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DIVISION II

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No. 42489-4-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

WM DICKSON CO., Respondent,

v.

MISENAR CONSTRUCTION, INC., Appellant.

BRIEF OF APPELLANT

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Introduction

Respondent Wm. Dickson Company (hereinafter “Dickson”) specializes in demolition, site development, and heavy pipe installation. Appellant Miselar Construction, Inc. (hereinafter “Miselar”) is a general contractor and homebuilder. Dickson entered into a site-preparation contract with Miselar for one of its new home developments in Milton. The nature of the contract required Dickson to perform the earth-moving and pipe-installation work in order for Miselar to then build several homes on the site. The parties signed a contract providing for a total price for the work as determined by the line item components. Dickson began the work soon after the final version of the contract was signed.

Although the contract contained a provision that required written change orders, Miselar waived this requirement. Miselar was eager to complete the project as quickly as possible. When the changes initially surfaced, Mr. Miselar indicated to Dickson employees that he would not require formal written change orders. Rather, Mr. Miselar established a pattern of conduct whereby he would (1) observe a changed condition, (2) discuss the change with Dickson, and (3) direct Dickson to proceed with the changed work. Even individuals such as the civil engineer and surveyor acknowledged that modifications to their contractual relationship with Miselar occurred through informal, verbal communications. Thus,

early in the life of the contract, Misenaar unequivocally waived the written change order requirement.

A significant portion of trial was spent defending Misenaar's counterclaims that Dickson had improperly installed a large block wall and the adjacent drainage pipe. The wall was a significant structure engineered specifically to hold back several tons of earth. Dickson was contracted only to install the wall and drainage pipe. It was not tasked with designing the wall, determining its site location, or surveying the lots to determine where to specifically install the items. Misenaar hired third parties to do each of those tasks. Dickson requested that the surveyor lay out with survey stakes where to install the wall and drainage pipe. Then Dickson installed the retaining wall and pipe in accordance with those survey markers. Trial testimony revealed that the wall engineer (who designed how the wall was to be installed and what setbacks were to be used for the drainage pipe) and civil engineer never coordinated in determining the exact location of the wall. Dickson installed the wall and bypass line based on the plans it received from the engineers and based on the stakes placed by the surveyor.

Misenaar simply does not like the factual findings of the court. This appeal is an attempt to undo what the trial court found after carefully considering seven days of trial testimony and over 100 exhibits.

Response to Assignments of Error

The trial court properly denied summary judgment due to genuine issues of material fact.

The trial court properly denied motion for directed verdict because it exercised its discretion to allow the late-filed reply and because the issues had already been addressed by the parties.

The trial court's findings of fact were properly supported by substantial evidence.

The trial court's conclusions of law were proper application of the law to the facts.

Issues Pertaining to Assignments of Error

Was the trial court correct in denying summary judgment when the moving party failed to establish that there were no genuine issues of material fact as to Misenaar's waiver of the contractual requirement for written change orders. (Assignment of Error 1)

Did the trial court properly exercise discretion in denying the motion for directed verdict where Dickson had already presented evidence in opposition to the counterclaims when the motion was filed? (Assignment of Error 2)

Were the trial court's findings of fact supported by substantial evidence even though the parties presented conflicting evidence on the disputed issues? (Assignment of Error 3)

Did the trial court's conclusions of law properly apply the law to the facts as stated in the findings of fact? (Assignment of Error 4)

Statement of Facts

Parties and Contract

Dickson is a construction company with over 70 years of experience in site preparation and pipe installation for property developments. Misenaar, at the time of the contract formation, was a new company, undertaking one of its first development projects.¹ The contract between the parties called for site development work for Misenaar's Lake Ridge Estates housing project.² The final contract price was manifested in a lump-sum total; however it was delineated by the individual unit prices.³ Contained within the written contract was a change order requirement.⁴ After obtaining final plans and approvals from the local municipalities, the project commenced.

Waiver of Change Order and Course of Dealing

The contract provided that time was of the essence in the contract, but the parties did not include any kind of a schedule or deadline for completion in the contract.⁵ Misenaar was eager to complete the site

¹ VRP at 624-27

² Trial Exhibit No. 1

³ VRP at 193-95. Randy Asahara from Dickson testified that the contract had "lump sum" components but was really a "bid price unit" contract.

⁴ Trial Exhibit No. 1.

⁵ Trial Exhibit No. 1; VRP at 268.

preparation quickly.⁶ Situations originating from the site itself and entities outside of Dickson's control mandated changes to the contract early in the development work. Dickson's on-site project manager approached Mr. Misenaar about these changes and was instructed that formal written change order protocols were not necessary.⁷ Misenaar waived the written requirement for change orders and established a course of dealing with Dickson whereby changes could be dealt with rapidly and without contract formalities that would prolong completion of the project.⁸

Throughout the project, a pattern evolved regarding change-orders to the contract: (1) a **changed condition** would arise, (2) Dickson would present Misenaar with **options** for resolving the condition, (3) a bid or "not-to-exceed" **price estimate** (with supporting documentation) would be presented to Misenaar, (4) who would **approve or reject** the estimate, (5) the **work was executed**.⁹ Misenaar and Dickson developed a working

⁶ VRP at 270, 432, 863. Misenaar states that one of the reasons he sought to hire Dickson was because he believed he would have a contractor that "was going to be able to get it done quickly and accurately and not have any surprises. That was critical to me at that point."

⁷ Trial Exhibit Nos. 12, 13, and 69 (written copies of bid estimates that were provided to Misenaar for approval before Dickson endeavored to do the change order work); also VRP at 13, 79, 108, 246, 265-66, 280-90 (Mike Hoven, Dickson's on-site project manager, testified that he asked Mr. Misenaar directly how he would like to handle the change orders. Mr. Misenaar indicated that no formal written change order would be necessary.)

⁸ VRP at 837-38, 849-51 Misenaar's expert Mike Pitardi admits that it is common to not require written change orders on jobs when the contractor has a certain relationship with the other party.

⁹ VRP at 12, 31, 81-83, 246, 255, 261(see also VRP 265-290); Trial Exhibits 12, 13 and 69. Exhibit 69 comprises evidence of the types of bid estimates and documentation that were provided to Mr. Misenaar for his approval in conjunction with the change orders. The verbatim record provides testimonial evidence that Mike Hoven, Shawn Hammond,

relationship that accommodated Misenaar's desire to rapidly push the project to completion.

Unequivocal Waiver as to Dickson and Other Contracted Parties

Misenaar's acceptance of verbal change orders applied to Dickson and to the other parties he hired on the project. Dickson employees would follow the above-outlined pattern for change orders and refused to undertake any change without obtaining direct, prior approval from Mr. Misenaar.¹⁰ Further, parties hired by Misenaar admitted that they did not follow strict procedures for written change orders on this project.¹¹ Misenaar's expert, Michael Pitardi, testified that contractors commonly do not require strict compliance with a contractual provision for written change orders.¹² It was not until Dickson attempted to settle the final accounting with Misenaar that it discovered the prior change-orders were being challenged.

and Randy Asahara would not undertake any change order work without prior approval and at the direction of Misenaar.

¹⁰ Trial Exhibit 69 and 12-13, VRP at 30, 80-84, 87 (Testimony of Shawn Hammond indicated that no change-order work was done without first informing Mr. Misenaar, and obtaining approval. In fact, Mr. Hammond states that everything he did in the field was approved first by Mr. Misenaar.); VRP at 291, 315, 338, 354-55 (Testimony of Mike Hoven indicated that approval was sought prior to any sort of work performed.); VRP 623-25 (This is an opinion issued on the motion for directed verdict by Misenaar. In this summation of the case, Judge Murphy details exactly what he's heard in the evidence, including a description of a clear understanding regarding the facts at issue and whether he believed that Misenaar pre-approved work prior to its being carried out by Dickson.)

¹¹ VRP at 762-63; 922-23.

¹² VRP at 837-38, 849-51 Misenaar's expert Mike Pitardi admits that it is common to not require written change orders on jobs when the contractor has a certain relationship with the other party.

Counterclaims – Wall and Bypass Line Installation

Misenar alleged Dickson breached the contract by installing a large retaining wall and bypass line (used for drainage) in the wrong location.¹³ Under the contract, Dickson was only required to perform a narrow task: install the retaining wall and bypass line pursuant to plans provided by third parties and in a location affixed by an independent surveyor.¹⁴ Dickson was not alone in its work regarding the retaining this installation. In fact, three other parties were integrally involved in the wall and bypass line construction: E3RA (wall engineer), Hal Hagenon (civil engineer – charged with planning the walls’ location), and Sadler and Bernard (survey company—charged with laying out markers that indicated where Dickson was to install the items).¹⁵ Each party was contracted with Misenar directly and did not operate under Dickson’s control.¹⁶ The fact that there were multiple parties involved in the wall and bypass line engineering made the issue more complicated.

The problem with the incorrect location of the retaining wall and bypass line found its genesis in the lack of communication between these

¹³ CP 5-8. Facts and testimony relating to the bypass line and retaining wall are significantly intertwined.

¹⁴ Trial Exhibit No. 1. The contract did not require Dickson to prepare the plans or verify their accuracy.

¹⁵ VRP 20-21; *see also* VRP 368, 497; Trial Exhibit Nos. 1, 2, 116.

