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No. 345491-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CACCHIOTTI PROPERTIES, LLC, a Washington limited liability company,

Respondent

v.

BRADLEY PHILLIPS and JANE DOE PHILLIPS, husband and wife, dba
DESERT SUN LANDSCAPING; and DEVELOPER'S SURETY AND
INDEMNITY COMPANY, an Iowa corporation,

Appellant

BRIEF OF RESPONDENT

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III. Argument

A. THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS FOLLOWING THE CLOSE OF CACCHIOTTI'S CASE.

1. Standard of Review.

A motion to dismiss by the Defendant following the close of the Plaintiff's case in a bench trial is governed by CR 41(b)(3), which reads as follows:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

CR 41(b)(3).

“Under CR 41(b)(3), dismissal is proper “if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff.” ” *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937, 940 (2009) (citing *Willis v. Simpson Inv. Co.*, 79 Wash.App. 405, 410, 902 P.2d 1263 (1995)). “[I]f the trial court acts as a fact-finder, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its

conclusions of law.” *Id.* (citing *In re Dependency of Schermer*, 161 Wash.2d 927, 939–40, 169 P.3d 452 (2007)).

2. Desert Sun breached the contract with Cacchiotti by failing to provide a fountain suitable for its intended purpose.

In order to prevail on a breach of contract claim, a plaintiff must prove: (1) the existence of a valid contract; (2) breach of that contract; and (3) damages resulting from that breach. *Lehrer v. State, Dep't of Soc. & Health Servs.*, 101 Wn. App. 509, 516, 5 P.3d 722, 727 (2000) (citing *Nw. Indep. Forest Mfrs. v. Dep't. of Labor & Industries*, 78 Wash.App. 707, 712, 899 P.2d 6 (1995)). There is an implied duty of good faith and fair dealing in every contract, which obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. *Frank Coluccio Const. Co., Inc. v. King Cnty.*, 136 Wn. App. 751, 764, 150 P.3d 1147, 1154 (2007) (citations omitted).

Additionally, construction contractors impliedly warrant the following: (1) the fitness of the materials used; (2) the work will be performed in accordance with accepted trade practice; (3) the building will be in compliance with code regulations; and (4) that **the resulting building or improvement will be suitable for its intended purpose.** *See Hoye v. Century Builders, Inc.*, 52 Wn.2d 830, 329 P.2d 474 (1958); *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v.*

Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990) (emphasis added). “Where a person holds himself out as qualified to furnish, and does furnish, specifications and plans for a construction project, he thereby impliedly warrants their sufficiency for the purpose in view.” *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 29, 442 P.2d 621, 624 (1968). “The cost of the error must be borne by the miscalculating ‘seller’ who represented itself as an expert, rather than by the innocent ‘buyer’ who relied upon the representations.” *Id.* at 29, 442 P.2d at 624

In *Prier*, the plaintiff contracted with defendant for the design and installation of an ice skating rink. *Prier*, 74 Wn.2d at 26, 442 P.2d at 622. A short time after plaintiff opened for business, the ice rink began to heave upwards and became unusable. *Id.* The plaintiff had relied upon the defendant whom represented that the defendant was an expert in the design and construction of the ice rink. *Id.* at 29, 442 P.2d at 624. The Court found that the defendant was liable for the repairs to the ice rink in order to give the plaintiff what the plaintiff was entitled to under the parties’ contract. *Id.*

Phillips relies upon *Nw. Indep. Forest Mfrs.* as authority that Cacchiotti has not established that the breach of contract by Phillips, i.e. the failure to provide a properly constructed water fountain, is not the cause of Cacchiotti’s damages. In *Nw. Indep. Forest Mfrs.*, Division II of

the Court of Appeals held “collateral estoppel precludes NIFM from showing a causal relationship between DLI's alleged mismanagement and NIFM's alleged damages, or, more specifically, between DLI's alleged mismanagement and “the cost of claims filed” that forms the basis for the disputed assessment of \$186,728. 78 Wn. App. at 717, 899 P.2d at 11. Thus without the element that the breach of the parties’ contract was the cause of the damages for NIFM, there was no action for breach of contract. *Id.* There is no issue of collateral estoppel as to Cacchiotti’s evidence that Phillips failure to construct a working water fountain was the cause of the damages sustained.

