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Appellate Court No. 68227-0

San Juan County Superior Court No. 02-2-05162-7

IN THE COURT OF APPEALS - STATE OF WASHINGTON
DIVISION ONE

SHEPLER CONSTRUCTION,

Plaintiff-Respondent,

v.

GARY LEONARD AND SUSAN KIRALY-LEONARD,
and the marital community thereof,

Defendants-Appellants,

and

PHH MORTGAGE SERVICES CORPORATION,

Defendant.

RESPONDENT'S BRIEF

K. GARL LONG, WSBA #13569
Attorney for Plaintiff-Respondent
1215 S. Second Street, Suite A
Mount Vernon, WA 98273
(360) 336-3322

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- A. FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF DENIAL OF ORDER TO COMPEL ARBITRATION
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- B. FINDINGS OF FACT AND CONCLUSIONS OF LAW (After Second Trial)
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- C. COMPLAINT FOR FORECLOSURE OF LIEN AND BREACH OF CONTRACT.
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- D. APPELLANTS' OPPOSITION TO MOTION TO RECONSIDER
Court of Appeals No. 5651-7-1 (Second Appeal).

I. FACTUAL AND PROCEDURAL HISTORY

The Leonards' resistance to paying Shepler for the house they live in has spawned two trials and three appeals by the Leonards. This litigation could have been avoided if the Leonards had complied with the contract's dispute resolution provision. The house is now a decade old, as is this litigation. This summary is limited to facts and procedure affecting the present appeal.

A. Factual History

On June 14, 2000, Shepler and the Leonards entered into a contract for construction of a San Juan Island house. *Appendix A'* at 9-15, CP __. The contract committed Shepler to build the house in return for a flat payment from the Leonards of \$280,444.37. *Appendix A*, at 9. Shepler Construction was a small family-owned business engaged in residential construction using concrete encapsulated in foam. RP(2004)² 28-29. Ms. Kiraly-Leonard is a dentist in private practice. RP(2004) 176. Mr. Leonard is an airline pilot. RP(2004) 192.

¹ *Appendix A*, Findings of Fact and Conclusions of Law in Support of Denial of Order to Compel Arbitration, numbered bottom right, a supplemental designation has been filed.

² The Verbatim Report from the 2004 trial was admitted in its entirety at the second trial as Exhibits 63 and 64. RP (Aug. 8, 2011) 27. Shepler has filed a designation for those exhibits.

The parties' contract required the Leonards to submit any unresolved complaints concerning completed construction to binding arbitration. The half page dispute resolution used the word "shall" 8 times.

After nine months of construction, and with the house 90% complete, the Leonards refused to make a progress payment for completed work and installed materials.³ *Appendix B*⁴, Findings 13-22. RP(2004) 64.

The Leonards claimed they were not paying because they wanted lien releases showing all subcontractors had been paid. Shepler had a substantial amount of uncompensated labor and materials invested in the house. Shepler borrowed money to pay the subcontractors and provided the Leonards with the lien releases. Instead of paying, the Leonards barred Shepler from the job site. The Leonards had never intended to pay. *Appendix B*, Finding 19.

The Leonards used the lien release to obtain a construction draw on the work and materials Shepler had provided, and then used the draw money to hire another contractor.

³ In fact the Leonards had been systematically siphoning off part of every previous draw payment made by the bank. *Appendix B*, Findings 14-18.

⁴*Appendix B*, Findings of Fact and Conclusions of Law after second trial.

Shepler sent letters stressing that if the Leonards had any complaint about the quality of completed construction their complaint must be handled under the mandatory dispute resolution process in the contract.

The Leonards ignored the letters; they did not submit any claim to dispute resolution. Despite the contract they signed, and the letters they were sent, the Leonards simply refused to submit any claim to arbitration and refused to pay for the completed work.