¹⁶ *Id.*

parties.¹⁷ It was revealed at trial that the civil plans outlaying where the block wall (which was massive) was drawn without having received or viewed the actual wall design from E3RA.¹⁸ Thus, when Dickson requested staking on the property from Sandler and Barnard to lay out the retaining wall and bypass line, it is unclear whether it was staked according to Hagenson's plans or E3RA's plans.¹⁹ In fact, Mr. Hagenson admitted that did nothing to resolve the discrepancy between his civil design and the actual wall/bypass line location with the other parties to the project.²⁰ Without proper civil engineering plans that incorporated the changes to the wall design and bypass line, Dickson cannot be responsible for the ultimate location of the wall or bypass line.

The counterclaims alleging that Dickson incorrectly installed the bypass line are misguided given the manner in which it performed work at the site. Dickson's employees testified at trial that before they would endeavor to install anything, including a bypass line and retaining wall,

¹⁷ VRP at 924-27, see also Trial Exhibit Nos. 25, 81, 116. In that exchange with Hal Hagenson, the civil engineer tasked with laying out the project, it was clear that he penciled in a retaining wall without having received the actual retaining wall drawing from the wall engineer E3RA.

¹⁸ *Id.*

¹⁹ VRP at 21, 22, 76-84, 91-106, 174-88, 362-79, 389-96, 406-10 (Mike Hoven and Shawn Hammond discuss the procedure for how the survey stakes were called for prior to any work being layer out and items installed. In addition, Mr. Hoven explained how it was virtually impossible to install items on a project without first requesting for and having survey markers laid out prior to the work. Also, this account was supported by the testimony of Shawn Hammond who was on the location as the site supervisor for Dickson at the time of the construction.)

²⁰ VRP 939-40.

they would first contact Misenaar's survey company to visit the site and lay out the proper survey markers.²¹ Reliance on the survey work by Sadler and Barnard was vital; as Dickson was not charged with that task and would potentially expose itself to mistaken installation of items should its work be incorrect.²² Dickson employees insisted at trial that they installed both the bypass line and retaining wall pursuant to survey stakes that were present on the site.²³ In fact, documentation from the surveyors themselves indicated that a "block wall" was staked October 26, 2005.²⁴

At trial, Misenaar claimed that the bypass line and retaining wall were located incorrectly because Dickson moved survey stakes and followed its own measurements, but this is based on a misinterpretation of an email from Mr. Hoven.²⁵ Mr. Hoven explained that he didn't lay out the location of the bypass line, rather, he used the location laid out by Sandler and Barnard. Specifically, he testifies that he took "a string line between the two stakes and paced it on the ground."²⁶ The two stakes that already were present on the site were there by Sadler and Barnard. Dickson's employees deny ever moving or installing stakes on

²¹ VRP 91-92, 102-04, 535, 550.

²² VRP 91-92.

²³ VRP 371-72, 381, 396, 497, 544-45.

²⁴ Trial Exhibit No. 117. See also discussion below in section D.9.

²⁵ Trial Exhibit 74. Mr. Hoven testified that he did not lay out the survey stakes, but that he used the survey stakes to install the location of the wall.

²⁶ VRP at 549-51.

their own.

ARGUMENT

A. Standards of Review.

Misenar's appeal challenges the majority of the trial court's determinations on the record. Different standards of review apply to different portions of the appeal, depending on what is specifically challenged. Apart from a standard of review regarding a directed verdict, the primary standards of review are *deferential* (*de novo* review shifts to deferential when it involves a mixed determination of fact and law) and *substantial evidence*.

De novo standard of review is appropriate when the appeal challenges conclusions of law from the trial court.²⁷ Though Misenar cites *Rasmussen v. Bendotti* as the basis for his claim that the standard is *de novo*, the bulk of his appeal (based on his own admission) challenges decisions which involve both conclusions of law AND findings of fact. In *Rasmussen* the court held that when conclusions of law are mixed with findings of fact, the standard shifts from *de novo* analysis to a *deferential standard* where the trial court's findings interpreting law and fact are given deference.²⁸ The bulk of Misenar's appeal consists of disputes

²⁷ *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011).

²⁸ *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 638 P.2d 1231 (1982).

regarding a mixture of factual findings and legal conclusions, and therefore requires a *deferential* appellate review standard.

In appeals where the findings of fact are challenged, the standard of review is also deferential towards the trial court. If the “trial court has weighed the evidence, [appellate] review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court’s conclusions of law and judgment.”²⁹ “A trial court’s findings of fact will not be reversed if supported by substantial evidence.”³⁰ Substantial evidence exists if the evidence would persuade a rational, fair-minded person. *Id.* The U.S. Supreme Court described this standard as “more than a mere scintilla,” meaning “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³¹ The evidence is reviewed “in the light most favorable to the prevailing party,” and the court will “defer to the trial court regarding witness credibility or conflicting testimony.”³² The appellate court will not substitute its “judgment for that of the trial court.”³³

²⁹ *Id.*

³⁰ *Rogers Potato Service, LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 97 P.3d 745 (2004).

³¹ *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420 (1971).

³² *Weyerhaeuser v. Tacoma-Pierce County Health Dept.*, 123 Wn. App. 59, 96 P.3d 460 (Div. 2 2004).

³³ *Ridgeview Properties*, 96 Wn.2d at 720.

Under the substantial evidence standard, the court of appeals must defer to the trial court's factual determinations.³⁴ The appeal process is not meant to provide the appellant with a second opportunity to try the facts of the case. If the responding party can show that there was evidence to support a factual finding of the trial court, that finding will be upheld.³⁵

B. The Order Denying Summary Judgment Was Proper.

Misenar brought a summary judgment motion alleging that there was no genuine issue of material fact that all change orders should have been in writing. Appeals from summary judgment rulings are reviewed de novo.³⁶ CR 56(c) authorizes applies a two-part test in determining whether a summary judgment is appropriate: whether there is a genuine issue of material fact and then, whether law entitles the moving party to a judgment. The trial court ruled in favor of Dickson, stating that there were genuine issues of fact, and that the legal precedent of *Mike M. Johnson, Inc. v. County of Spokane* was legally distinguishable.³⁷

³⁴ E.g., *Willener v. Sweeting*, 107 Wn.2d 388, 730 P.2d 45 (1986); *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996); *Sunnyside Valley Irr. Dist. v. Dickie*, 111 Wn. App. 209, 43 P.3d 1277 (2002).

³⁵ See generally *Ridgeview Properties*, 96 Wn.2d at 720.

³⁶ *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98–99, 249 P.3d 607 (2011)

³⁷ CP 355; *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wash.2d 375, 78 P.3d 161 (2003)

The trial court properly found that there were genuine factual issues that required review at trial.

In response to the summary judgment, Dickson presented testimony and evidence showing that numerous factual differences existed which required review at trial.³⁸ *Mike M. Johnson* is applicable to the present case, but does not reach the entirety of what transpired between the two parties. (*Mike M. Johnson*'s findings were foundational in nature. It established that mere notice of a change-order on a project did not waive the contractual provision of a pre-approved written change order.³⁹) If factual circumstances between the parties were that clear, and mere notice of a change order condition was at issue, then perhaps the *Mike M. Johnson* standard would apply. The court found that there was much more to the story: while *Mike M. Johnson* was instructive and provided a general framework for addressing change-order disputes, the facts between Dickson and Misenar proved more complicated and did not fall within the limited boundary set by *Mike M. Johnson*.⁴⁰

The parties' conduct throughout a project can constitute a waiver of contract provisions, such as a written change-order requirement.⁴¹ Waiver of the contractual notice requirement is established when the

³⁸ CP 117-210.

³⁹ *Mike M. Johnson*, 150 Wash.2d at 391, 78 P.3d 161 (2003)

⁴⁰ *Id.*

⁴¹ *Bignold v. King County*, 65 Wash.2d 817, 822, 399 P.2d 611 (1965).

benefitting party “authorized, permitted, and directed” the contracting party to perform the work in question.”⁴² In fact, “[i]f any extras were furnished at the express request of the [benefitted party], recovery can be had therefor, as such request would amount to waiver of the contract provision.”⁴³ While it is true that notice of a change-order is insufficient to waive a contract provision for written change orders, it is also true that patterns of conduct between contracting parties may constitute a waiver of change-order provisions. *Id.* When those provisions are waived, the court is free to move into a second-level analysis as to whether those charges were appropriate and should be paid.

Misenar argues that because a disagreement exists over whether there is ambiguity of the waiver of the change-order provision, a summary judgment becomes a self-fulfilling motion.⁴⁴ If this is accepted, then a trial court would have to grant every motion for summary judgment where a defendant argued unequivocal waiver. Misenar’s argument conflates and confuses two different items which operate on different levels within the summary judgment process: *the purpose of a summary judgment and the underlying factual dispute before court.* The argument assumes that all

⁴² *Am. Sheet Metal Works, Inc. v. Haynes*, 67 Wash.2d 153, 159, 407 P.2d 429 (1965)

⁴³ *Barbo v. Norris*, 138 Wash. 627, 635-36, 245 P. 414 (1926)

⁴⁴ Appellate Brief at 22-23

the factual assertions made by the parties are accepted as true, which is not the standard for summary judgment.

