

No. 65197-8-I

COURT OF APPEALS,  
DIVISION I,  
OF THE STATE OF WASHINGTON

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COUNG TRANLA and KHAI TRANLA, Husband and Wife,  
and the marital community thereof,

Appellants,

v.

AMADOR ZAMORA and JANE DOE ZAMORA,  
and the marital community thereof, and  
AMADOR ZAMORA d/b/a ATOMIC CONSTRUCTION,

Respondents.

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BRIEF OF RESPONDENT

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DIVISION I  
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## Table of Contents

A. Statement of the Issues .....	1
B. Statement of the Case .....	2
C. Argument .....	9
I. THE COURT SHOULD DISMISS THE INSTANT APPEAL AND AWARD RESPONDENT ATTORNEYS' FEES DUE TO APPELLANT'S FAILURE TO ABIDE BY THE RULES OF APPELLATE PROCEDURE. ....	9
A. <u>Tranla failed to provide the court with an adequate record.</u> .....	9
B. <u>Tranla failed to appropriately assign errors, failed to cite to the record throughout her         brief, and failed to state the appropriate standards of review.</u> .....	12
C. <u>The Court should award Respondent attorneys' fees for costs incurred in defending this         appeal.</u> .....	14
II. THE TRIAL COURT PROPERLY FOUND THAT ZAMORA COMPLETED ADDITIONAL VALUABLE WORK THAT MERITED COMPENSATION FROM TRANLA UNDER QUANTUM MERUIT ... ..	15
A. <u>The trial court properly found that Tranla was responsible for paying for construction of         the fence.</u> .....	18
B. <u>The trial court properly found that Tranla was responsible for paying for construction of         the retaining walls.</u> .....	20
C. <u>The trial court properly found that Tranla was responsible for paying for the transplant         of 7 additional trees.</u> .....	22
D. <u>The trial court properly found that Tranla was responsible for paying for the installation         of smoke detectors in the old house.</u> .....	24
E. <u>The trial court properly found that Tranla was responsible for paying for the concrete         deck and wheelchair ramp.</u> .....	25
F. <u>The trial court properly found that Tranla was responsible for paying for the additional         electrical work on the panel and hot water tank.</u> .....	28
G. <u>The trial court properly found that Tranla was responsible for paying for the         construction of an additional bedroom.</u> .....	30
H. <u>The trial court properly found that Tranla was responsible for paying for relocation of         piping for two toilets.</u> .....	31
I. <u>The trial court properly found that the extra work was completed in a suitable manner.</u> . .....	33

J. The trial court properly concluded that Zamora was entitled to quantum meruit damages. .....35

III. THE TRIAL COURT PROPERLY CONCLUDED THAT THE PRESUMPTION OF RCW 82.08.050 APPLIED TO THE ADDITIONAL WORK CLAUSE SUCH THAT TRANLA WAS RESPONSIBLE FOR PAYING TAXES ON THE WORK NOT INCLUDED IN THE BASIC CONTRACT. ....38

IV. THE TRIAL COURT PROPERLY FOUND THAT NOVEMBER 10, 2007 WAS A REASONABLE DATE FOR COMPLETION OF THE PROJECT.....42

V. THE TRIAL COURT PROPERLY FOUND THAT ZAMORA COMPLETED THE BASIC CONTRACT AND THAT TRANLA WAS ENTITLED TO A SET-OFF.. .....46

D. Conclusion.....49

**Table of Authorities**

**A. Table of Cases**

**Washington Cases**

*American Sheet Metal Works, Inc. v. Haynes*, 67 Wn.2d 153, 407 P.2d 429 (1965).....16  
*Bignold v. King County*, 65 Wn.2d 817, 399 P.2d 611 (1965).....37  
*Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 141 P.3d 1 (2006) .....10  
*Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wn.2d 214, 484 P.2d 399 (1971).....36  
*Heilman v. Wentworth*, 18 Wn. App. 751, 571 P.2d 963 (1977).....9  
*Pomeroy v. Anderson*, 32 Wn. App. 781, 649 P.2d 855 (1982) .....40, 41  
*State v. Scott*, 150 Wn. App. 281, 207 P.3d 495 (2009) .....10  
*State v. Tracy*, 128 Wn. App. 388, 115 P.3d 381 (2005).....10  
*Sunnyside Valley Irrigation Dist. V. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003).....  
.....15, 17, 35, 39, 42, 46

**B. Statutes**

**Statutes**

RCW 82.08.050 .....38-41

**C. Court Rules**

**Washington Rules of Appellate Procedure**

RAP 9.6 .....9  
RAP 9.10 .....9  
RAP 10.3 .....12  
RAP 18.9 .....14

## A. Statement of the Issues

1. Whether this appeal should be dismissed, or in the alternative, whether Appellant's brief should be stricken, and whether attorneys' fees should be awarded for Appellant's failure to abide by the Washington Rules of Appellate Procedure.
2. Whether the trial court properly found that there was additional work performed which was not included in the contract, Finding of Fact ("FF") No. 10,<sup>1</sup> and that "there clearly was value to the extra work [Zamora] and his company provided," FF No. 15, and properly concluded that "Zamora should be compensated for the additional work performed under the theory of quantum meruit." Conclusion of Law ("CL") No. 6. (Appellant's Assignment of Error No. 1).
3. Whether the trial court properly concluded that "the presumption in RCW 82.08.050 controls and Tranla is responsible for sales tax on the amounts owing to Zamora, for the additional work." CL No. 12. (Appellant's Assignment of Error No. 2).
4. Whether the trial court properly found that "[a] reasonable date for completion of the project was November 10, 2007." FF No. 20. (Appellant's Assignment of Error No. 3).
5. Whether the trial court properly found that "Zamora completed the basic project," FF No. 21, and that Tranla was entitled to set-off the additional work by \$3,285.49. FF No. 18. (Appellant's Assignment of Error No. 4).