Under the dispute resolution provision Shepler had the right to fix any construction identified by the arbitration panel as in need of alteration or repair. The Leonards not only refused to bring any claim they had to dispute resolution, they made sure it could never happen. They barred Shepler from the property and hired a different contractor to finish the house, thereby altering and covering work performed by Shepler. Their conduct both prevented arbitrators from inspecting the work performed by Shepler, and deprived Shepler of its contractual right to fix any work to conform to an arbitration decision.

The Leonards moved in once their new contractor, Mr. Sliger, completed the house. Moving in was a violation of the final payment provision of the contract. This provision required that the arbitration of

any dispute as to finished construction, and final payment, occur prior to the owner moving in. The Leonards had done everything possible to render the dispute resolution provision they signed useless.

B. Procedural History

In order to protect its lien right Shepler had to file its mechanics lien within 90 days of its last work on the project, and file suit within eight months of filing the lien.⁵ Shepler timely filed a mechanics lien and then a lawsuit. It sought payment for the work and materials it provided under the contract, including change orders, and for the benefit of its contract. It also sought to enforce its payment right by foreclosure of its mechanics lien. Shepler's claims were not subject to the mandatory dispute resolution provision.

Shepler's complaint also alleged that the Leonards were in breach of contract for failing to submit any complaints concerning the completed construction to arbitration under the mandatory dispute resolution provision. In their answer the Leonards denied that they refused to submit such claims to arbitration, but they took no steps to do so. They filed a counterclaim that could be read as alleging poor construction but was mostly concerned with allegations of timeliness and supervision.

⁵ RCW 60.04.091, 141.

Faced with the Leonards denying that it was in breach of the dispute resolution provisions on the one hand, and possible defective construction counterclaim on the other, Shepler deposed Mr. Sliger, the contractor the Leonards hired to complete the house. After Sliger testified the house was unfinished when he took over, but there was no poor construction, Shepler moved to dismiss any defective work counterclaim for lack of evidentiary support. The trial court agreed and granted summary judgment.

At the subsequent trial the court found the Leonards in breach of contract. It awarded damages to Shepler and ordered foreclosure of the mechanics lien. *Appendix F to Brief of Appellant*, CP 294-99.

In addition, Shepler proved, aided by the Leonards' own testimony, that the Leonards understood the mandatory dispute resolution provision but had intentionally violated it by not submitting their claims as to completed work to arbitration. Although the trial court found the Leonards in breach of the arbitration provision, it did not award Shepler damages for the breach. The Leonards appealed, challenging the summary judgment dismissal of any construction defect claim. Shepler cross appealed the failure to provide a remedy for breach of the arbitration provision.

On appeal Shepler argued that even if the summary judgment decision was incorrect the trial court should be affirmed because the correct remedy for the Leonards' refusal to engage in arbitration was dismissal of the same claims that had been dismissed at summary judgment. The Court of Appeals declined to reach the issue because "the trial court's assessment of breach" may change upon retrial. *Appendix A to Brief of Appellant*, FN 4.

After remand Shepler moved for summary judgment as to any claim that should have been submitted to the mandatory and binding dispute resolution under the contract. CP 304-307. The Leonards resisted, but the court granted summary judgment and denied reconsideration. CP 357-359. The court found that the remedy for such an intentional and willful refusal to engage in contractually mandated dispute resolution is the striking of all claims that should have been submitted to arbitration under the contract. *Appendix A*, Findings 1-28.

The Leonards obtained new counsel and began a series of maneuvers to eliminate the approaching trial date. On March 21, 2008 they moved for a trial continuance. When that was unsuccessful, the Leonards, eight years after their decisions to breach the contract, refuse to

arbitrate, hire a different contractor, and move into the house, filed a motion to compel arbitration.

Shepler resisted a continuance or a stay because the case had been pending for years, and the trial was only weeks away. Shepler resisted compelled arbitration because the Leonards refused to demonstrate how, so many years after the fact, after they had altered and moved into the house, and after the years of litigation, the dispute resolution process could be carried out. The Leonards had refused for years to follow the contract; it appeared their expressed desire to arbitrate was only a means to prevent trial and obtain further delay.