American Safety v. City of Olympia is distinguishable from the present dispute because the essential facts regarding waiver were not disputed.⁴⁵ The contractor did not dispute that the city had sent a letter asserting that because change order provisions were not followed, its claims were waived.⁴⁶ The parties also did not dispute that the city's letters agreeing to negotiate payment also contained a statement that it was not waiving its defenses.⁴⁷ Even construing all the other facts in favor of the nonmoving party, these letters expressly reserving its right to rely on the contractual requirement for written change orders prevented any reasonable juror from finding that the city unequivocally waived its rights when it agreed to enter into negotiations regarding the claim.⁴⁸

In contrast, Misenaar and Dickson each disputed the truth of the other party's statement of facts on summary judgment. Misenaar argued that it had never waived the requirement for written change orders.⁴⁹ Indeed, Misenaar testified that all of the work was included within the

⁴⁵ *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 174 P.3d 54 (2007).

⁴⁶ *Id.* at 765

⁴⁷ *Id.* at 767.

⁴⁸ *Id.* at 771.

⁴⁹ CP 9-20, 252.

contract and that there were no “extras.”⁵⁰ Dickson claimed that Misenar had specifically stated that there was no need to produce a written change order for signature.⁵¹ Dickson also provided evidence that showed Misenar was not only aware of the additional work and changes to the contract, but in fact directed the changes.⁵²

Thus, there were disputed facts as to whether Misenar waived the contractual provision for change orders. In addition, there were disputed facts as to whether the additional work was even within the scope of the original contract. Indeed, the Reply Declaration submitted by Misenar did virtually nothing but claim that the testimony submitted by Dickson was inaccurate.⁵³ The question for the trial court was not whether the undisputed facts made Misenar’s conduct equivocal at best, but rather which party’s statement of the facts was accurate. This disputed issue of fact had to be construed in Dickson’s favor, and summary judgment was properly denied.

In ruling in Dickson’s favor, the trial court found that “[w]hile the Mike M. Johnson case has strong language as to whether recovery can be made if the contract language as to the change orders is not followed, the facts in that case are significantly different than the facts in the instant

⁵⁰ CP 22.

⁵¹ CP 117-18, 122.

⁵² CP 121-22.

⁵³ CP 251-55.

matter. I do believe that there are factual issues as to whether the parties agreed to deviate from the contract language. There are also credibility determinations which cannot be made during a summary judgment motion.”⁵⁴

In rejecting Misenar’s summary judgment, the trial court signaled that further factual determinations were necessary to establish whether waiver of contractual requirements occurred. This did not signify that there was an underlying ambiguity based on the undisputed facts of the case. Rather, the court reserved the right to make credibility determinations based on review of documentation and hearing testimony at trial.⁵⁵ The court had to hold in that manner; otherwise, virtually every time there is an issue of ambiguity of waiver before the court, a summary judgment would create a self-fulfilling result.

The present case is distinguishable from Mike M. Johnson v. County of Spokane.

As recognized above in the trial court’s decision, there are many components to this case which separate it from the facts outlined in *Mike M. Johnson*. In that case, a contractor named Mike M. Johnson entered into a contract to perform work for the City of Spokane.⁵⁶ Throughout the

⁵⁴ CP 399

⁵⁵ *Id.*

⁵⁶ See generally *Mike M. Johnson*, 150 Wash.2d at 391, 78 P.3d 161 (2003).

work, different issues arose that deviated from the original scope of the contract. *Id.* Even though representatives from the City of Spokane plead with Mike M. Johnson repeatedly to provided written change orders (even sending letters directly stating that their change-order requirements were not waived) for those changes, he failed to do so. *Id.* After completing the work, Mr. Johnson demanded payment from the City, but was ultimately denied. *Id.* Mr. Johnson sued, alleging that the City had actual notice of his work, and on that basis, should be required to submit payment for the work. *Id.* The court eventually held in favor of the City, establishing a standard regarding written change orders in contracts: *actual notice of a contract change is insufficient to create an exception to contract compliance. Id.* at 391.

The facts in the present case do not resemble those outlined in *Mike M. Johnson*. Had the trial court stopped at the first question, and looked no further into the background circumstances of the present case, *Mike M. Johnson* may apply. Instead, *Mike M. Johnson* provides a starting point for the analysis, not a compendium of data which foreshadows a result.

The standard for evaluating changes to contract goes further than the *Mike M. Johnson* standard. Even the court in *Mike M. Johnson* seemed to anticipate this fact by indicated that there would be instances

where failing to follow the rigors of a written change order requirement would nonetheless not shield a party from having to pay for work. *Id.* at 387-88. According to the *Mike M. Johnson* court, if the party benefiting from the term of the contract has *actual notice* of the change, AND *subsequently directs the contracting party to proceed with that work*, this is evidence of an intent to waive the contractual requirement. *Id.* This standard is typified through an analysis of *Bignold v. King County*, 65 Wn.2d 817, 399 P.2d 611 (1965) and emphasized through references to several other cases explaining in broader detail the characteristics of an unequivocal waiver. In *Am. Sheet Metal Works, Inc. v. Haynes*, a “waiver of the contractual notice is established when the benefiting party ‘authorized, permitted, and directed’ the contracting party to perform the work in question.” *Am. Sheet Metal, inc. v. Haynes*, 67 Wn.2d, 153, 159, 407 P.2d 429 (1965). In fact, “[i]f any extras were furnished at the express request of the [benefitted party], recovery can be had therefor, as such request would amount to waiver of the contract provision.” *Barbo v. Norris*, 138 Wash. 627, 635-36, 245 P. 414 (1926).

Dickson’s response brief outlined numerous factual differences that invoked the analysis beyond the *Mike M. Johnson* case and was more in keeping with the standards developed through the court’s interpretation

of *Am. Sheet Metal, Bignold, and Barbo*.⁵⁷ Among other things, Dickson provided evidence from a site supervisor (and later witness at trial) that detailed an account of how Misenaar unequivocally waived the change order requirement.⁵⁸ Dickson's supervisor for the project testified that Misenaar did not wish to follow formal, written change order protocols, preferring instead to review estimate costs and then give verbal approval/direction for the change to be executed. This account is in direct keeping with the expanded analysis from *Mike M. Johnson* and presented disputed facts which needed review at trial. Thus, the applicability of the *Mike M. Johnson* standard is incomplete. The court found that while there was one similarity (the existence of a written change order requirement), the surrounding factual circumstances as described by both parties tended to show that a waiver was present. Thus, the court properly decided that the summary judgment at that stage was improper.⁵⁹

C. The Trial Court Properly Denied Misenaar's Motion for Directed Verdict.

Misenaar's Motion for a Directed Verdict brought at trial was properly denied, as Dickson defended the counterclaims by presenting

⁵⁷ CP at 70-75.

⁵⁸ VRP at 76-116; and VRP at 951-953, see also footnotes 7-10. At trial, Dickson's witnesses Mike Hoven, Shawn Hammond, and Randy Asahara testified that written change orders were waived by Mr. Misenaar at the beginning of the project in favor of a more informal, quicker method of handling change orders. Trial Exhibit No. 69 provided a short list of documentation which supports this assertion and was presented in conjunction with the Plaintiff's Response to the summary judgment motion.

⁵⁹ CP 355

testimony at trial, had filed a reply to the counterclaims, and Misenar had ample notice of Dickson's position regarding the claims.⁶⁰

Although Misenar's motion requested a directed verdict, the trial court first considered whether to strike the reply to the counterclaims that Dickson had filed after Misenar's motion was filed. CR 6(b) allows a trial court to exercise its discretion to extend the time required for taking any action. Dickson's response to Misenar's motion for directed verdict specifically asked "for leave of court to file its reply to the amended counterclaim now under CR 6(b)"⁶¹ Thus, Dickson did move for an extension of time, and the trial court properly exercised its discretion in allowing the late filed reply (although striking the affirmative defenses in the reply), because it found that there was no prejudice to Misenar by allowing the late reply and because the late filing was excusable due to Misenar's three amendments to add counterclaims shortly before the scheduled trial date.⁶²

Beers v. Ross, 137 Wn. App. 566, 154 P.3d 277 (2007), does not hold that a trial court has no discretion to allow a late reply. In fact, *Beers* reversed summary judgment in favor of the counterclaimant where the only ground asserted for judgment was the plaintiff's failure to file a reply

⁶⁰ VRP at 560, 591-600, CP at 663-673, 376-380

⁶¹ CP 668.

⁶² VRP at 571-72, 592-93.

to the counterclaim. 137 Wn. App. at 574. One day after the motion for summary judgment was filed, the plaintiff filed a motion requesting leave to file a late reply to the counterclaim. *Id.* at 572. The plaintiff's complaint and declarations in response to summary judgment clearly indicated material issues of disputed fact as to the issues presented in the counterclaim. *Id.* at 574. Thus, the trial court's unsupported decision to deny the motion to file a late reply was reversed, as was the order granting summary judgment on the counterclaim. *Id.* The Court of Appeals held that the motion was "more accurately characterized as a motion for judgment on the pleadings, CR 12(c), and entry of an order of default." *Id.* at 573.