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<sup>1</sup> Appellant failed to include Judge Erlick's Findings of Fact and Conclusions of Law in the Clerk's Papers. Respondent, therefore, is unable to cite to the record. For more argument on this error, please see Section C(I) *infra*.

## **B. Statement of the Case**

### **Procedural History**

This appeal concerns a breach of contract action between Plaintiff Cuong Tranla (“Tranla”) and Defendant Amador Zamora d/b/a Atomic Construction (“Zamora”). CP 5. A two day trial was held before Judge Erlick on January 12 and 14, 2010. RP 1, 270. On March 8, 2010, Judge Erlick entered Findings of Fact and Conclusions of Law and the Final Order and Judgment. CP 149. Judge Erlick dismissed Plaintiff’s claims and awarded Defendant damages in the amount of \$18,497.13. CP 149. Plaintiff’s Notice of Appeal was timely filed on April 2, 2010. CP 154.

### **Statement of Facts**

On January 15, 2007, Tranla and Zamora entered into a “Work for Hire Agreement” in which the parties agreed that Zamora would construct

a 1900 square foot addition to Tranla's residence in Seattle, Washington

for the price of \$115,000.00. Ex. 101; CP 29.

The relevant portions of the contract are as follows:

1. Description of Services. There will be a new addition of 1,900 square feet on the floor plan as done by Eddie King, the preplan specification attached. ATOMIC CONSTRUCTION will provide the following services (which includes labor and material costs) for \$115,000.00.

ATOMIC CONSTRUCTION will complete the project as according to the building code required by the city, pay for any other required and necessary permit fees and fines, and handle all project related issues.

2. PAYMENT FOR SERVICES. [Tranla] will pay compensation to ATOMIC CONSTRUCTION for services in the total amount of \$115,000 (which includes sales tax) . . .
3. TERM/TERMINATION. The scope of work beginning on 1/15/2007 shall be completed in 4 months from the stating date. If the project can not [sic] be completed within these 4 months, then ATOMIC CONSTRUCTION shall pay [Tranla] \$150.00 per day.

. . . .

7. ENTIRE AGREEMENT. This agreement contains the entire agreement between the parties and there are no other promises or conditions in any other agreement whether oral or written. If additional work is required, a new work agreement will be written, or any change or specification cost of \$45.50 per hour.

CP 29. Section 7 of the contract is silent as to designation of the party responsible for paying sales tax for additional work. *See id.* The parties are in agreement that Tranla made \$112,000.00 in payments on the basic contract. RP 207:13–17. Tranla uses the addition to house residents of her DSHS Adult Family Home. RP 13:22–15:10; 86:17–19.

It was undisputed at trial that Tranla submitted several change orders and that Zamora did additional work on Tranla's home beyond the scope of work specified in the basic contract. *See e.g.*, RP 69:23–25; 41:18 –24; 90:5–7; 104:5–13; 106: 5–10; 157: 1–13; 167:2–11; 232:17–233:16; 295:13–20. It was also undisputed that Tranla gave Zamora an

order for a major revision to the floor plan in either April or June of 2007.

RP 91:7–92:16; 151:14 –152:2.

Tranla granted Zamora several extensions of the completion date.

*See* Brief at 6–7. On October 22, 2007, Tranla’s counsel sent Zamora a letter notifying Zamora that he had until November 10, 2007 to complete the project or that Tranla would impose liquidated damages beginning on September 16, 2007. Ex. 112; CP 106. Tranla terminated the contract in December 2007. RP 72:10–73:9. Zamora testified that he secured permitting from the City of Seattle for all work on the basic contract except for the pit trap in the kitchen sink. RP 174:22–176:7.

While Tranla claims that Zamora agreed to perform labor on additional work outside the basic contract for free, Zamora argued that Tranla agreed to pay up front for materials and at the end for labor. *See e.g.*, RP 109: 1–11; 163:25–164:19. At trial, Zamora argued that Tranla

should pay for the following additional work: construction of retaining walls; construction of a fence; moving a kitchen wall; moving some windows; transplanting seven trees (to be distinguished from the 3 trees to be removed under the basic contract); reinstallation of plumbing and toilets; additional electrical work on the existing home to meet DSHS requirements; construction of an additional bedroom; and construction of a concrete deck and wheelchair ramp. *See* 151:20–184:19. Mr. Zamora’s testimony illustrated that he conducted this project professionally, and that all work was done in a workmanlike manner. *See id.*

In Finding of Fact No. 10, Judge Erlick found that Zamora did the following “additional work not included in the contract:”

- a) Construction of a retaining wall . . .
- b) Construction of a . . . wooden fence
- c) Moving a kitchen wall . . .
- d) Relocating 7 trees and removing 3 trees
- e) Relocation of 2 toilets in 2 bathrooms
- f) Construction of an additional bedroom and a  $\frac{3}{4}$  bath. The  $\frac{3}{4}$  bath was not built.

- g) Installation of smoke detectors to comply with DSHS requirements
- h) Replacement of baseboard heaters
- i) Upgrade and replacement of electrical panel
- j) Update and rewiring of hot water tank
- k) Construction of a concrete deck and wheelchair ramp.

The judge also found that Zamora was at fault for having to correct the windows. FF No. 11.