Phillips does not challenge that a duty was owed to Cacchiotti to design and construct a working water fountain. Brief of Appellant at pg. 8. Phillips does not challenge that the fountain does not work. Brief of Appellant at pg. 9 (“The concrete failed-that much is known.”). Phillips does not challenge damages. Phillips’ only challenges that Cacchiotti has not shown that Phillips breach was the cause of Cacchiotti’s damages.

Cacchiotti must only show that Phillips breach of his contractual duty to provide a working water fountain when Phillips is the cause of the damages sustained by Cacchiotti. *Lehrer*, 101 Wn. App. at 516, 5 P.3d at 727. Cacchiotti presented substantial evidence in support of the breach by Phillips, i.e. the failure to provide a working water fountain, was the cause

of the damages sustained by Cacchiotti.

It was an established as facts for trial that Phillips selected the structural components and method of construction. CP 13. Cacchiotti only provided input into the aesthetic features of the fountain. *Id.* In addition, it was also established as facts for trial that the entire fountain must be demolished and replaced in order for it to work properly. *Id.* Furthermore, it was established for trial that Phillips had the burden of proof regarding his affirmative defense that the damage to the fountain was caused by some third person. *Id.*

Cacchiotti presented testimony that the fountain was to be the center of its new office for the benefit of patients being treated. RP 16 lines 4 - 8. Cacchiotti presented testimony that once Phillips informed him the fountain was completed, there were problems with the fountain almost immediately following completion. RP 27 line 7 – RP 28 line 14. On at least 4 occasions during the first 30 days after Phillips finished construction of the fountain, Phillips was contacted to come fix the fountain. See RP 28 line 21 – RP 37 line 13. Cacchiotti presented testimony that every time there was a problem with the fountain, he notified Phillips. RP 46 lines 1 – 7.

Furthermore, Cacchiotti presented testimony that Phillips presented at least three different reasons for why the fountain failed:

Q (by Trevor Bevier): Okay. And the --
Each problem, was it the same problem each
time?

A (Dino Cacchiotti): It seemed to be a
different problem each time. One time it was
controlling splash, the other time it was
possibly sediment, and then there was the
theory of somehow it'd been tampered with.

Q: Okay. And, and those are the
explanations you got from Mr.
Phillips?

A: Correct.

RP 46 lines 6 – 15.

Cacchiotti presented testimony that no employee of Cacchiotti ever
took any action which could cause the tampering alleged by Phillips. RP
46 lines 20 – 24. Cacchiotti paid Phillips for a fountain that is no longer
functional after 35 days. RP 76 lines 11 – 21. That Cacchiotti does not
have a functional fountain after only 35 days following completion is
substantial evidence that Phillips did not provide Cacchiotti with a
properly working fountain.

Brad Phillips also testified that he agrees the fountain is in need of
repair. RP 79 lines 2 – 14. Phillips further testified that the “only fix for
the foundation is to be removed and replace the old concrete.” RP 81 lines
16 – 17. Phillips acknowledgement that the fountain must be fixed after
only 35 days is substantial evidence that Phillips did not provide
Cacchiotti with a properly working water fountain.

Phillips moved for dismissal following the close of Cacchiotti's case in chief. RP 83 lines 7-16. The trial court denied the motion to dismiss, stating on the record "[c]learly from the evidence at this point the Court could, could conclude that Dr. Cacchiotti, or Cacchiotti Properties, LLC, contracted to purchase a fountain, paid for a fountain, didn't get a fountain." RP 86 lines 3-7.

The burden of proof as to whether the fountain was damaged by some outside force or agency relieving Phillips partially or entirely from his breach is placed upon Phillips pursuant to RCW 4.16.326 is discussed in the section below.

The trial court did not err in denying Phillips' motion to dismiss following the close of Cacchiotti's presentation of evidence.

B. PHILLIPS DID NOT MEET HIS BURDEN OF PROOF ON HIS AFFIRMATIVE DEFENSE UNDER RCW 4.16.326(1).

1. The Court did not err by placing the burden of proof for the affirmative defense under RCW 4.16.326 on Phillips.

Phillips appears to argue that Cacchiotti has a burden to prove that someone didn't tamper with the fountain. The legislature has created a comparative fault framework specifically for construction contractors making improvements to real property.¹ RCW 4.16.326 provides for

¹ "RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired

affirmative defenses to actions or claims for breach of contract for construction defects as follows:

(1) Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in part, from any obligation, damage, loss, or liability for those defined activities under the principles of comparative fault for the following affirmative defenses:

(a) To the extent it is caused by an unforeseen act of nature that caused, prevented, or precluded the activities defined in RCW 4.16.300 from meeting the applicable building codes, regulations, and ordinances in effect at the commencement of construction. For purposes of this section an “unforeseen act of nature” means any weather condition, earthquake, or man-made event such as war, terrorism, or vandalism;

(b) To the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this section. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim;

any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.” RCW 4.16.300.