An order of default can only be entered if "a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules." CR 55(a)(1). A party who has appeared is entitled to written notice of a motion for default "at least 5 days before the hearing on the motion." CR 55(a)(3). A motion for judgment on the pleadings is reviewed to determine if there is any set of facts that would entitle the claimant to relief. *E.g. N. Coast Enters., Inc. v. Factoria P'ship*, 94 Wn. App. 855, 858-59, 974 P.2d 1257 (1999).

It is well-settled that Washington law prefers resolution of cases on their merits, and that default judgments are therefore disfavored. *E.g.*

Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979). In Washington, therefore, although CR 12(a) requires an answer to the complaint within 20 days of personal service and a reply to a counterclaim within 20 days of service of the answer, a default can only be entered if the appropriate responsive pleading is not filed at the time of the hearing on the motion for default. See Ronald B. Leighton, *Washington Civil Procedure Deskbook*, Rule 12 Defenses and Objections, at § 12.5(2)(a)(vii) (2d ed. 2006) (“A default judgment may not be entered against a defendant who has appeared unless the defendant fails to serve a responsive pleading prior to hearing on the motion for default. ... Thus, the timing requirements enunciated by the rule for filing responsive pleadings are of limited relevance and appearance does not waive any defenses.”).

Further, *Jansen v. Nu-West, Inc.*, 102 Wn. App. 432, 6 P.3d 98 (2000), is distinguishable. The dispute centered on a loan, and the defendant lender asserted a counterclaim alleging that the business purpose exception to usury laws applied to the loan. *Id.* at 436. Before a reply to the counterclaim was filed, the defendant moved for summary judgment on the counterclaim. *Id.* In his first response, the plaintiff challenged the motion based solely on a defect in notice and the nature of some payments, but did not directly address the issue of the apparent

commercial purpose of the loan. *Id.* The motion was continued, and the plaintiff filed another response citing law regarding a conflict between a borrower's written and oral statements concerning the purpose of the loan, but did not present any evidence that such conflicting statements were made to the lender. *Id.* An order granting summary judgment on the counterclaim was entered September 22, 1997. *Id.* at 437. In July 1998, the plaintiff filed a reply to the counterclaim and pleaded the affirmative defense of usury for the first time. *Id.* The court of appeals held that the counterclaim was resolved on summary judgment "because the allegation was unrefuted" and the reply was not filed until after the order on summary judgment was entered. *Id.* at 438-39.

In the present case, the trial court elected not to enter judgment against Dickson on Misenaar's counterclaims.⁶³ The court considered that the issues presented in the counterclaims had been addressed in depositions and discovery and had been the subject of three days of trial testimony.⁶⁴ Further, the pleadings up to trial had clearly shown that Misenaar was apprised of the position of Dickson regarding the counterclaims, and that it was rejecting them.⁶⁵ Testimony at trial also established that Misenaar had foreknowledge of the contested

⁶³ VRP at 575-585

⁶⁴ VRP at 594

⁶⁵ VRP at 593-94

counterclaims.⁶⁶ Thus, Dickson had “otherwise defend[ed]” the claims as contemplated in CR 55(a)(1).

In *Beers*, the court relied in part on the plaintiff’s response to the motion for summary judgment in reversing judgment on the counterclaim. As in *Beers*, Dickson had presented a defense to the counterclaim, even though a reply was not timely filed. This is completely distinguishable from the situation in *Jansen*, where the plaintiff presented no defense to the allegation whatsoever and did not file a reply until almost a year after the order on summary judgment was entered. Entering judgment on Misenar’s counterclaim in the situation placed before the trial court would run contrary to law’s preference to resolve matters on their merits.

The Court also properly denied the motion because it was actually a motion for judgment on the pleadings, which must be filed “within such a time as not to delay the trial.” CR 12(c). Because the motion was not filed until after trial started, the Court noted that the motion should be treated as a motion under CR 56.⁶⁷

⁶⁶ *Id.* At 593-96. The court states that “I don’t think there has been any question between the parties that this has been an issue. [Dickson] was not accepting these counterclaims or accepting responsibility for them. I don’t think that was ever been an issue between the parties.” The court then held that Misenar was not surprised or prejudiced by the defenses to the counterclaims.

⁶⁷ *Id.*

D. The Trial Court's Findings of Fact and Conclusions of Law Were Based on Substantial Evidence.

Misenar challenges several of the trial court's Findings of Fact, and Conclusions Law, claiming that they were not supported by substantial evidence at trial. As stated above, great deference is afforded to a trial court's factual findings and to mixed questions of law and fact. A review of the testimony and evidence presented at trial shows that there was sufficient evidence given to persuade a reasonable person for each of the disputed Findings of Fact and Conclusions of Law, and that the trial court's Findings and Conclusions should be left undisturbed.

There is substantial evidence in the record that the parties agreed to waive the contract's written change order requirement and to support Findings of Fact 3, 4, 5, 26 and Conclusion of Law 19.

Misenar challenges Findings of Fact 3, 4, 5 and 26, which all lend support to the challenged Conclusion of Law 4, which states that: "Misenar unequivocally waived the contract provision requiring written change orders, so Misenar is obligated to pay Dickson for some of the 'extras' claimed by Dickson", and Conclusion of Law 19, which denied Misenar's counterclaim for breach of contract based on the failure to use written change orders. There is substantial evidence in the record that throughout the course of the project, Misenar neither required nor insisted on formal written change orders. Instead, Misenar either gave his verbal

consent to projects or relied on email communications, effectively waiving this provision of the contract.

Witnesses Mike Hoven, a Dickson supervisor, Shawn Hammond, a Dickson crew foreman, and Randy Asahara, an estimator who generated the bid and helped form the terms and scope of the contract, testified that where formal change order forms are contractually required, it is the customary practice of the owner or contractor to initiate and provide a change order form when a change is proposed by a subcontractor.⁶⁸ However, while Dickson employees obtained prior approval for every change, Misenar did not provide them with any written change order forms.⁶⁹ Instead of using written change orders, a process that was “pretty much verbal” was used by the parties.⁷⁰ Mr. Asahara, either through email or verbally, would inform Misenar of what had occurred on the site and provide him with the price to do the appropriate work.⁷¹ If Misenar approved of the additional work, he would then give the authorization and direct Dickson to go to work.⁷²

Mr. Asahara testified that the first such departures from the contract formalities occurred when the need arose to alter a retention pond

⁶⁸ VRP at 13, lines 5-20; 79, lines 11-24; 247, lines 3-8.

⁶⁹ VRP at 13, 79, 246-7.

⁷⁰ VRP at 246, lines 23-24.

⁷¹ VRP at 246, lines 23-25.

⁷² VRP at 247, lines 1-2.

wall and to change piping material. Mr. Asahara testified that this was done “pretty much” by verbal agreement and email.⁷³ According to Mr. Misenaar’s own testimony, these initial changes were negotiated and agreed upon through an email exchange and over telephone.⁷⁴ No formal written change orders were generated or signed by the parties. The change in the contract resulted in a price increase of \$9,270.00 for the change to the wall, and \$2,843.00 for the change in pipe from “HDPE” to “Ductile Iron Pipe.”

Mr. Misenaar’s method of dealing with these initial changes set the tone for the project and typified a course of dealing for subsequent changes through the project. As the work continued, more changes continued to surface, all of which were dealt with in an informal matter.⁷⁵ For example, Michael Hoven testified that when a decision by a local municipality necessitated that import trench backfill, rather than native backfill must be used in the project, Misenaar did not demand a formal, written change order be issued.⁷⁶ Instead, he said the procedure to handle this change was “up to” Michael Hoven, and that he could “just add it as a line item.”⁷⁷

⁷³ VRP at 12, lines 19-25; 13 lines 1-9; Trial Exhibit Nos. 12 and 13.

⁷⁴ VRP at 868-71.

⁷⁵ *See generally*, Trial Exhibit Nos. 69C-69P.

⁷⁶ VRP at 289, line 16.

⁷⁷ VRP at 289, lines 13-16.

Further, with regard to the tree, Mr. Hammond testified that he stopped work and consulted directly with Mr. Misenaar. Dickson provided a price estimate to remove the tree, and Misenaar directed them to proceed with removal, despite the lack of a written change order.⁷⁸ Mr. Hoven offered similar testimony.⁷⁹

Mr. Asahara attributed the departure from contractual formalities to the “good relationship” he had with Misenaar.⁸⁰ Similarly, Misenaar’s own witness, Erik Isaacson, the crew manager for Sadler and Bernard, said that he and Misenaar did not have a pre-agreed upon written list of areas to stake, even though they generally did with other contractors, “in part because we had a good relationship with the owner.”⁸¹ Isaacson explained, “we just depended on whatever the contractor was going to need he would request or the owner would request it and we’d go out and do it.”⁸²

Misenaar’s brief argues incorrectly that the trial court never made a finding that Misenaar’s conduct was an unequivocal waiver.⁸³ On the contrary, Findings of Fact 3 and 5 indicate that the court considered the change order provision and found that the parties “mutually agreed to waive the contractual provision” and that “Misenaar unequivocally waived

⁷⁸ VRP at 82-83.

⁷⁹ VRP at 327.

⁸⁰ VRP at 13, lines 10-15.

⁸¹ VRP at 762, lines 15-22.

⁸² VRP at 763, lines 2-6.