Using Zamora's cost estimator program to determine value, Judge Erlick ruled that the value of Zamora's additional labor was \$20,455.18. FF No. 15. Including tax, in total Tranla owed Zamora \$22,255.24 for labor. *Id.* In addition, Tranla owed Zamora money for materials for the extra work, in the amount of \$4,177.38. FF No. 16. In total, Tranla was ordered to pay Zamora \$26,732.62 for his extra work. FF No. 17. Tranla was also ordered to pay the remaining \$3,000.00 on the basic contract. FF No. 21.

The trial court credited Tranla a \$3,285.49 set-off for extra work already paid. FF No. 18. Finding a reasonable completion date to be November 10, 2007, the judge ruled that Tranla was entitled to liquidated damages in the amount of \$7,950.00. FF No. 20. The judge ultimately ruled that Tranla owed Zamora \$18,497.13. CP 149; *see also* CP 134–136. In his trial brief, Zamora had asked the trial court to award him just over \$50,000.00.<sup>2</sup>

The judge also concluded that Tranla waived the contract provision requiring extra work to be in writing, CL No. 3, that Zamora was entitled to quantum meruit damages for extra work performed, CL No. 7–9, and that Tranla should pay sales tax only on the extra work performed, CL No. 12. Appellant takes issue with a number of findings of fact and conclusions of law.

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<sup>2</sup> As noted in Section C(I), Appellant failed to include Zamora's trial brief in the Clerk's Papers. Respondent, therefore, cannot cite to the record.

**C. Argument**

**I. THE COURT SHOULD DISMISS THE INSTANT APPEAL AND AWARD RESPONDENT ATTORNEYS' FEES DUE TO APPELLANT'S FAILURE TO ABIDE BY THE RULES OF APPELLATE PROCEDURE.**

A. Tranla failed to provide the court with an adequate record.

Under RAP 9.6(a), the appellant has the burden of “serv[ing] on all other parties and fil[ing] with the trial court clerk and the appellate court clerk a designation of those clerk’s papers and exhibits the party wants the trial court clerk to transmit to the appellate court.” RAP 9.6(b)(1)(E) states that, “The clerk’s papers shall include, *at a minimum*: . . . any written opinion, findings of fact, or conclusions of law” (emphasis added).

Under RAP 9.10, the appellate court has the power to correct or supplement the record, but it is not required to do so. *Heilman v.*

*Wentworth*, 18 Wn. App. 751, 571 P.2d 963 (1977). Tranla failed to

include important documents in the Clerk’s Papers—not only Zamora’s

Trial Brief but also Judge Erlick's Findings of Fact and Conclusions of Law.

If the party with the burden of designation fails to provide an adequate record on appeal to determine the basis for an order, the appellate court may decline to rule on the issue. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 574, 141 P.3d 1 (2006); *State v. Scott*, 150 Wn. App. 281, 298, fn. 18, 207 P.3d 495 (2009) (finding that because the appealing party did not designate a document upon which it relied in its brief, the court would not consider either the party's allegation or the document itself). In other words, "[i]f the appellant fails to meet [the burden of providing an adequate record for review], the trial court's decision stands." *State v. Tracy*, 128 Wn. App. 388, 394-395, 115 P.3d 381 (2005).

Every one of of Tranla's assignments of error derives from Judge Erlick's Findings of Facts and Conclusions of Law. It was Tranla's responsibility, as the party seeking review, to designate the necessary portion of the record, and Tranla failed to include in the Clerk's Papers the document which forms the basis upon which she is seeking an appeal.

While Tranla did attach the document as an exhibit to her appellate brief, the record itself is still inadequate. Moreover, the exclusion of Zamora's trial brief is entirely prejudicial to Respondent's case.

Although this court has the power to supplement the record, it should be noted that Appellant is represented by counsel, who is presumed to be familiar with the relevant rules and procedures governing appellate review in this Court. There is simply no sufficient reason why Appellant should be excused from compliance with court rules and procedures.

Based on these fatal errors, the Court should decline to rule on all issues and dismiss this case altogether or, in the alternative, the Court should strike Appellant's brief.

- B. Tranla failed to appropriately assign errors, failed to cite to the record throughout her brief, and failed to state the appropriate standards of review.

Under RAP 10.3(g), the appealing party must include a separate assignment of error for “*each* finding of fact a party contends was improperly made . . . *with reference to the finding by number*. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” (emphasis added). Additionally, under RAPs 10.3(a)(5–6), the Statement of the Case and Argument sections should include citations to the record for factual statements. Furthermore, under RAP 10.3(a)(6), the

Appellant is encouraged to include a concise statement of the standard of review as to each issue.

Tranla's assignments of error contain no number references to either findings of fact or conclusions of law. Brief at 1. Tranla's brief also lacks citations to the record throughout the Statement of the Case and Argument sections. *See generally, id.* at 3–9, 12–28. Finally, as far as Respondent can tell, not once did Tranla include the appropriate standard of review for an issue.

Appellant's failure to follow the rules of the appellate court has required Respondent to spend a substantial amount of time ferreting out the relevant issues, facts, and law which form the basis of her appeal. As a result, Respondent has incurred significant costs that would not otherwise have been incurred.

C. The Court should award Respondent attorneys' fees for costs incurred in defending this appeal.

Under RAP 18.9(a), the appellate court, on motion of a party, may order a party or counsel who fails to comply with the appellate rules to pay terms or compensatory damages to any other party who has been harmed by the failure to comply.