When the court refused to either stay the case or compel arbitration, the Leonards filed an appeal. The trial court struck the trial date, accepting the Leonards' argument that the appeal prevented trial.

The appellate court initially entered a decision affirming the trial court and reinstating the verdict from the first trial. But the Leonards, rather than allowing the litigation to end, moved for reconsideration. The final opinion affirms the trial court denial of the motion to compel, but does not reach the remedy question.

At the subsequent second trial all of the testimony from the first trial was admitted by stipulation, and additional testimony was taken. Shepler again prevailed on its claims, although the court made some different decision regarding set off amounts. The court entered extensive Findings of Fact. *Appendix B.*

The Leonards again appealed, principally alleging that dismissal of claims is not a proper remedy for their refusal to follow the dispute resolution provision of the contract, and that Shepler, by litigating its claims against the Leonards, waived the requirement that the Leonards submit their claims to arbitration.

II. ISSUES PRESENTED

When a party intentionally refuses to follow a contract's binding dispute resolution provision, frustrates the utility of the provision by altering the construction and moving in, and then seeks to litigate in court claims that were subject to contractual dispute resolution, is the proper remedy to dismiss all claims that should have been addressed under the contract's dispute resolution provision? Or may a party ignore its contractual commitment to dispute resolution and litigate its claims directly in superior court?

When a property owner, instead of following a contractual dispute resolution provision governing owner complaints about a contractor's work, keeps a progress payment from his lender rather than paying it to his contractor, bars his contractor from the work site, finishes construction, and occupies the house, has he waived claims subject to the dispute resolution provision? Or is he estopped from pursuing such claims?

Is a contractual provision that requires the owner to identify and submit any complaints concerning construction to an arbitration panel, waived by the contractor if it files suit for payment and foreclosure of its mechanics lien?

III. ARGUMENT

A. **The Leonards Have Not Assigned Error to the Vast Majority of the Trial Court's Findings of Fact, and Have Not Presented Argument Concerning Those They Have.**

The trial court entered detailed findings to support its denial of the Leonards' motion to compel arbitration. Appendix A.⁶ The court also entered detailed Findings of Fact after the second trial. *Appendix B.*

⁶ The appellate court has expressed appreciation for detailed findings when the trial court rules on a motion to compel arbitration. Steele v. Lundgren, 85 Wn. App. 845, 935 P.2d 671 (1997).

1. Unchallenged Findings

The Leonards contend that by so severely breaching the contract as to lose the contractual right to compel arbitration, it gained the right to litigate in court claims subject to contractual arbitration. Yet the Leonards have not assigned error to any of the court's findings and conclusions made in support of its denial of their motion to compel arbitration.

The trial court also entered detailed findings after the second trial.⁷ The Leonards have assigned error to only two of these findings, and have not supported either assignment with argument.

Unchallenged findings are verities on appeal. It is incumbent upon a party challenging a findings of fact to demonstrate that it is not supported by substantial evidence in the record. RAP 10.3(6). “It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration.” of an assignment of error. *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 244, 877 P.2d 176 (1994).

The Leonards have failed to assign error to all but two trial court Findings of Fact, and have failed to support their assignment with

⁷ Although supplying an extensive appendix, including the findings from the first trial, the Leonards failed to include the Findings of Fact and Conclusions of Law from the second trial. Appendix B, CP 172-196.

argument. The trial court findings are verities on appeal.

2. Trial Court Findings

The trial court found that the Leonards breached the contract with Shepler by:

- 1) retaining part of each draw payment instead of fully paying Shepler, *Appendix B*, Findings 14-18
- 2) refusing to make progress payments when due, *Appendix B*, Findings 19-22
- 3) keeping and spending the last draw payment due Shepler, *Appendix B*, Findings 19-22
- 4) failing to reimburse Shepler for materials the Leonards ordered, *Appendix B*, Findings 23-26
- 3) refusing to follow the dispute resolution provision, *Appendix A*, Findings 1-30, *Appendix B*, Finding 27, *RP (3-26-2008) 3-4, 17-26*
- 5) barring Shepler from the work site and refusing to allow Shepler to complete the project, *Appendix B*, Findings 27-33
- 6) using other contractors and workers to complete the house, *Appendix A*, Findings 17-19, and
- 7) moving into the house without paying Shepler, *Appendix A*, Findings 18-19.