⁸³ Appellant’s Brief at 35-36.

the requirement for written change orders from Dickson.”⁸⁴ Misenaar himself testified that he was concerned about delaying the project.⁸⁵ Mr. Hammond testified that there was “a real push to start and go, go, go on the project.”⁸⁶ This testimony supports the court’s finding that Misenaar waived the provision in order to avoid delays.

Misenaar misstates the testimony when he asserts that Dickson admitted that Misenaar did not waive the change order requirement because he asked for change orders. Mr. Hoven did testify that Misenaar “asked me for change orders,” but he goes on to explain that he did not create written change orders pursuant to his discussion with Misenaar that it wasn’t necessary.⁸⁷

Misenaar also overstates the trial testimony as to any confusion about the final approved plans. As to some of the changes, the impact on Dickson’s work and the bid was negligible.⁸⁸ Ultimately, it is clear that the trial court understood the issues arising from the confusion as to final plans and considered that evidence in making its findings. Dickson’s claims with regard to additional paving near the entrance of the plat and

⁸⁴ CP 968.

⁸⁵ VRP at 937.

⁸⁶ VRP at 130.

⁸⁷ VRP at 421, 281 (Hoven testified that Misenaar said “just add it as a line item on our pay estimate and I’ll pay it.”)

⁸⁸ VRP at 233-35.

the changed stop sign were rejected because those claims were based on earlier plans.⁸⁹

There is no requirement that the trial court accept Misenar's testimony at face value. The trial court has the discretion and obligation to weigh the testimony and the evidence and is free to reject some of the testimony.⁹⁰ Misenar's objection to the court's findings on the issue of waiver and most of the other issues on the appeal seems to be based on the false assumption that the trial court was required to accept all of his testimony as true.

Under the rule in *American Sheet Metal Works, Inc. v. Haynes*,⁹¹ evidence that an owner directed and approved of changes to contract work is evidence that a contract's written change order requirement was waived. As cited above, there is substantial evidence in the record to uphold the trial court's findings that the parties agreed to waive the formal written change order requirement. The evidence of Misenar's conduct with regard to the pipe change, the trench backfill, the tree, and other examples are sufficient to uphold the court's finding that Misenar unequivocally waived the change order requirement in the parties' contract.

⁸⁹ CP 974 (FF 17 and 19).

⁹⁰ *E.g. In re Sego*, 82 Wn.2d 736, 739 513 P.2d 831 (1973).

⁹¹ 67 Wn.2d 153, 159, 407 P.2d 429 (1965).

There is substantial evidence in the record to support an award of \$6,666.64 for the cost of labor and equipment associated with the use of import trench backfill and to support Finding of Fact 14 and Conclusion of Law 7.

Misenar claims that there was not substantial evidence to support Finding of Fact 14, and related Conclusion of Law 7 – that he must pay \$21,554.89 for the cost of the import backfill – a figure which includes the cost for the screened pit run, trip fees, labor and equipment. Specifically, Misenar disputes \$6,666.64 of these damages; the portion which he attributes to labor and equipment. He agrees that “the evidence shows that the imported trench backfill cost \$14,888.25,” arguing only that “the trial court erred when it held Misenar needed to pay more than the cost of only the imported backfill material.”⁹² However, there is substantial evidence in the record to show that the use of import backfill material did increase labor and equipment costs as compared to native backfill, in part because of the need to import the approved material and remove the native soils, and therefore the trial court’s award of \$6,666.64 in labor and equipment costs should be upheld.

⁹² Brief of Appellant at 39. *See also* Trial Exhibit No. 106, the “Holroyd Pit Estimate”, which was relied upon by the trial court to derive the \$14,788.25 (plus \$100.00 in trip fees) in the cost of the import backfill and delivery.

As part of their October 12, 2005 bid Dickson agreed to provide a sewer line for Misenaar.⁹³ However, neither the bid, nor any other portion of the contract included a specification regarding the material that would be used to fill in the sewer trench.⁹⁴ The parties certainly did not include any provisions in the contract or bid which stated that Dickson would be responsible for the cost of the labor and equipment to import the material.⁹⁵ Instead, the parties discussed the possibility that Pierce County would allow them to use native soils as backfill, which would be cheaper, and also agreed to leave open the possibility that another company would provide import trench backfill.⁹⁶

After the County rejected the request to use native soils as backfill, Michael Hoven provided the necessary pricing information to Misenaar

⁹³ Trial Exhibit No. 1 at “Exhibit B Contract Documents: Project Work Bid”; VRP at 202-3.

⁹⁴ VRP at 203; lines 19-25, (Randy Asahara explaining that the contract did not have any provisions regarding the use of backfill “we excluded any import trench backfill”); VRP at 281, line 4 (Michael Hoven testifying “our cost proposal didn’t include using native backfill.”)

⁹⁵ VRP at 204; lines 16-19, (Randy Asahara agreeing “yeah, it was not part of the contract” in response to Mr. Snyder’s question “and in fact, *the import of that material* was not even a line item in the contract that you had agreed to provide, did you?”) (emphasis added). Note: In footnote 137 in Misenaar’s Appellant Brief, Misenaar argues that the trial judge erroneously failed to apply Paragraph 2.2 of the parties’ contract, which is Trial Exhibit Number 1. Paragraph 2.2 of this contract states “the Contractor agrees to furnish all supervision, labor, tools, equipment, materials and supplies necessary to perform the follow described portion of the work (hereinafter called the ‘Work’) in accordance with the terms and conditions of this Contract.” However, as an examination of the contract, and Randy Asahara’s testimony shows, the use of import trench backfill was not part of the “Work” anticipated by the original contract, but rather, constituted a change to the contract.

⁹⁶ VRP at 204-5; VRP at 280-1, (Michael Hoven explaining that he drafted a letter on Misenaar’s behalf that included the recommendation of an engineer that native soils could be used).

regarding the costs involved in the use of the imported backfill.⁹⁷ After they received approval from Misenar to use the imported trench backfill, Michael Hoven and Shawn Hammond moved forward with the work.⁹⁸ (It is important to note at this pattern of change order approval was typical throughout the project. Witnesses Mike Hoven and Shawn Hammond both testified that when a changed condition surfaced, approval and direction were issued from Mr. Misenar directly.)

As Mike Hoven's testimony showed, not only does imported trench backfill cost more than native backfill, it requires higher labor and equipment costs as well.⁹⁹ Hoven testified that with the use of imported backfill, as opposed to native backfill, there was "surplus material, so we had to take and haul that and place in the lots and grade it out and compact it."¹⁰⁰ These additional costs are enumerated in Trial Exhibit Number 69, which Hoven prepared to provide Misenar a breakdown of the additional costs from using the import trench backfill.¹⁰¹

⁹⁷ VRP at 289, lines 8-12.

⁹⁸ Id. See also footnotes 7-10.

⁹⁹ VRP at 285, lines 7-20.

¹⁰⁰ Id.

¹⁰¹ Id.; Trial Exhibit No. 32 (which shows labor costs of \$2,628.24 for four hours of a Senior Foreman's work, 48 hours for an Operator Class 2, and 4 hours for a Pipe Layer, as well as equipment costs in the amount of \$4,038.40 for a JD 644G Loader, JD 750 Wide-Track Dozer, and a Ford 150 Pickup Truck).

There was substantial evidence to support the trial court's award of \$6,666.64 in labor and equipment costs from the use of imported trench backfill, and this award should be upheld.

There is substantial evidence that the removal of the tree was an "extra" and to support Finding of Fact Number 16 and Conclusion of Law Number 9.

Misenar also challenges the trial court's Finding of Fact 16, in which the court found that work on the project necessitated removal of a tree located on property that did not belong to Misenar, and was not anticipated in the original contract. The trial court awarded Dickson \$2,680.00 for the cost it incurred for removing the tree.¹⁰² There was substantial evidence at trial that the tree was not located on property to be cleared and grubbed, but was rather on the lot with an existing home, that it could not have been contemplated that the tree would have to be removed under the contract, and therefore the trial court's decision should be upheld.

Shawn Hammond testified that the initial bid plans and contract agreement did not include the removal of the tree.¹⁰³ While the bid sheet did include a provision for Dickson to undertake "clearing and grubbing" of brush and some trees on Misenar's property, there was confusion as to

¹⁰² Conclusion of Law No. 9.

¹⁰³ VRP at 83, lines 1-12, VRP at 128, lines 1-3; 18-19 (testifying that "it became an issue on the prints I saw. Never said remove 150 foot tree and take that out, dig alongside it); VRP at 138, line 5.

whether the tree was located on Misenar's property.¹⁰⁴ Misenar had agreed to convey that lot back to the person who resided in the home on that property without changes. In fact, the property owner had "a huge discussion with the City and everybody" about the eventual removal of the tree because she was so unhappy about it.¹⁰⁵

Hammond's testimony further established that it was not clear until Dickson's crew had actually commenced digging that the initial staking and placement of the sidewalk and entrance wall would not meet the City's minimum requirements, necessitating removal of the tree.¹⁰⁶ The original plans were changed to accommodate an ornamental wall at the front entrance. According to the adjusted staking offsets, in order to achieve the proper cut and slope, they would damage the roots of the 150 tree to the point that the tree was no longer safe to the public.¹⁰⁷

When the problem became apparent, a representative from the City Public Works Director visited the site. He rejected proposals to simply cut the roots shorter (so that they did not interfere with the sidewalk) or to shorten up the installation of the sidewalk to avoid the tree.¹⁰⁸ At this point, Hammond testified, everybody, "including Bodi [Misenar]", agreed

¹⁰⁴ VRP at 175, 249.