As explained *supra*, Appellant has failed to comply with the Washington Rules of Appellate Procedure, specifically Sections 9.6 and 10.3. This has required Respondent to spend an inordinate amount of time dissecting Appellant's assignments of error and arguments in order to understand what they are in order to form a response. Because Appellant failed to identify the relevant standard of review for any one of her assignments of error, Respondent was forced to do so for her. As such, the instant appeal should be dismissed, and Appellant should be ordered to pay attorneys' fees incurred in defending this appeal.

**II. THE TRIAL COURT PROPERLY FOUND THAT ZAMORA COMPLETED ADDITIONAL VALUABLE WORK THAT MERITED COMPENSATION FROM TRANLA UNDER QUANTUM MERUIT.**

Tranla has failed to assign specific error to Judge Erlick's findings of fact and conclusions of law and has also failed to indicate the appropriate standard of review regarding Assignment of Error No 1. In her first assignment of error, Tranla argues about (1) enforcement of provisions of the contract and (2) various findings regarding additional work performed.

First, Tranla argues that Zamora should not have been awarded money for the "extra" work completed because the contract specified that all "extra" work must be in writing. Brief at 9, 11–13. Thus, Appellant seems to take issue with Judge Erlick's conclusion that Tranla waived the contract's writing requirement. CL No. 2–3. Questions of law and conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation*

*Dist. V. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (citations omitted).

The parties' contract did specify that "[i]f additional work is required, a new work agreement will be written, or any change of specification cost of \$45.50 per hour." CP 29, §7. And the parties did fail to enter into a written agreement for either the additional work or the change orders. One of Tranla's arguments is that, because nothing was put in writing, Zamora is not entitled to compensation for any additional work. Brief at 11–13.

If a contract requires a writing that is for the benefit of the owner, however, the owner may, by express words or conduct, waive such requirement. *American Sheet Metal Works, Inc. v. Haynes*, 67 Wn.2d 153, 407 P.2d 429 (1965); CL No. 2. Here, the writing requirement clearly benefitted Tranla, the homeowner, and Judge Erlick also found that Tranla

“orally ordered, requested, directed, authorized, or consented to the additional work/change orders.” CL No. 2. Accordingly, the trial court properly concluded that Tranla waived the writing requirement of the contract. CL No. 3.

Second, while not clearly delineated, Tranla appears to take issue with FF No. 10—the judge’s finding regarding additional work completed that was not included in the contract, and FF No. 15—the judge’s finding as to the value of the additional work. *See* Brief at 14–23. Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley*, 149 Wn.2d at 879 (citations omitted). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court, even if it might have resolved the factual dispute differently. *Id.* at 879–880 (citations omitted).

As the Court will see, Judge Erlick gave a careful and balanced ruling after listening to hours of testimony. When the judge believed that Zamora was at fault on an issue (i.e., the window height, award of liquidated damages), he ruled against him. *See* FF No. 10, 20. But as his ruling makes clear, Judge Erlick simply found Tranla’s testimony to lack credibility. Each finding is addressed in turn below.

A. The trial court properly found that Tranla was responsible for paying for construction of the fence.

Judge Erlick found that the “construction of a 160 linear foot wooden fence” was additional work not included in the basic contract. FF No. 10(b). Tranla testified that Zamora—his worker/agent, to be precise—built a wooden fence for her, RP 51:17–25, that it was not part of the original contract, RP 104:10–13, and that she paid \$2,500.00 for it. RP 52:7–10. While Tranla argues that “[Zamora] informed Tranla that if she agreed to pay the costs of the [fence] project, [Zamora] would not charge

Tranla *labor* on the project,” Brief at 13 (emphasis added), this statement was challenged on cross-examination of Tranla and directly contradicted during direct examination of Zamora.

During cross-examination, Tranla testified that she wrote two separate checks to Zamora and that on the memo line of each check, she wrote “backyard fence materials” and “backyard [] fence material cost[].” RP 109:1–111:9; CP 43. Tranla also testified that she never wrote a check that said backyard fence labor. RP 111:10–14. Tranla later testified on re-direct that all Zamora asked to be paid were those two checks. RP 113:13–114:1.

During direct examination, Zamora testified that he built a fence for Tranla because she needed it for the home care (i.e., the adult family home). RP 162:25–163:13. When asked by counsel about the cost of labor to construct the fence, Zamora responded that he did not offer to do

the labor for free and that there was an understanding, an agreement between the parties, that Tranla would pay him at the end of the project for the cost of labor. RP 163:25–164:19.

Based on the witnesses' testimony and on Judge Erlick's determination of credibility, there is substantial evidence in the record that Tranla agreed that she would pay for the labor costs of constructing the fence. Accordingly, Judge Erlick's judgment should not be substituted by that of this court; the finding is proper.

B. The trial court properly found that Tranla was responsible for paying for construction of the retaining walls.

Judge Erlick found that the “construction of a retaining wall measuring approximately 200 linear feet” was additional work not included in the basic contract. FF No. 10(a). Tranla argues that she should not be responsible for the cost of labor on the retaining wall because “Tranla agreed to pay the costs for the project.” Brief at 15; *see*

RP 36:9–39:16. Tranla also argues that the amount she was ordered to pay in labor for the wall should have been reduced by the amount that the neighbor paid to Zamora. Brief at 16. During trial, Tranla testified that the retaining walls were not part of the original contract. RP 104:5–9.

Zamora testified that he did not tell Tranla that he would build the entire retaining wall, labor and materials, for \$1,500.00. RP 161:15–19.

