total increase of \$72,237.00 for the plan changes listed above. You will see this listed as Change Order #06 in the information faxed and mailed to you today. CP 567.

Milne never disputed receiving these emails. (He did not even submit an "I do not recall" defense). Nor did Milne claim he responded to the emails to inform Mountain West that change orders should only be signed by him. These undisputed emails leave no genuine dispute Poe was reviewing and signing the change orders and Milne was aware. Thus,

to the extent Poe was not an agent of JA at the outset, Milne's silence ratified the agreement (change orders). A principal ratifies an agent's agreement if he accepts the benefits and remains silent or fails to repudiate it. *Hoglund v. Meeks*, 139 Wn. App. 854, 870, 170 P.3d 37 (2007); *Lemcke v. Funk*, 78 Wash. 460, 466, 139 P. 234 (1914) ("Mere silence and inaction are usually held sufficient.")

3. It Was Undisputed that When Poe Approved a Change Order, He Identified Himself in at Least One Cover Letter to Mountain West as Cook's Addition's "Project Manager."

Milne never disputed that Mountain West received at least one cover letter from Poe approving a change order in which he identified himself as "Project Manager" for "Cook's Addition."

4. It Was Undisputed that JA Paid for the Change Order Work Until It Fell Behind in Payments.

It was undisputed that Mountain West's invoices identify the scope and amount of change order work, and it was also undisputed that, until JA became delinquent in payment, it paid for all of the change order work. Milne never offered any reason why the change order work that was signed by James or Poe was paid, but when JA ran out of money, the change orders became "unauthorized."

All of the foregoing undisputed and documented facts establish that "no reasonable mind could reach but one conclusion" - Poe had

express or apparent authority to sign the change orders. This conclusion can be made without considering that Norm Olson (JA's engineer), James, and Poe all testified that Poe had authority to sign the change orders, did in fact sign them, and discussed them with Milne.

5. James and Poe Testified They Were JA's Construction Managers, Were Authorized to Sign the Change Orders, and Discussed the Change Orders with JA's Engineer, Accountant, or Directly with Milne. JA's Engineer Provided Similar Testimony.

Poe testified he had been a project manager for approximately 35 years, served as a project manager for Milne on numerous projects, and was authorized to sign and signed change orders in all of those projects, including Cook's Addition. He further testified he sent a copy of the change orders to JA's office and discussed the change orders with JA's engineer and/or Milne. He also reviewed the change orders at the end of each month with JA's accountant because, at the request of Milne, the accountant and Poe had to prepare and sign construction loan draw paperwork to submit to JA's lender, Sterling Savings (*i.e.*, unless the additional work was performed and approved by JA, Sterling Savings would not advance that amount).

James' testimony regarding the process for him signing the change orders was substantially similar to Poe's testimony.

Norm Olson testified that James and Poe were the construction/project managers, they discussed various change orders with him, and he discussed many of these change orders directly with Milne.

Considering the foregoing testimony from JA's construction managers and engineer, the undisputed signed change orders, and the undisputed writings regarding Poe and James' capacity as project managers, Milne's "not authorized" defense borders on absurdity and certainly does not create the requisite genuine dispute. This is likely why JA, after the trial court requested a written response to Mountain West's motion for reconsideration, did not even bother to file one. The trial court recognized that courts are designed for resolving genuine conflicts between parties, not as a method to forestall paying a party what it is owed, and entered summary judgment.

C. The Trial Court Made No Reversible Error in Dismissing JA's Claims.

JA's sole argument in its appeal is Poe was not "authorized" to sign the change orders. JA has not appealed the summary judgment dismissal of its claims against Mountain West, nor is there any such discussion in the argument section of its brief. However, in the facts section of JA's brief it is implied that Mountain West 1) improperly commenced work before JA received funding, 2) did not complete its

work on time, 3) improperly charged taxes, and 4) was improperly awarded retainage.

JA waived these potential assignments of error by failing to provide argument or authority in its brief on these issues. *Dickson v. Kates*, 132 Wn. App. 724, 733 n.10, 133 P.3d 498 (2006) (“Without argument or authority to support it, an assignment of error is waived. We need not consider arguments that are not developed in the briefs and for which a party has not cited authority,” *citing*, RAP 10.3(a)(5);¹ *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)).

In the event the Court considers these issues within the scope of JA’s appeal, Mountain West responds briefly on each issue.

1. Mountain West Was Not Required to Ensure JA and Its Lender Had Tied Up Issues with Funding Before Mountain West Commenced Work.

JA wrote in its facts section of its appeal that Mountain West was contractually required to wait for written confirmation of funding before it commenced work and referenced a contract between Mountain West and DAD, not the contract between Mountain West and JA. Milne, at the outset of the lawsuit, argued the DAD contract was not the effective

¹ RAP 10.3(a)(5) was amended to RAP 10.3(a)(6), effective September 1, 2006, without material change.

contract, and requested that he and DAD be dismissed as debtor defendants. Mountain West agreed, and the contract between Mountain West and JA was the operative contract. Moreover, the trial court adjudged the JA/Mountain West contract to be the effective contract. The JA/Mountain West contract contains no written confirmation of funding requirement. Additionally, the JA/Mountain West contract was dated May 10, 2007, and signed by JA on the same date. It was undisputed Mountain West did not commence work until May 14, 2007.