¹⁰⁵ VRP 175, lines 11-18.

¹⁰⁶ VRP at 83, lines 20-24.

¹⁰⁷ VRP at 84.

¹⁰⁸ Id., at lines 15-19.

that the tree needed to be removed.¹⁰⁹ Michael Hoven also testified that when Misenar became aware of the problem, he asked Dickson to remove the tree.¹¹⁰ If the tree had been included within the original scope of the project, the request by Misenar for its removal would have been unnecessary or redundant.

There was also testimony that the plans would have specifically called for removal of the tree if it had been contemplated at the outset.¹¹¹

There is substantial evidence to support the trial court's ruling that Misenar should pay Dickson the \$2,680.00 cost for removing the tree, because it was not anticipated in the initial contract and was therefore an "extra."

There is substantial evidence to support an award of \$860.00 for repairs to asphalt damaged by a third party, and to support Finding of Fact Number 23 and Conclusion of Law Number 16.

Misenar also challenges the trial court's Finding of Fact Number 23, in which the court found that right before the final paving was to be done, another party's work on the project damaged the asphalt to the point that it needed to be repaired before the final lift was put down. The trial court awarded Dickson \$860.00 for the costs it incurred repairing the

¹⁰⁹ VRP at 128, line 23.

¹¹⁰ VRP at 328, lines 14-18.

¹¹¹ VRP at 217, see also VRP at 325-26.

asphalt.¹¹² Misenaar specifically challenges the trial court's award of damages under Misenaar's interpretation of the original contract under contract law. There was substantial evidence at trial to support the trial court's award of \$860.00 for these repairs, and the trial court's decision should be upheld.

Michael Hoven testified that one day before Dickson completed the final paving, another contractor came to the work site and in order to install a gate, jack hammered through ATB asphalt that Dickson had already poured.¹¹³ In doing so, Hoven testified, the third party dug several trenches before finally successfully digging a trench for the gate. This resulted in significant damage asphalt.¹¹⁴ The third party attempted to patch these trenches by pouring cold mix asphalt into the grooves instead of the ATB that Dickson had used.¹¹⁵ Hoven explained that cold mix asphalt cannot be paved over the way that ATB can because it is a type of oil diluted with diesel and it will degrade the final surfacing.¹¹⁶

In order to complete the scheduled final paving, this damage needed to be repaired. Michael Hoven testified that he called Misenaar to inform him about what had happened, and get approval to do the required

¹¹² Conclusion of Law No. 16.

¹¹³ VRP at 353 lines 23-25.

¹¹⁴ VRP at 24-25.

¹¹⁵ VRP at 354, lines 14-19.

¹¹⁶ VRP at 354, lines 16-18.

repairs.¹¹⁷ Hoven testified that at this point Misenaar told him to “do the work” and that he would pay him for it.¹¹⁸

Misenaar argues that the contract requires Dickson to “protect and bear the costs incurred to repair its work” under the contract, but does not cite any portion of the contract which required Dickson to repair damage from third parties. While Misenaar further argues that if these repairs are not within the scope of the contract, a written change order form should have been submitted, it has already been shown that the requirement for written change orders was mutually waived. In this case, the repairs needed to be completed within a 24 hour time period so that the scheduled paving could take place, making it even more likely that Misenaar intended to give oral permission for the repairs to take place. The trial court’s award of \$860.00 for the repairs was supported by substantial evidence and should be upheld.

There is substantial evidence to support a ruling that Misenaar did not meet his burden of proof on his affirmative defenses, and to support Finding of Fact Number 25 and Conclusions of Law 18 and 24.

Misenaar challenges the trial court’s ruling on the following two affirmative defenses: 1) equitable estoppel; and 2) unclean hands. These defenses arise from the allegation that Dickson actually saved money from

¹¹⁷ VRP at 356, lines 9-10.

¹¹⁸ Id.

some of the changes made to the contract. Specifically, Misenar claims that he showed that Dickson was contractually obligated to import material to balance the site, and saved money when Misenar decided to change the grading levels for the site rebalance. The trial court found that Misenar did not meet his burden to prove these affirmative defenses because Misenar did not produce sufficient evidence of the alleged savings to Dickson from changes made to the contract.¹¹⁹ The trial court's finding should be upheld, as Misenar failed to provide evidence that these changes actually saved Dickson money.

In fact, in his Appeal, Misenar does *not cite to a single instance* in the trial record or exhibits to support the claim that Dickson saved money from the site rebalancing. An examination of the trial record and exhibits actually shows that the cost to import fill material to balance the site, (much like the import materials used to fill the sewer trench), was not included in the original contract bid price. Randy Asahara unequivocally testified that Dickson did not have the contractual responsibility to balance the site and that the cost of importing and hauling away material is an "added cost to the owner and added cost to the bid."¹²⁰ While the original site plan drawn up by Misenar's engineer, Hal Hagenson had necessitated the importation of 7,500 cubic yards of fill material, Dickson contacted an

¹¹⁹ Finding of Fact 25. *See also* related Conclusions of Law Numbers 18 and 24.

¹²⁰ VRP at 57, lines 1-3; VRP at 251, lines 6-9.

outside firm to “value engineer” a plan that relied on native soils to rebalance the site.¹²¹ This plan ultimately saved Misenar significant money by reducing the costs required to balance the site.

Misenar’s affirmative defenses are completely contradicted by an examination of the evidence and the trial court’s ruling should be upheld.

There is substantial evidence that Misenar did not establish an accord and satisfaction and to support Finding of Fact Number 27 and Conclusion of Law Number 18.

There is substantial evidence in the record to support the trial court’s finding that Misenar did not prove an accord and satisfaction and the trial court’s finding should be upheld.¹²²

The “tender of a certain sum in full payment, followed by acceptance and retention of the amount tendered” establishes an accord and satisfaction. *U.S. Bank Nat. Ass’n v. Whitney*, 119 Wn. App. 339, 351, 81 P.3d 135 (2003). An accord and satisfaction requires a “meeting of the minds” and the party claiming an accord and satisfaction bears the burden to prove both parties understood settlement of the disputed claim would be the result of accepting the payment. *Douglas Northwest Inc., v. Bill O’ Brien & Sons Coast., Inc.*, 64 Wn. App. 661,686, 828 P.2d 656 (1992).

¹²¹ VRP at 251-53.

¹²² Finding of Fact No. 27. *See also* related Conclusion of Law No. 18.

Here, the notation “Final Billing w/ret (retainage)” does not clearly provide notice to Dickson that this is the final payment to be made by Misenaar and that by cashing the check Dickson would be waiving any future claims for payment. The words “final billing” are ambiguous, at a minimum, and certainly do not convey that if Dickson chose to cash the check it would waive any claim for future payment. Misenaar did not use the words “final payment,” he did not clearly indicate that he disputed the amount owed. Going through the balance of the record will prove that there is simply no evidence that Dickson ever agreed to settle its claim.

There is not substantial evidence that this was an accord and satisfaction, and the trial court’s ruling must be upheld.

The trial court's ruling that Misenaar failed to provide sufficient evidence in support of his third counterclaim for back charges and costs should be upheld.

Misenaar challenges the trial court’s denial of his third counterclaim for back charges and costs, arguing that there was “un-contradicted” evidence that he incurred costs in clearing and grubbing and re-staking the entry curbs.¹²³ Dickson denies that it is responsible for the cost of re-staking the entry curbs, which is addressed in the sections below. Dickson performed the work clearing and grubbing the property in accordance with the terms of the original bid plan, and there is certainly not “un-

¹²³ Finding of Fact 29; Conclusion of Law 21; Appellant’s Brief at 46.

contradicted” evidence in the record to the contrary. Misenar cites Trial Exhibit Number 61, which is an invoice from Sadler Barnard and Trial Exhibit Number 62, which is a list of transactions with Misenar vendors.¹²⁴ The transactions in Exhibit Number 62 lack descriptions. At most, this exhibit shows that various vendors charged Misenar for various good or services on certain dates.

Dickson was not contractually obligated to reconcile structural and civil plans regarding the placement of the retaining wall and bypass line on the site.

Misenar challenges Conclusion of Law 22, which denied Misenar’s counterclaims regarding the storm bypass line and pond retention wall.¹²⁵ It asserted specifically that Dickson was not responsible for the encroachment of those items on the affected lot. The court also found that Misenar did not present evidence of damages regarding the counterclaims.¹²⁶

There was substantial evidence provided at trial that Dickson did not have a contractual obligation to coordinate or control third-party engineers and wall-designers hired by Misenar. Hal Hagenon, E3RA, and Sadler & Bernard contracted directly with Misenar to determine the size and scope of the wall and bypass line and to plan where the location

¹²⁴ Appellant’s Brief at 46, fn. 157; Trial Exhibit Nos. 61 & 62.

¹²⁵ CP at 979.