Zamora testified that he told Tranla that the materials would be about \$1,500.00 and that he would bring the receipts for the materials to her. RP 161:19–23. Zamora then testified that he told Tranla how much labor was going to be, that Tranla told Zamora that she trusted him and he told her the same, and that he finished the work. RP 162:1–6. Zamora later testified that he had provided Tranla with a sheet of paper containing the anticipated costs of the retaining wall. RP 231:9–232:5.

Thus, again, there was conflicting testimony, and Judge Erlick found Zamora's testimony more credible. And as for the neighbor's payment, while Tranla writes in her brief that the neighbor paid Zamora \$2,000.00 for their half of the costs and labor, there is no testimony regarding the exact amount that the neighbor paid Zamora. RP 36:9–39:16.

As there is substantial evidence in the record to support the trial court's finding that Tranla should pay for labor costs for constructing the retaining wall, the finding was proper.

C. The trial court properly found that Tranla was responsible for paying for the transplant of 7 additional trees.

Judge Erlick found that “relocating 7 trees and removing 3 trees” was additional work not included in the basic contract. FF No. 10(d). Respondent admits that the finding should only state “relocating 7 trees,” as the removal of 3 trees was included in the original bid. RP 295:13–25.

As indicated in Respondent’s Supplemental Brief regarding set-offs, however, the trial court credited Zamora *only* for moving seven trees—not ten. CP 134–135:2 (emphasis added). Therefore, while the language of the finding is slightly incorrect, the total amount awarded is correct.

While Tranla testified that Zamora “never requested ask[ed] for [] money” regarding the transplant of the trees, RP 327:8–25, Zamora testified that that he removed 10 trees altogether, that he got rid of three of them, and that he re-transplanted seven of them. RP 158:15–22. Zamora testified that three of the trees that he worked on were included in the original contract. RP 295:13–20.

Zamora also testified that he spoke with Tranla about the costs of transplanting and that Tranla said he was a fair guy. RP 158:23–159:3.

He later testified that it took him two days to relocate the trees because he used a machine. RP 193:12–16.

Accordingly, Judge Erlick was presented with substantial evidence upon which to find that Tranla should have been responsible for the labor incurred in transplanting seven of the trees. The trial court's finding is proper.

D. The trial court properly found that Tranla was responsible for paying for the installation of smoke detectors in the old house.

Judge Erlick found that “installation of smoke detectors to comply with DSHS requirements” was additional work not included in the basic contract. FF No. 10(g). Indeed, installation of some smoke detectors was included in the bid to construct the addition. Brief at 18. Tranla testified, however, that Zamora installed additional smoke detectors in the *existing home*. RP 83:4–13 (emphasis added). And she later testified that Zamora put smoke detectors into the *existing part* of the adult family home that were not included in the bid. RP 106:5–10 (emphasis added). Thus,

according to Tranla's own testimony, some smoke detectors were installed in the old house, that is, *not* as part of Zamora's addition. Brief at 18. Accordingly, what Judge Erlick charged Tranla with paying additional money for is the smoke detectors that were installed in the *old house*.

As far as Respondent is aware, Tranla's assertion that she "pa[id] the electricians for the . . . installation of the smoke detectors," Brief at 18, is not supported by any evidence in the record. Judge Erlick's finding, then, is properly supported by substantial evidence.

E. The trial court properly found that Tranla was responsible for paying for the concrete deck and wheelchair ramp.

Judge Erlick found that "construction of a concrete deck and wheelchair ramp" was additional work not included in the basic contract. FF No. 10(k). Tranla argues that the deck was part of the basic contract and that Respondent failed to complete the wheel chair ramp and concrete deck. Brief at 19.

Tranla testified that Zamora suggested pouring down concrete so that residents of Tranla's Adult Family Home could get in and out from the door of the addition. RP 48:7-16. Tranla testified that, "[Zamora] said that that concrete is not included in my bid price" and that he would charge \$2,000.00. RP 48:20-22.

Yet, Tranla later testified on cross-examination that she "did not know" if the deck that Zamora built out of concrete was part of the original bid, RP 107:1-12, and that she "did not know" whether the concrete ramp was part of the original \$115,000.00 bid. RP 107:13-108:7.

On direct, when Zamora was testifying regarding the time that it took him to do the "extra work," he was asked how long it took to complete the wheelchair ramp and deck. RP 193:17-194:20. Zamora stated that it took him two extra days; he built forms one day and poured

concrete the other. RP 194:23–195:1. On cross, Zamora was asked to explain what the biggest changes were between the original contract and the April change order. RP 232:17–233:16. Zamora responded with a list of changes, including the “concrete slab” and a “ramp.” RP 233:17–234:16. Finally, while Zamora was testifying regarding receipts he had for materials, there were two receipts for loads of concrete, and Zamora stated affirmatively that this was for the “extra work on the slab” and for “the ramp.” RP 280:25–281:10.

Thus, while Tranla did testify that the slab “was stated in the blueprint,” RP 306:21–307:4, she also testified to all of the above, including that she “didn’t know” if the deck and ramp were part of the original bid. And besides the fact that Tranla’s testimony contradicts itself, Zamora presented ample testimony that the deck and ramp were a change from the original contract and, thus, additional work.

Furthermore, as far as Respondent is aware, no evidence was presented regarding Tranla being “forced to have the deck and [] ramp completed at her own expense,” Brief at 19, and Appellant provided no citations to the record where this evidence was presented. Judge Erlick was presented with substantial evidence that the deck and ramp were not part of the basic contract, and the finding is, therefore, proper.

F. The trial court properly found that Tranla was responsible for paying for the additional electrical work on the panel and hot water tank.