Despite the egregious and intentional breaches of contract by the Leonards, the trial court carefully considered what offsets may be due the Leonards. Each party prevailed on offset issues, but Shepler received the net judgment. *Appendix B*, Findings 35-43. The trial court also carefully reviewed all of Shepler's change order claims. Again, each party prevailed on some claims, but Shepler received the net judgment. *Appendix B*, Findings 44-75.

B. The Trial Court Correctly Dismissed Claims the Parties Had Agreed to Settle Through Dispute Resolution.

Contractual dispute resolution provisions are useless if claimants are not required to follow them. Here the Leonards intentionally and willfully refused to follow the contract. The appropriate remedy for their breach is dismissal of all claims that were subject to contractual dispute resolution.⁸ The Leonards do not propose a different remedy; there is no other sensible remedy.

1. Arbitration Provision Applied Only to the Leonards' Claims.

The dispute resolution process applies only “to performance of contractor’s obligations under [the] agreement”. *Emphasis added.*

⁸ The court has already determined that their conduct prevents them from compelling arbitration.

Appendix A, CP 411. The Leonards' breach of contract, including their failure to pay, was not subject to the dispute resolution process. Nor was the mechanics lien foreclosure. The trial court findings in this regard have not been challenged. *Appendix A*, Finding 30. Because there was no agreement in the contract to arbitrate Shepler's claims against the Leonards, the court had no authority to compel arbitration of those claims.

2. Intentional Breach By the Leonards.

The trial court has repeatedly found that the Leonards did not abide by the dispute resolution provision. The Leonards testified to as much at the prior trial, and never asserted compliance in any testimony or declaration. Yet the Leonards still assign error to the trial court finding that they failed to follow the dispute resolution process in the contract.⁹ However no argument is presented in support of the assignment.

The finding of breach is well supported by the record. The Leonards understood the dispute resolution provision. RP(2004) 185-186. Nothing prevented them from following the dispute resolution provision, they simply refused. RP (2004) 275-276.

⁹Brief of Appellants, Assignment of Error No. 5, assigning error to Trial Court's Finding No. 27.

The contract required the Leonards to use all reasonable diligence to discover and immediately report any material or labor that was not satisfactory. If not timely reported, the objection to the work was waived.

Owner shall exercise all reasonable diligence in discovering and reporting to contractor, as the work progresses, all materials and labor which are not satisfactory to owner, to avoid trouble and cost to contractor in making good any defective parts or workmanship; otherwise, any objection thereto shall be deemed to have been waived if the same was reasonably discoverable upon physical inspection of the premises by the owner.

Appendix A, CP 409.

The Leonards lived at the construction site and were in daily contact with the project. The one time they brought a concern to Shepler's attention it was addressed. *Appendix B*, Finding 11. Under the contract, they waived any claims that they should have discovered by the exercise of all reasonable diligence and did not report to Shepler.

The dispute resolution provision also related only to completed work. If the Leonards had objected to an item of construction, and Shepler had refused to alter it to their satisfaction, the second step was for arbitrators to be selected to inspect the completed work and determine if it complied with the contract:

Each party shall employ a contractor of his or her choice to evaluate the work completed. The contractors then will

select a third contractor to act as an impartial arbiter. This contractor shall, likewise, inspect the construction to determine if the work has been performed in accordance with this agreement, applicable building codes and in a good and workmanlike manner as provided hereinabove.

Appendix A, pg. 13. Emphasis added.

Shepler had the right, and should have had the opportunity, to fix any work identified as lacking by the arbitrators:

If two of the three contractors determine that the work is not in conformity with the provisions of this agreement, then they shall state in writing the work in need of repair or replacement and contractor shall undertake to perform same as soon as reasonably practical.