¹²⁶ *Id.*

of these items was to be installed.¹²⁷ The contract itself is informative.¹²⁸ Under subsection 2.3, Dickson's responsibilities were described as being limited to three categories of work. Dickson was responsible for erosion control, site work (which included things like clearing the area, building pond walls, and installing certain utilities), and installing the storm system (this included the pond wall, manholes, testing water, pipes, fire hydrants, and other utilities and trench work).¹²⁹ The contract *does not* provide that Dickson was responsible for providing the engineering plans or wall designs. Dickson's role was limited to a specific set of obligations on the site and did not include engineering the construction or location of the wall or bypass line.

Dickson was not a general contractor. Nowhere within the contract is Dickson required to supervise third parties hired directly by Misenaar. At trial, Misenaar provided no evidence to support the assertion that Dickson was responsible for managing the engineers and surveyors who were ultimately charged for laying out the development (including the bypass line and retaining wall). Certainly, Dickson is responsible for installing certain items on the property. However, it is not responsible for

¹²⁷ See footnote 16. Testimony at trial from Dickson employees proved that civil engineer Hal Hagenson, structural engineer E3RA, and surveyor Sadler and Bernard were third-parties responsible for the design and planned placement of the bypass line and retaining wall.

¹²⁸ Trial Exhibit No. 1.

¹²⁹ *Id.*

the universal integrity of the project, including the layout of specific items to be installed such as the retaining wall or bypass line.¹³⁰

Testimonial evidence also supports this claim. Mike Hoven, Shawn Hammond, and Randy Asahara all testified that they were not responsible for overseeing the work done by Misenar's engineers.¹³¹ Engineers outside Dickson's control ultimately determined the design and location of the bypass line and retaining wall.

Dickson requested staking for the location of the pond wall and installed the wall pursuant to that staking.

Numbers 10, 11 and 12 of Misenar's brief deal with very similar and related issues regarding the proper staking, and location of a bypass line and retaining wall.¹³² This is primarily due to the fact that the location of the bypass line was dependent on the location of the pond wall. The trial court's findings on these factual issues all support its Conclusion of Law 22 – the dismissal of Misenar's fourth and fifth counterclaims. The trial court properly dismissed these counterclaims because Misenar did not prove that Dickson breached the contract, or that location of the wall and bypass line have resulted in any damage to Misenar.

¹³⁰ VRP at 21, line 5-13. Randy Asahara testified that he did not control surveying on the property, meaning that he did not control where the specific layout of certain items are on the property. That is delegated to Sadler and Bernard, a third-party surveyor hired by Misenar.

¹³¹ See footnote 16. See also VRP 504-05.

¹³² Appellant's Brief at 47-53; Findings of Fact Nos. 30-36 all deal with some aspect of these related factual issues.

Staking for the Pond Wall:

Misenar's first assertion is that Dickson failed to request and secure staking for the location of the pond retention wall. However, as the trial testimony showed, Dickson's witnesses were adamant in their testimony that the wall was built according to stakes in the field. Testimony from Shawn Hammond, affirmed that staking was always sought prior to installation of items on the development.¹³³ The procedure went as follows: employees of Dickson would come to a juncture in which they needed specific locations to be laid out for installation (such as the installation of a drainage pipe, or sewage line); the Dickson employee would contact either Misener directly, or Sadler and Barnard (Misener's chosen survey company), and request staking for that item; Sadler and Barnard would then come out and measure and stake the specific location pursuant to plans created by Hal Hagenson; Dickson would then proceed to install or construct the subject item pursuant to the staking requests.¹³⁴

In footnote 163 of his brief, Misener points to Erik Isaacson's testimony that there is no record that the wall was staked, but the lack of clear records does not conclusively establish that there were no stakes.¹³⁵

¹³³ VRP at 95.

¹³⁴ VRP at 101-02.

¹³⁵ Eric Isaacson, Misener's only witness as to staking, admitted that he was never out on the site personally and that he did not know whether or what the staking was actually showing. His testimony was based only on his review of the file. VRP at 922.

The surveyor's records do establish a few critical points that support the conclusion that the wall was staked as Dickson testified. The List Points Report shows that as of October 25, 15-foot offset stakes had been placed by the surveyor.¹³⁶ Mr. Isaacson testified that this was staking for a smaller angled wall in the northeast portion of Tract C.¹³⁷ Then, on October 26, a Field Crew Check List instructed the surveyor's crew to stake a "block wall."¹³⁸ Mr. Isaacson confirmed that the notations on the Field Crew Check List call for 15-foot offset stakes from the property line, the back of the sidewalk, and the wall.¹³⁹ Thus, the Field Crew Check list cannot have been referring to the smaller wall in the northeast portion of Tract C. First, that wall has already been staked as of October 25, so there would not have been a need to instruct for it to be staked on October 26. Second, that wall is nowhere near a sidewalk, so offset stakes from the back of sidewalk would be unnecessary. In addition, the foreman report for November 7, 2005 confirms that the surveyors were site and "staked sewer/wall."¹⁴⁰ Because Mr. Isaacson himself did not do any staking on site, his testimony as to whether the wall was staked by the crew is doubtful, especially in light of the apparent instructions to the field crew in

¹³⁶ Trial Exhibit No. 146.

¹³⁷ VRP at 760.

¹³⁸ Trial Exhibit No. 117.

¹³⁹ Trial Exhibit No. 146; VRP at 780.

¹⁴⁰ Trial Exhibit No. 57, p. 6.

Exhibit 117. Indeed, the evidence shows that Dickson asked for stakes for the catchbasins, sewer manholes, the smaller wall in the pond area, grading, and many other points.¹⁴¹ The assertion that Dickson abandoned this course of dealing for the pond wall, one of the most critical features on the plat does not make sense, and is not supported by the evidence presented at trial.

Location of the Pond Wall and Bypass Line:

The design and placement of the wall and bypass line were a source of much consternation for the other parties involved in the project. Misenaar asserts that Dickson installed the retaining wall and bypass line in the wrong location. The root of this mistake, according to Misenaar, is found in Dickson's disregard for staking and failure to reconcile conflicting engineering and wall design plans.¹⁴² Misenaar did not prove that any error in the location of the wall or bypass line were the result of a failure by Dickson to perform its contractual duties. The testimony at trial established that E3RA was responsible for designing the wall, Hal Hagenson was responsible for locating the wall on the plan, Sadler & Barnard was responsible for staking the wall, and Dickson was responsible only for building the wall. Dickson was merely responsible for

¹⁴¹ Trial Exhibit Numbers 144 (catchbasins), 145 (sewer manholes), and 146 (smaller wall in pond area).

¹⁴² Appellant's Brief, at 48-49, 50-53.

constructing the wall pursuant to those plans as laid out through Sadler & Barnard's staking.¹⁴³ Misenaar failed to prove a breach of a term of the contract and resulting damages by a preponderance of the evidence, and the trial court's ruling should be upheld.

Generally, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *Dravo Corp. v. Municipality of Metro Seattle*, 79 Wn. 2d 214, 484 P.2d 199 (1971) (quoting *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 63 L.Ed. 166 (1918)). Substantial evidence supports a finding that the the wall and pipe could not be constructed as designed by the engineer.

The plans themselves were altered on more than one occasion, finally arriving at structural design that was issued by Hal Hagenson on October 20, 2005. Normally, this plan should have been sufficient to construct the items depicted. However, in this case Hal Hagenson's drawings were deficient. This was because the actual, physical wall design by E3RA had not been taken into account by Hal Hagenson. Hal Hagenson's revised civil plans were completed on October 20, the day

¹⁴³ VRP at 406 (testimony of Michael Hoven that Sadler & Barnard was charged with the staking and that if something didn't match up with the stakes, the surveyor would either come out and restake it or check the staking).

before he had even received the structural plans from E3RA.¹⁴⁴ The civil plans and the structural plans were therefore inconsistent, and this inconsistency was never resolved. The E3RA plans called for the portion of the wall adjacent to Nevada Court to be 65 feet long and required that the bypass line be located a minimum of 8 feet west of the wall.¹⁴⁵ However, Hagenson's final plans depict a wall that is 85-90 feet long and place the bypass line only 6 feet from the wall.¹⁴⁶

This discrepancy between the plans was vital, because the design wall conflicted with the physics and geographic location of the retaining wall and bypass line in the plan issued by Mr. Hagenson.¹⁴⁷ This account is supported by not only the dates on the plans, specifically that the wall design by E3RA was issued after Hal Hagenson had created his mapping of the projected location for the wall and bypass line, but by the fact that there were specific survey staking requests sought by Dickson, which were completed by the surveyor.

The location of the bypass line and retaining wall are essentially tied together. This is due to the fact that the retaining wall's design indicated that the bypass line had to be so that it was within a certain

¹⁴⁴ Trial Exhibit No 2; VRP at 390.

¹⁴⁵ Trial Exhibit No. 2.

¹⁴⁶ Trial Exhibit No. 116.