Judge Erlick found that “upgrade and replacement of electrical panel” and “update and rewiring of hot water tank” was additional work not included in the basic contract. FF No. 10(i, j). Tranla argues that the court should not have awarded Zamora the value of labor incurred for rewiring the water tank, updating wiring, or installation of lights specified in the plans. Brief at 21. Tranla did, in fact, admit that electrical work

outside the basic contract was completed. RP 41:18–24. And as Judge Erlick did not find that Tranla was responsible for paying for the “installation of lights specified in the plans,” there is no reason to address the issue.

While Tranla claims that “the sole reason the wiring and water tank failed inspection and required updating and rewiring was due to the negligence of [Zamora] and its electricians,” Brief at 20, this assertion is untrue.

Zamora testified that nobody working for him damaged Tranla’s electrical system. RP 177:14–175:9. Zamora also testified that an inspector required extra electrical work to be completed in order to make the addition and the *existing home* DSHS compliant; specifically, Zamora had to integrate all of the electrical wires from two panels into one. RP 180:12–181:16. Zamora also had to update the wiring of the old house,

including “the hot water tank,” to bring it into compliance with fire safety code. RP 181:17–182:5. Zamora later testified that he “never” expected to be doing electrical work in the old part of the house. RP 185:25–186:9.

And while Tranla did make at least one direct payment to the electrician and some payments to Zamora for the electrical sub-contractor, there was no direct testimony concerning whether those amounts paid constituted all of the labor expended on extra electrical work. RP 182:21–183:11. Because Judge Erlick’s finding is supported by substantial evidence, it is proper.

G. The trial court properly found that Tranla was responsible for paying for the construction of an additional bedroom.

Judge Erlick found that “construction of an additional bedroom and a ¾ bath” was additional work not included in the basic contract. FF No. 10(f). Judge Erlick also found that “the ¾ bath was not built.” FF No. 10(f). Tranla argues that the bedroom was “specified in the building

plans.” Brief at 21. Tranla also argues that Zamora re-installing a wall that he had previously torn down is not constructing a new bedroom.

Brief at 22.

When asked on cross-examination whether Zamora built a bedroom for Tranla that was not part of the original contract, Tranla responded, “He did not do anything.” RP 105:4–8. Zamora testified, however, that Tranla agreed to pay for the extra bedroom and that he never offered to build the extra bedroom for free. RP 167:2–11. As Judge Erlick was presented with substantial testimony regarding the extra bedroom, his finding was proper.

H. The trial court properly found that Tranla was responsible for paying for relocation of piping for two toilets.

Judge Erlick found that “relocation of 2 toilets in 2 bathrooms” was additional work not included in the basic contract. FF No. 10(e).

Tranla argues that the relocation was “contemplated” by both parties

before Zamora commenced work, that the work was minor, and that Zamora did not request money for his labor. Brief at 22.

Zamora testified that after he began work on the project, he received a new floor plan which had many changes, including the location of two of the toilets. RP 151:5–9. The change order indicated that the toilets were being moved from facing one direction to the other. RP 152:3–23.

Zamora testified that, before Tranla had submitted a change order, a plumber had laid down piping and Zamora had laid down sheeting consistent with the original plan, such that when the plumber went to drill through the floor to get to the pipe, it would have been underneath the toilet. *See* RP 157:1–157:13. Due to the change order, however, the plumber had to correct the pipes to move them underneath the new location of the toilets. *See* RP 157:1–157:13.

Thus, it was due to Tranla's change order that the plumber had to relocate the pipes for the two toilets. While "relocation of two toilets" is not, perhaps, the most precise way to describe what occurred (i.e. "relocation of piping for two toilets" may have been better), it was for this plumbing work that Judge Erlick ordered Tranla to pay labor; as there was substantial evidence in the record, the finding was proper.

I. The trial court properly found that the extra work was completed in a suitable manner.

Judge Erlick found that Zamora completed the additional work discussed *supra*, in addition to the rest of the work listed in FF. No. 10.

Tranla argues that the court did not determine "how much work was completed, and what work was completed faulty." Brief at 23. These arguments are inapposite, as the trier of fact sat through hours of testimony regarding all of these issues.

Interestingly enough, the judge did find that some of Zamora's work was faulty. While the judge did find that additional work was completed, he also found that Tranla was not liable to pay for either the correction of the window height or the  $\frac{3}{4}$  bathroom, FF No. 10(f), 11, as Zamora was at fault. Therefore, the judge did, in fact, consider whether Zamora's work was faulty based on the testimony of the parties.

Tranla also argues that "the determination of the value of unfinished services or services improperly completed can only be determined by the finder of fact, [] the Trial Court." Brief at 24. The trial court did, in fact, determine the value of all services. *See* FF. No. 15.

The judge was shown an illustrative document created by Zamora showing his calculations of labor costs. Zamora used a cost estimator and testified in detail regarding such. RP 196:22–207:20; 253:13–255:22.

Although the court did not have testimony from, for example, an

independent general contractor offering an assessment of the value of the work, the judge ultimately concluded that Zamora’s testimony—including how he made calculations—was credible.

Ultimately, the trial court did, in fact, find that the estimator cost for labor was the best evidence and was reliable. FF No. 15; *see* CL 5 (noting that only reasonable certainty is required to prove economic damages). As there was substantial evidence before the court, the findings were proper, and Appellant’s arguments merit no relief.