(c) To the extent it is caused by the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's maintenance recommendations, or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of the schedule, the schedule was reasonable at the time it was issued, and the homeowner failed to substantially comply with the written schedule;

(d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose...

RCW 4.16.326(1). The party alleging an affirmative defense has the burden of proving it. *Locke v. City of Seattle*, 133 Wn. App. 696, 713, 137 P.3d 52, 61 (2006) *aff'd and remanded*, 162 Wn.2d 474, 172 P.3d 705 (2007).

Although never pled specifically², there are two possible sections of the statute which may apply in the present matter, RCW

² The respective paragraphs of the Response to Petition read as follows:

3.3: "The fountain functioned properly from the installation to the time that some unknown person interfered

with the fountain causing damage complained of in Plaintiff's complaint."

3.5: "'Funny pipe'" "supplying water to the nozzle was forced down below the concrete pad of the fountain

using great force and effort by someone other than the Defendant." CP at 10.

4.16.326(1)(a)&(d). Notably, a March 4, 2016 Order entered by the trial court established that Phillips' had the burden of proof with regard to the affirmative defense that any damage to the fountain was caused by some third person, in accordance with RCW 4.16.326(1)(a)&(d).³ Phillips appears to argue that RCW 4.16.326, placing the burden of proof of his affirmative defense upon him results in strict liability. Pg. 7, Brief of Appellant. Phillips does not provide any authority in support of his argument that he should not have the burden of proof regarding his affirmative defense that someone tampered with the fountain.

The Court did not err by placing the burden of proof for the affirmative defense under RCW 4.16.326 on Phillips.

2. The Court did not err in making Findings of Fact VI and VII.

Phillips also challenges Findings of Fact VI and VII, which establish that Phillips did not meet his burden of proof. Brief of Appellant at 12. A trial court's findings of fact are reviewed under a substantial evidence standard, "defined as a quantum of evidence sufficient to persuade a fair-minded person that the premise is true." *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 719, 238

³ Finding of Fact IV reads "The March 4, 2016 order also established that [Phillips] had the burden of proof as to the affirmative defense that any damage to the fountain was caused by some third person." CP at 13.

P.3d 1217, 1221 (2010). “In order to overturn the trial court's findings, the reviewing court must determine that the evidence preponderates against the findings.” *Seattle-First Nat. Bank v. Hawk*, 17 Wn. App. 251, 254, 562 P.2d 260, 262 (1977). The trial court is generally free to believe or disbelieve a witness in reaching a factual determination. *State v. Chapman*, 78 Wn.2d 160, 164, 469 P.2d 883 (1970). An appellate court will not ordinarily substitute its judgment for that of the trial court even though it may have resolved the factual dispute differently. *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 503, 563 P.2d 822 (1977).

Phillips appears to rely upon testimony from Travis Phillips, an employee of Phillips, that the “funny pipe” was kinked over. RP at 160 lines 3 – 22. Travis Phillips testified:

We got out of the truck, seen that there was one nozzle just kind of bubbling and there wasn't -- You know, we, we kind of assumed from afar right out of the truck that it was the same exact thing, as soon as we walked up to the pad we seen the one crack through and through, we shut the pump off, got everything to stop flowing so that we could examine what was going on. I noticed that the hose going into the rosette, which was our stream of water, was jammed underneath our rosette, basically underneath our surface of our concrete, the water was blowing downwards washing out all of our base underneath our pad, and we delaminated the nozzle, the, the rosette, we delaminated that, got it off of the pad, and

obviously it was -- our funny pipe was bent over at about a 45 or so just washing everything out. We were able to pull that back up, get it straightened out a little, get our rosettes set back over it and turned it on, everything worked fine.

RP at 160 lines 3 – 22. Travis Phillips further testified that he never saw anyone other than himself or his brother, Brad Phillips touch the water fountain. See RP 172 lines 3 – 15. No evidence was presented as to the identity of this person who may have done this and the trial court made a finding of fact to this effect. CP 14 (Finding of Fact VII). Additionally, the order entered March 4, 2016, established for trial the fact that “No pictures of the tube forced below the concrete were ever taken by Defendant or Defendant’s employees.” CP 13.