¹⁴⁷ *Id.*; VRP at 446 (testimony of Hoven on cross examination that the designs were "multiple feet off" and that the plans were "drawn incorrectly by Hal Hagenson"),
[16]

distance in order to provide for the stability of the wall.¹⁴⁸ Therefore, if the retaining wall is not located properly, it has a direct impact on the location of the bypass line. Mr. Misenaar was well aware of the need to relocate the bypass line in order to avoid conflict with the wall, as is evidenced in an email he was copied on from Hal Hagenson, his civil engineer to Michael Hoven, in which Hagenson says that there would be only “slight adjustments to the inverts”, so the relocation of the bypass line “looks doable.”¹⁴⁹

Staking for the Bypass Line:

In his brief, Misenaar claims that even if the bypass line had to be relocated, Dickson failed to secure any updated staking for the new location.¹⁵⁰ Mr. Hammond unequivocally testified in his cross examination that when the location of the pipe was changed the original staking done by Sadler was “never moved,” but, following standard procedure, “we offset those with a regular offset.”¹⁵¹ Michael Hoven testified that he had to “get the surveyors out there three times” in order to reconcile the staking with the drawings.¹⁵² Dickson crews followed the staking done by

¹⁴⁸ Trial Exhibit No. 2 at 1, Note 2 (stating that the bypass line had “to be relocated a minimum of 8 feet to west to avoid wall bearing conflict.”)

¹⁴⁹ Trial Exhibit No. 113. (Hagenson explains that he got a call from Shawn Hammond saying that the bypass line should be shifted in order to “minimize any impacts to the adjacent retaining wall between the detention pond and the bypass line.”)

¹⁵⁰ Appellant’s Brief, at 53.

¹⁵¹ VRP at 185-186.

¹⁵² VRP at 446.

Sadler & Barnard to relocate the wall and bypass line.¹⁵³ Misenar suggests that Dickson breached the contract by failing to build the wall according to civil plans, but Dickson could not possibly have done so with plans it received from the owner. It was not Dickson's responsibility per the contract or per construction industry standards to resolve the discrepancies in the plans. Rather, Misenar was ultimately responsible for providing adequate plans to Dickson. Mr. Hagenon, upon receiving the plans from E3RA, he did nothing to bring to anyone's attention the fact that the bypass line could not be placed in the location he had indicated, nor did he point out that the wall was not long enough to satisfy his design.

In light of all of the foregoing evidence, the trial court's findings were proper and must be upheld.

The trial court considered the proper standard of damages arising from Dickson's alleged breach.

In sections 13, 14 and 15 of his brief, Misenar argues that the trial court erroneously failed to award him damages for the relocation of the bypass line and pond retention wall. Misenar claims that there was evidence at trial to support an award of damages, that the trial court erred in imposing a burden of proof of the loss of property value to calculate damages.¹⁵⁴ The trial court's ruling should be upheld because even if

¹⁵³ VRP at 504.

¹⁵⁴ Appellant's Brief at 56-62.

Dickson somehow breached its contractual duties in regards to the location and construction of the bypass line and pond retention wall, Misenaar did not show sufficient evidence of damages at trial, and the court's implied use of the "loss of property value" standard was proper.

In Finding of Fact Number 36, the trial court ruled that "Misenaar presented no evidence as to what the actual damages are to him for the loss of 4.5 feet of Lot 2, or the location of the pipe." In the letter ruling, the trial court explained further:

Finally, the defendant has failed to prove any damages from the location of the wall and the by-pass line. In his e-mail of April 19, 2006, the Defendant told Michael Hoven that 'we are working through the issue and I think we will be OK one way or another.' The Defendant has not presented evidence as to what the actual damages are to him for the loss of 4.5 feet of Lot 2, or the location of the pipe.¹⁵⁵

Assuming that the trial court even used "loss in property value" to calculate potential damages for Misenaar, this Court should reject Misenaar's argument for an alternative calculation of damages because Misenaar raises it for the first time in his appeal.¹⁵⁶ Had Misenaar properly argued for this award and measure of damages in his Trial Brief, or even in Closing Statements, the consideration of this alternative measure of

¹⁵⁵ CP 698.

¹⁵⁶ See *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351, 100 (1983) (stating "failure to raise an issue before the trial court generally precludes a party from raising it on appeal.") See also *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978).

damages might be appropriate. Instead, Misenar saves this argument for his appeal—long after the trial, and long after Dickson would have been afforded the opportunity to present and elicit the sort of evidence needed to rebut the use of this standard, or an award of damages under this standard.

Misenar argues that the burden was on Dickson to offer evidence that the loss of the property value would be minimal compared to the cost to remedy. However, Dickson offered no evidence of potential property value loss because there *was no such loss* and Misenar did not offer sufficient evidence of damages either in the form of loss of property value, or that the location of the wall and bypass lines were the result of defective action by Dickson. In order to establish the grounds for an award to remedy defects the injured party must first have “established the cost to remedy defects.”¹⁵⁷ *Only then* does the burden fall to the contractor to challenge the evidence in order to reduce the award and to provide the trial court with evidence to support an alternative award. Because Misenar did not establish that he suffered injury from the location of the bypass line and pond wall, Dickson was not required to provide evidence of an alternative standard of damages. Misenar cites the Court of Appeals decision in *Panorama*. This case is distinguishable, because here the trial

¹⁵⁷ *Fetzer v. Vishnecki*, 399 Pa.Super. 218, 224-226, 582 A.2d 23 (1990).

court *had* found that the owner established damages due to improperly installed roofs to the point that there was a material breach of the contract, because the installation defects “were substantially inferior to what [the contractor] had agreed to provide and...the installation defects directly affected the performance and life of the roofs.”¹⁵⁸ Here, the court found that Misenar did not succeed at trial in showing that he suffered damages from the relocation of the bypass line and pond wall. In fact, as discussed above, Misenar was actually responsible for the relocation of the pond wall and bypass line. The trial court’s findings, that Misenar did not prove “actual damages” should properly be interpreted to mean that Misenar did not meet this initial burden to show that he suffered any injury, and not that the court was applying the improper standard of damages.

Even if Misenar had raised this issue regarding an alternative measure of damages, and Dickson had a chance to respond to it, from the evidence that did come out during the course of trial, any loss to property value was either nonexistent, or negligible. As for the wall, it was shown that it encroaches minimally (4 feet or so) into Lot 2.¹⁵⁹ The wall is within the 12-foot access easement, and therefore has no effect on whether a house can be built on Lot 2. As Michael Hoven testified, he and Mr.

¹⁵⁸ *Panorama Village Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wash.App. 429 10P.3d 417 (2000).

¹⁵⁹ Trial Exhibit No. 154.

Misenar exchanged emails regarding the relocations, and Mr. Misenar stated that “we are working through this issue and I think we will be OK one way or another.”¹⁶⁰

The trial court’s denial of damages for the relocation of the bypass line and pond wall was supported by the evidence, and should be upheld.

The trial court’s award of prejudgment interest was proper.

In his appellate brief, Misenar concedes that prejudgment interest is appropriate. However, Misenar contests the starting point of the interest as designated by the trial court in its finding of fact number 38.

Prevailing parties are entitled to prejudgment interest on liquidated damages. *Lakes v. von der Mehden*, 117 Wn. App. 212, 214, 70 P.3d 154 (2003) (citing *Kiewit-Grice v. State*, 77 Wn. App. 867, 872, 895 P.2d 6 (1995)). The starting point of the interest is determined either (1) when the amount claimed is liquidated, or (2) when the amount claimed is unliquidated but determinable by computation with reference to a fixed standard in a contract. *Lakes*, 117 Wn. App. at 217, 70 P.3d 154 (citing *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968); *Kiewit-Grice*, 77 Wn.App. at 872, 895 P.2d 6).

Trial Exhibit No. 64, pg. 8, provides the starting point that was recognized by the trial court. The exhibit included all of the damages

¹⁶⁰ VRP 549; Exhibit 74 (April 19, 2006 Email from Bodi Misenar to Michael Hoven).

requested by Dickson as of January 31, 2007, the date of the invoice sent to Misenaar. Thus, the prejudgment interest is properly calculated as starting in January 2007 because Misenaar could properly ascertain the amount at issue and was able to “compute the amount with exactness, without reliance on opinion or discretion. *Lakes*, 117 Wn.App. at 217. Therefore, the trial court’s finding of fact number 38 (and corresponding conclusion of law number 26) were proper.

E. Dickson Is Entitled to Attorney’s Fees.

Dickson should recover its attorney’s fees incurred in defending this appeal. A party is entitled to attorney’s fees on appeal if a contract permits recovery of fees and the party is the substantially prevailing party. *E.g. Dayton v. Famers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Dickson was awarded attorney’s fees below pursuant to the contract.¹⁶¹ It is therefore entitled to attorney’s fees on appeal under the contract, pursuant to RAP 18.1.

CONCLUSION

Misenaar’s appeal must fail. The trial court reviewed a vast record and heard from numerous witnesses over a seven-day trial. Based on documents admitted into evidence at trial, and the trial court’s determination of witness credibility, it ultimately ruled in favor of

¹⁶¹ Trial Exhibit No. 1 at ¶ 2.17.

Dickson. The bulk of Misenar's appeal attempts to re-argue much of what was reviewed and adjudged at trial. Dickson has shown that it presented substantial evidence at trial to justify the trial court's determinations. Simply because Misenar disagrees with the court's assessment of his witnesses' accounts of the facts, does not invalidate that judgment. The trial court is specifically charged with an obligation to wade through the various exhibits and testimonies in forming its opinion. It did so properly in this case: the trial court's decision should be affirmed in all respects.

Respectfully submitted this 11 day of May, 2012.

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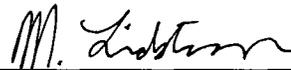
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Maggie Lindstrom, Legal Assistant