J. The trial court properly concluded that Zamora was entitled to quantum meruit damages.

Judge Erlick concluded that “Zamora should be compensated for the additional work performed under the theory of quantum meruit.” CL No. 6–9. Questions of law and conclusions of law are reviewed de novo. *Sunnyside Valley*, 149 Wn.2d at 880 (citations omitted). Tranla’s threshold argument seems to be that since “much of the ‘extra work’ . . .

was foreseen as a result of the underlying contract,” quantum meruit does not apply to the additional work that Zamora performed. Brief at 26.

Defendant cites *Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wn.2d 214, 484 P.2d 399 (1971), as authority for this argument.

*Dravo Corp.* is not a quantum meruit case. It is, however, a construction contract case where the Court ordered that because the contract itself placed the risk of unknown conditions on the contractor and because the contractor, in general, assumes the risk of subsurface conditions in excavation contracts, the contractor was not entitled to additional compensation for labor expended on correcting subsurface conditions. 79 Wn.2d at 217–220. Because the instant case does not concern an excavation contract, *Dravo* does not apply to the present facts.

Quantum meruit is, in fact, a theory of recovery for reasonable value of services provided when a change occurs that was not within

contemplation of the parties. *Bignold v. King County*, 65 Wn.2d 817, 826, 399 P.2d 611 (1965) (citations omitted). Tranla’s argument that the “extra work” was contemplated by the parties is simply false. Judge Erlick was presented with ample testimony that Tranla submitted multiple change orders and requested additional work. *See* Sections C(II)(A–H) *supra*.

Because the change orders and “extra work” were not part of the basic contract and were not within contemplation of the parties at contract formation, Zamora was entitled to recover the reasonable value of services provided under their implied-in-fact contract. CL No. 7. Because quantum meruit applies to the facts of the instant case, as Judge Erlick clearly laid out in his ruling, the trial court’s conclusion was proper.

As for the remainder of Appellant’s specific arguments—regarding the trees, electrical work, and deck and ramp, please see above; Respondent submitted significant argument on these issues *supra*.

In conclusion, there was substantial evidence to support Judge Erlick's findings that Tranla was responsible for paying for additional work not included in the basic contract and that Zamora was entitled to quantum meruit damages. Appellant's Assignment of Error No. 1 should be dismissed, or in the alternative, the trial court should be affirmed.

**III. THE TRIAL COURT PROPERLY CONCLUDED THAT THE PRESUMPTION OF RCW 82.08.050 APPLIED TO THE ADDITIONAL WORK CLAUSE SUCH THAT TRANLA WAS RESPONSIBLE FOR PAYING TAXES ON THE WORK NOT INCLUDED IN THE BASIC CONTRACT.**

Tranla's second issue statement misconstrues the circumstances of this case. In order to identify the precise assignment of error and the correct standard of review, it is first necessary to clarify the facts. Judge Erlick made two rulings relative to the issue of taxes.

First, Judge Erlick found that there was an enforceable construction contract, which contained a provision that Tranla would not

pay taxes (i.e., the taxes were included in the bid). FF No. 5. Judge Erlick did not order Tranla to pay taxes on the basic contract.

Second, Judge Erlick concluded that the additional work was performed under a contract implied in fact theory and that Tranla had to pay for the value of such additional work under quantum meruit. CL No. 6–9. The trial court found that Tranla was responsible for paying sales tax on the materials used for and the value of the additional work. FF Nos. 15–17.

With those clarifications in mind, Tranla’s threshold argument seems to be that the trial court erred in applying the presumption of RCW 82.08.505 to the additional work performed. *See* Brief at 28–30; CL No. 12. Questions of law and conclusions of law are reviewed de novo. *Sunnyside Valley*, 149 Wn.2d at 880 (citations omitted).

The contract between the parties states as follows: “PAYMENT FOR SERVICES. [Tranla] will pay compensation to ATOMIC CONSTRUCTION for services in the total amount of \$115,000.00 (which includes sales tax).” CP 29, § 2. The contract also states: “If additional work is required, a new work agreement will be written, or any change of specification cost of \$45.50 per hour.” CP 29, § 7. Thus, while it is clear that the basic contract includes sales tax, the “additional work” clause is silent as to the issue.

Under RCW 82.08.050, there is a conclusive presumption that “the selling price quoted in any . . . contract . . . between the parties does not include the tax imposed by this chapter.” If a contract specifies that sales tax is included in a construction bid, however, then the tax paid by the bidding party will be upheld. *Pomeroy v. Anderson*, 32 Wn. App. 781, 649 P.2d 855 (1982). In *Pomeroy*, the court held that since the contract at

issue was silent as to sales tax, the buyer was responsible for paying taxes.

*Id.* at 784.

Judge Erlick's ruling parallels *Pomeroy*. Tranla did not pay taxes on the basic contract that specified responsibility for taxes. Tranla was ordered, however, to pay taxes on the contract implied in fact; the presumption of RCW 82.08.050 applied to the additional work clause since it was silent as to whether additional work or change order billings included sales tax. *See* FF No. 6. Accordingly, Judge Erlick properly concluded that the statutory presumption applied only to Zamora's additional work—that which was not included in the basic contract. Appellant's Assignment of Error No. 2 should be dismissed, or in the alternative, the trial court should be affirmed.

**IV. THE TRIAL COURT PROPERLY FOUND THAT  
NOVEMBER 10, 2007 WAS A REASONABLE DATE  
FOR COMPLETION OF THE PROJECT.**

Because Tranla testified that she extended the completion date and Judge Erlick engaged in a colloquy with counsel to determine the proper date for completion, the trial court properly found that November 10, 2007 was a reasonable date for completion of the project. Again, Tranla has failed to specifically identify either the findings or conclusions that she believes are erroneous or the appropriate standard of review. It appears that Tranla takes issue with FF No. 20—that “[a] reasonable date for completion of the project was November 10, 2007.” Findings of fact are reviewed under a substantial evidence standard. *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 879 (citations omitted). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the

trial court, even if it might have resolved the factual dispute differently.