Appendix A, pg. 13. Emphasis added.

The use of arbitrators became impossible before suit was even filed because the Leonards had Shepler's work altered and completed by others. Shepler's work was altered by others, it could not be inspected by arbitrators or corrected by Shepler. The Leonards made sure arbitration could not take place by altering and completing the house.¹⁰

The Leonards were required to complete the arbitration process and make final payment before moving into the house. The contract provided both the Leonards and their bank with an opportunity to inspect,

¹⁰ Shepler offered to arbitrate, even 8 years later, if the Leonards could point to some work that could still be examined and evaluated in the state Shepler left it. The Leonards did not accept. *Appendix B to Appellants Brief, pg. 2.*

and present a “punch list”, but required payment within 10 days of completion of the list. Any work unacceptable to owner was to be handled by the contract's dispute resolution provision, which is set forth on the next page. *Appendix A*, pg. 12-13. Despite the contractual agreement not to move without making final payment, the Leonards moved into the house.

Shepler wrote letters to the Leonards stressing that the Leonards must bring any complaints about finished construction to arbitration. Shepler was ready and willing to repair any work that needed it, and to finish the project.

On December 11, 2001, in an attempt to get the project on track, Shepler wrote the Leonards:

As far as workmanship, there are several items you have not been happy with. Many of these we are aware of and have intended to take responsibility for them prior to completion of the house. Should any part of the completed (sic) work remain unsatisfactory, we should both refer to the Dispute Resolution portion of the Building Agreement and initiate that process. While not a desirable, or hoped for event, it is the means towards resolution.

Appendix A, pg. 15. *Emphasis added.*

In response, the Leonards, through their first attorney, told Shepler in writing to “be advised that your services with regard to the above-referenced project are terminated, effective immediately.” *Emphasis in*

original. The letter further demanded that “All further communications regarding this matter should be directed” to the Leonards’ attorney.

Appendix A, pg. 16.

Within days of receiving the letter, counsel for Shepler responded.

The third paragraph of that letter reads:

Other items on the “punch list” challenge the quality of the work already performed. The contract makes it clear that the Leonards had the responsibility to bring such issues to the contractor’s attention in a timely manner. It does not appear that they did so. In any event, these issues are to be addressed under the dispute resolution provisions of the underlying contract. Your letter reads as if your client is refusing to abide by this aspect of the contract. Please confirm whether or not that is the case.

The final paragraph of the letter asks:

Please let me know at your earliest convenience whether or not the Leonards will abide by the payment and dispute resolution provisions of the contract.

Appendix A, pg. 20. Emphasis added.

The Leonards never responded to the letter asking them to clarify their refusal to submit their claims to dispute resolution. The court, after hearing all evidence on the subject at trial, found after the first trial:

The Leonards failed to engage in dispute resolution as called for by the contract. Shepler Construction sent letters, including a letter of December 11, 2001, attempting to get them to honor the contractual provision. The Leonards’ silence was not an appropriate answer; it constituted a rejection of dispute resolution and was a

breach of the contract.

Appendix F to Brief of Appellant, Finding 13.

The court reached the same conclusion at summary judgment and after the second trial. The Leonards' conduct was intentional, and in breach of contract.

Shepler had the right under the dispute resolution to repair any work found lacking by the arbitration panel. Because its work has been altered and/or completed by someone else, Shepler was deprived of the benefit of the dispute resolution provision.

Here the Leonards barred Shepler from the project, collected the progress payment due Shepler, and finished the house with that money. By doing so they waived any claim as to Shepler's completed work. Allowing the Leonards to bypass the arbitration provision and seek money damages in court would eviscerate the contract, and give them a remedy they did not have under the contract.

3. Remedy For Breach¹¹

Washington has a strong public policy favoring alternate dispute resolution. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape*

¹¹ The trial court found that the Leonards agreed the proper remedy for refusing to follow the dispute resolution provision was the barring of any claim that should have been resolved under the provision. *Appendix A, Finding 21.* The Leonards have not assigned error to the findings.