Brad Phillips also testified that upon discovering the crack, he “snapped a picture at that time of dirt left on top of the slap that was in the system.” RP 112 line 21 – RP 113 line 2. When questioned on cross examination as to a picture of the “funny pipe” kinked over, he stated “I did not. My, my brother had already unkinked it.” RP 148 lines 18 – 20. Aside from the oddity that a picture of the alleged cause of failure was not taken, this testimony was a direct contradiction to earlier testimony given by Brad Phillips that he was the one who unkinked the “funny pipe:”

Q (by Shane Kenison): Okay. What did you do to fix it?

A (Brad Phillips): I reached in with needle nose pliers and unkinked it and kind of straightened it out, and then reattached the rosette back to the concrete.

RP 114 lines 15 – 19.

Regarding the possibility of someone forcing the “funny pipe” downward into the fountain, Brad Phillips testified as to the construction of the rosettes:

Q (by Jeremy Huberdeau): Okay. So this funny pipe is the exact diameter as these rosettes?

A (Brad Phillips): It is.

Q: Okay. So you didn't have to put marine grade silicon in between?

A: (no audible response)

Q: Because I understood your testimony was that you did.

A: What you do is put a bead around it, and that way when it slides over it has an adhesive to hold the pipe to the rosette, also to the concrete.

Q: Okay. So --

THE COURT: When you say it, just so I understand, Mr. Phillips, you're talking about this, what we've referred to as the funny pipe?

WITNESS: Yes, Your Honor.

THE COURT: There's a bead in between the funny pipe and the rosetta (sic)?

WITNESS: Yeah, at -- right at this, right at this location we would -- what we'd do is we'd take and run a bead around here, and then it actually also lubricates for it to slide on --

THE COURT: So you can slide it on.

WITNESS: -- and then once it's on, you wipe it clean, and then when it cures it's got a good bond --

THE COURT: Okay.

WITNESS: -- it's similar to glue, but you don't use glue on funny pipe, you use silicon.

Q (by Mr. Huberdeau): So, to be clear, this rosette and this funny pipe, which is the exact design, is with that silicon and sliding it on as you described to, to Your Honor, is very tight, right?

A (Brad Phillips): (no audible response)

Q: I mean, it's a very strong, marine grade adhesive is required (sic), it's snug, it's tight?

A: It is.

Q: Okay. Because if you did it properly, you don't want to move it?

A: Right.

Q: And you were in charge of making sure it was done properly?

A: I was.

RP 132 line 17 – RP 134 line 15. Regarding the adhesive properties of the silicone, Brad Phillips testified:

Q: Okay. So the silicon acts as kind of like an adhesive too, correct?

A: A very good one.

RP 131 lines 5 – 8.

Brad Phillips went on to testify that despite the silicone adhesive, and tightly fitted “funny pipe,” it was folded over by some person:

Q (by Mr. Huberdeau): So the point is what you're saying is this hole right here, and I'll tip it over so we all can see, is -- on August

19th, August 20th when you came back and said, "Hey, there's another problem," right, it wasn't just the sediment, someone had messed with it is what your testimony was, right?

A (Brad Phillips): Uh-huh (affirmative). Yes.

Q: That this was actually folded over somehow within there, right, causing -- therefore, this pipe was folded over and folded downward so that it caused the water to come back down here as opposed to spit up?

A: Correct.

Q: Okay. So, airtight, stuck with adhesive... Now I can't get it.

MR. KENISON: (inaudible - away from mic)

Q: And, well, for the sake of argument, this pipe, the funny pipe that's in there is also extremely rigid, your testimony just was, somehow somebody must've folded it over?

A: Right.

Q: All within that space?

A: Right.

Q: Okay.

RP 135 line 8 – RP 136 line 9.⁴

Phillips also presented expert testimony of Steve Slack, regarding the design and construction of water fountains. Mr. Slack also physically inspected the fountain. RP 176 lines 4 – 15. Mr. Slack testified as the cause of the crack in the slab:

⁴ A demonstrative model of the fountain and rosette was used during this line of questioning and was subsequently admitted as Exhibit 13 for illustrative purposes at the request of the trial court. RP 234 line 14 – RP 235 line 11. It is unknown if Exhibit 13 has been transmitted to this Court.

Q (by Mr. Kenison): You had an occasion to see the crack that ran through the concrete when you were out there?

A (Steve Slack): Yes.

Q: In your opinion, when -- In your experience, what causes that?