2. The Change Orders Extended the Completion Date, and Mountain West Ceased Work Before the Completion Date.

JA wrote in its facts section of its appeal that Mountain West “did not complete its work by October 31, 2007.” Pursuant to the express language in the signed change orders, they cumulatively extended the Contract completion date from October 31, 2007 to April 23, 2008. With any construction project, if there is an addition or a change in scope of work, often the work will take longer, and additional permitting may be needed. It was undisputed that Mountain West ceased its work on April 21, 2008, which is before the extended Contract date. Because the Contract was completed before the extended Contract completion date, JA’s delay claim failed as a matter of law.

Even assuming Mountain West had not completed its work before the extended Contract completion date, Cook's Addition was (and still is) not completed for reasons entirely unrelated to the scope of work in the Contract. For instance, the off-site sewer system, which is not a part of the Contract, has not been completed and will take at least \$350,000 to complete. Other items not completed include: installing an irrigation system, lighting structures, a sports court, fencing, and landscaping. The Cook's Addition project ran out of money just like the many other Milne projects, and big ticket items, such as an off-site sewer, could not be funded. That is why Cook's Addition has remained incomplete to this day.

3. Taxes Were Not Improperly Charged.

JA wrote in its facts section of its appeal that Mountain West "improperly charged taxes." The trial court dismissed that claim because RCW 82.08.050(9) provides that if the contract is silent as to sales tax, a contractor has the right to collect sales tax in addition to the contract price:

(9) ...for purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter, but if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price shall not be considered the selling price.

The sales tax issue in the context of a contractor billing an owner/developer has been squarely addressed, and our courts uniformly have held that the owner must pay sales tax in addition to the contract price when the contract is silent on this issue. *Pomeroy v. Anderson*, 32 Wn. App. 781, 785, 649 P.2d 855 (1982); *Morrison-Knudsen Comp. v. Dept. of Revenue*, 6 Wn. App. 306, 310, 311, 493 P.2d 802 (1972); *Irwin v. Sanders*, 49 Wn.2d 600, 603, 304 P.2d 697 (1957).

The Contract is silent on sales tax, and Mountain West billed JA for sales tax on its invoices, with a separate sales tax itemization. Accordingly, Mountain West properly billed for sales tax under RCW 82.08.050(9).

JA also claimed to the trial court that under RCW 82.04.050(8), sales tax should not be charged for the work on publicly owned streets and sidewalks. That statute is applicable only if the property is owned by a public entity. *Id.* RCW 82.04.050(8) provides:

(8) The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind.

(*Emphasis added.*) See also WAC 458-20-171, which contains the same public entity ownership requirement.)

As the title report revealed and JA admitted, no part of Cook's Addition is owned by a public entity, therefore RCW 82.04.050(8) is inapplicable.

4. Retainage Was Properly Awarded.

JA wrote in its facts section of its appeal that the summary judgment award "included retainage." The award did include retainage, and it was proper. JA had argued to the trial court it had not accepted the project, therefore retainage was not yet due. However, "[I]t is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due of him or of a condition upon which his own liability depends, he cannot take advantage of the failure. *Highlands Plaza Inc. v. Viking Investment Corp.*, 72 Wn.2d 865, 876, 435 P.2d 669 (1967). It has been expressly held that when a contractor does not complete construction because the owner did not fulfill a promise, the performance of the condition is excused and the liability of the owner "on the contract becomes absolute regardless of the failure [of the contractor] to fulfill the condition." *Refrigeration Engineering Co. v. McKay*, 4 Wn. App. 963, 970, 486 P.2d 304 (1971). Under the foregoing authority, JA could not withhold retainage money otherwise due to Mountain West

because of JA's nonpayment and ongoing failure to complete its own project.

D. Mountain West Should Be Awarded its Fees and Costs.

A trial court may award attorney fees based on contract, statute or recognized ground of equity. *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). The trial court awarded Mountain West its attorneys' fees, costs and interest under the Contract and/or the mechanics lien statute (RCW 60.04.181). Mountain West requests under RAP 18.1(d) an award of fees, costs and interest incurred in the appeal.

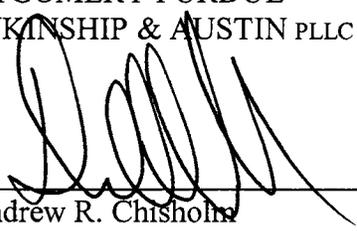
IV. CONCLUSION

For the reasons stated above, Respondent Mountain West requests this Court AFFIRM the decision(s) of the trial court, and to award its fee and costs as the prevailing party.

RESPECTFULLY SUBMITTED this 22 day of February, 2010.

MONTGOMERY PURDUE
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By



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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, ~~under the laws~~
DEPUTY
of the State of Washington, that the following is true and correct:

That on February 22nd, 2010, I caused to be served in the manner noted a true and correct copy of Brief of Respondent Mountain West Construction, LLC in Response to James Alan, LLC's Opening Brief addressed to:

Jerry Kindinger Ryan, Swanson & Cleveland, PLLC 1201 Third Avenue, #3400 Seattle, WA 98101 Attorney for Sterling Savings Bank	<input checked="" type="checkbox"/> Via E-Mail <input type="checkbox"/> Via Mail <input checked="" type="checkbox"/> Via Messenger
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DATED this 22nd day of February, 2010, at Seattle, Washington.



Emily Thor