*Id.* at 879–880 (citations omitted).

Judge Erlick found that Tranla extended the completion deadline several times. FF No. 20. While Tranla argues that the trial court “went out of [its] way to rule against Tranla and her entitlement to the offset of liquidated damages,” Brief at 36, the record is replete with evidence regarding Tranla’s extension of the deadline.

For example, during trial, Tranla testified to giving at least two extensions. *See* RP 68:3 – 71:3. And Tranla’s brief concedes that Tranla granted at least five extensions: “Tranla granted [Zamora] a fifth and final extension to complete the work, providing [Zamora] until November 10, 2007 to complete the project.” Brief at 7. Furthermore, Exhibit 112, admitted at trial, is a letter written by Tranla’s attorney to Zamora

providing Zamora until November 10, 2007 to complete the project. CP

106.

Finally, and likely most importantly, towards the end of the second day of trial, Judge Erlick engaged in a colloquy with counsel specifically concerning the date from which to calculate liquidated damages. Judge Erlick stated,

And liquidated damages. You know, there were – there were clearly delays . . . I don't want to take the wind out of anyone's closing, but, you know, I might as well tell you what my thoughts are since I spent a good part of yesterday and today thinking about this. . . [T]here's a number of dates that I could use. I think that there were – clearly the homeowner here is responsible for some of the delay because of change orders. And in fact I think she conceded that. She kept granting the extensions.

There's two dates I'm dealing with. And I – I'm not sure which one to use. One is September 16<sup>th</sup> and the other is November 10<sup>th</sup>.

RP 341:23–342:15. Judge Erlick then asked for argument from

counsel regarding the slab, the ramp, the trees, what was done after

September, the November 10, 2007 letter, and changes in work orders. RP 342:15–344:3.

That is, Judge Erlick spent a significant amount of time not only reflecting on the date from which to calculate liquidated damages but also engaging counsel in oral argument regarding such date.

Tranla's arguments regarding enforcement of liquidated damages clauses are inapposite; Judge Erlick did enforce the provision, entitling Tranla to \$7,950.00 in liquidated damages. FF No. 20. Under the substantial evidence standard, Judge Erlick clearly acted within his discretion in finding the November 10, 2007 completion date. Appellant's Assignment of Error No. 3 should be dismissed, or in the alternative, the trial court should be affirmed.

**V. THE TRIAL COURT PROPERLY FOUND THAT ZAMORA COMPLETED THE BASIC CONTRACT AND THAT TRANLA WAS ENTITLED TO A SET-OFF.**

With regard to Tranla's fourth assignment of error, Tranla has again failed to cite to a specific provision of the judge's findings and conclusions and has also failed to provide the Court with the appropriate standard of review. Tranla seems to be making two arguments.

First, Tranla argues that Zamora did not complete the "basic contract," and that Tranla, thus, should not have been responsible for paying the last \$3,000 on the contract. According to Tranla's brief, she takes issue with FF No. 21, "Zamora completed the basic contract . . . Tranla owes \$3,000 of the basic contract." Brief at 37. Because Tranla is assigning error to a finding of fact, the substantial evidence standard applies. *Sunnyside Valley*, 149 Wn.2d at 879 (citations omitted). Again,

the record contains substantial evidence that Zamora completed the basic contract.

It should be noted that Tranla has failed to identify for the Court what exactly remained to be completed on the contract; Tranla simply asserts that the contract was not completed. *See* Brief at 36–38.

Tranla testified that, in October 2007, the house was basically up and that they just needed to pass a couple of final inspections. RP 70:19-22. Tranla later testified that, after she terminated Zamora’s job, the only two inspections left were the plumbing and final building inspections. RP 82:18-23.

Zamora testified that he forgot to call for the plumbing inspection before he called for the final inspection. RP 174:22–175:3. Zamora testified that when he did call for the plumbing inspection, the only correction to be made was on the pit trap. RP 175:4-8. Zamora testified

that he could not finish the pit trap because Tranla would not let his workers inside the house. RP 176:14–17. Accordingly, Zamora’s testimony provided that the only item remaining on the basic contract was correction of the pit trap; once the plumbing inspection passed, the final inspection could be completed. Judge Erlick’s finding that the basic contract was completed and that Zamora was entitled to the remaining \$3,000.00 was properly supported by substantial evidence.

Second, Tranla argues that the trial court did not deduct “the money expended by Tranla to hire additional labor to complete the project[,] \$2,000, and the value of her and her families own labor.” Brief at 37–38. As far as Respondent is aware, there was no evidence presented at trial regarding either the “value of Tranla’s labor” or the “value of her family’s labor.” As seen in FF No. 18, Judge Erlick did, however, allow Tranla to set off \$3,285.49 against the value of Zamora’s extra work.

Therefore, the trial court acted properly in awarding Zamora \$3,000 and awarding Tranla a set-off. Appellant's Assignment of Error No. 4 should be dismissed, or in the alternative, the trial court should be affirmed.

**D. Conclusion**

For the reasons set out above, the Respondent respectfully requests that the Court dismiss the instant appeal, or in the alternative, affirm the trial court's judgment, and award attorneys' fees.

Submitted this 15<sup>th</sup> day of November, 2010.



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