A: That had to have been quite of bit of erosion underneath there. I mean honestly, the ground, being a six-inch slab, it weighs quite a bit, and so you undermine it with all this, there had to have been erosion there because you can tell, I mean, it's going, there's a big hole actually underneath it, you can put your hand underneath that slab, so quite a bit of dirt has moved out from underneath that and just the pure weight of it itself, it settled and cracked. I mean, that's... It has separated, so the rebar did its job, I mean, it, it held it together but, yeah, I mean, that whole one side, you know, I don't know how many yards of concrete's in that, but you're about 3,500 lbs. a yard, so there's a lot of weight there. You, you undermine it and it's, it's going sink, absolutely.

RP 179 line 14 – RP 180 line 12.

When Mr. Slack was questioned on cross examination as to the construction of the “funny pipe,” Mr. Slack testified:

Q (by Mr. Huberdeau): What do you think the diameter of this funny pipe is? You use that on a regular basis, right?

A (Steve Slack): Yeah, it's half-inch O-D (sic).

Q: Half-inch? Okay.

A: And I'm not 100% sure, but I'm pretty sure that's half-inch OD.

MR. HUBERDEAU: I'm going to hand the witness what's been marked as Exhibit 5.

Q: This, based upon testimony today, we've identified that this is the rosette that was used.

A: Okay.

Q: You see that this sentence here says that it's a 3/4-inch pipe?

A: That's it, yeah.

Q: So the hole, as I understand it, would be 3/4-inch, and then this funny pipe would be a half-inch?

A: Yes, I guess, I --

Q: So there would be, there would be a quarter-inch gap, right, in the diameters?

A: Sure.

RP 187 lines 1 – 24. Mr. Slack also testified as to the likelihood that a pipe was broken causing the concrete to settle and break. RP 195 lines 3 – 4.

Findings of Fact VII simply demonstrates that the trial court did not believe the testimony of Brad Phillips or Travis Phillips. Based upon the testimony of the design of the fountain, the materials used, and the method of construction, the trial court did not believe that the “funny pipe” was forced down as Phillips claims it to be. No other evidence of tampering, misuse or any other scenario set forth in RCW 4.16.326 was presented before the trial court.

Likewise, Findings of Fact VI was proper. As stated in the previous section above, there is substantial evidence that Cacchiotti did not receive a properly working water fountain. Phillips does not challenge

that the fountain does not work. Brief of Appellant at pg. 9 (“The concrete failed-that much is known.”). Rather, the evidence presented clearly demonstrates that the fountain worked for 15 – 20 days, didn’t work for three or four days, and then completely failed after another 12 – 14 days. RP 76 lines 14 – 21.

Based upon the testimony and evidence presented, there is clearly no preponderance against the findings of fact made by the trial court. The trial court did not err in making Findings of Fact VI and VII.

C. CACCHIOTTI SHOULD BE AWARDED ITS ATTORNEY’S FEES IN RESPONDING TO THIS APPEAL.

Under RAP 18.1(a), “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule.” Cacchiotti requests that the Court award attorney fees and costs incurred on appeal on the same basis as the superior court, i.e., because Phillips has not improved its position on trial de novo. *See* RCW 7.06.060; MAR 7.3. Such fees and costs are appropriate on appeal, even under circumstances when the Court determines that they have been forfeited in the trial court. *See Hernandez v. Stender*, 182 Wn. App. 52, 61–62, 358 P.3d 1169, 1174 (2014).

Fees and costs were awarded at the trial court level and such

award is not being challenged by Phillips. Cacchiotti is entitled to fees as the prevailing party on appeal.

IV. CONCLUSION

Appellant has not demonstrated that the trial court erred in denying his motion to dismiss following the close of Cacchiotti's case in chief or in finding for Cacchiotti following the close of trial where Phillips did not meet his burden of proof regarding his affirmative defense. Furthermore, the trial court did not err in making Findings of Fact VI and VII. The decision of the trial court should be affirmed. Cacchiotti asks that fees and costs be awarded on appeal pursuant to RAP 18.1, RCW 7.06.060, and MAR 7.3

Respectfully submitted this 13th day of January, 2017.



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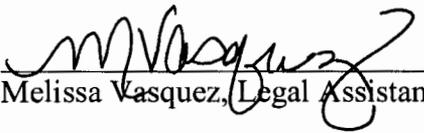
CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by First Class Mail, postage prepaid, as follows:

Shane Kenison
404 S. Division
Moses Lake, WA 98837

Signed at Moses Lake, Washington on January 13, 2017.



Melissa Vasquez, Legal Assistant