Group, Inc., 148 Wash.App. 400, 200 P.3d 254 (2009). Where an agreement provides for a method of resolving disputes between the parties, that method must be pursued before a party can resort to the courts for relief. This contract provided a procedure to resolve claims concerning the completed construction work. The dispute resolution procedures in the contract are mandatory. The Leonards' refusal to comply with the dispute resolution procedure set forth in the contract waived their right to claim a construction defect. *Absher Constr. v. Kent School Dist.*, 77 Wash. App. 137, 890 P.2d 1071 (1995).

In *Absher* a party sought payment for additional work, and claimed it was entitled to payment as an "off-contract" remedy based on fraud. The court refused to address the merits of the claim, and held that the failure to follow the dispute resolution provision barred the party from seeking payment through the courts. "Where an agreement provides for a method of resolving disputes between the parties, that method must be pursued before either party can resort to the courts for relief." *Absher*, 146, citing cases. In the same paragraph the court went on to hold that where the dispute resolution procedures in a contract are mandatory, a party that fails to follow those procedures waives its claims.

A party that fails to abide by a contractual dispute resolution provision is completely barred from bringing suit for recovery of alleged losses that should have been resolved through the dispute resolution procedure. *Pegasus Constr. v. Turner Constr.*, 84 Wash. App. 744, 929 P.2d 1200 (1997).

In *Pegasus v. Turner*, Pegasus failed to abide by the dispute resolution provision of a construction contract but sought to obtain payment by presenting the merits of its claim in arbitration. The arbitrator refused to hear evidence as to the merits of the claim and refused to award damages. On review, the court stated “Pegasus' failure to comply with the dispute resolution procedure was dispositive. Evidence regarding the merits of the claim was therefore not “pertinent and material to the controversy.”” *Pegasus* at 749-50.

While this case has been pending the Supreme Court affirmed the *Pegasus* remedy in *Mike M. Johnson, Inc. v. County of Spokane*, 78 P.3d 161, 150 Wn.2d 375 (2003). Johnson performed significant extra work under a contract but failed to pursue its claim under the dispute resolution provisions of the contract.

Like in this case, the party with the claim was sent letters reminding them of the contractual dispute resolution process. The letter to

Johnson read "if you believe that you have a claim...please submit this claim" per the dispute resolution provisions of the contract. *Johnson* at 381. This is very like the letter sent by Shepler to the Leonards which read "Should any part of the completed (sic) work remain unsatisfactory, ... refer to the Dispute Resolution portion of the Building Agreement and initiate that process."

In *Johnson*, as in this case, the potential claimant admitted he knew of the dispute resolution process to be followed, but did not follow it. *Johnson* at 384. The Leonards' conduct, was however, far more flagrant than was that of the claimant in *Johnson*.

The contract in *Johnson* provided that if claims were not submitted to dispute resolution before acceptance of final payment they were waived. *Johnson* at 389. The Leonards' contract provided that the Leonards were required to follow the dispute resolution process and make final payment before moving into the house. *Appendix A*, pg. 12, 13. But the Leonards moved into the house without submitting any claim to dispute resolution. The Leonards waived any claim as to completed construction by its conduct.

The *Johnson* Court rejected arguments that would render the dispute resolution provision "meaningless". *Johnson* at 391. The same

should be true here. Allowing the Leonards to intentionally disregard and obstruct the dispute resolution provision, and then to pursue claims subject to it in court, would render the provision meaningless.

A party that refuses to follow a contractual dispute resolution clause is barred from pursuing in court any claim subject to the provision. Any other rule would eviscerate mandatory contractual dispute resolution provisions and defy this state's strong public policy in favor of contractual dispute resolution provisions.

Here the Leonards refused to comply with the dispute resolution provisions of the contract. Their refusal is dispositive. They are prevented from seeking damages in superior court for claims that were required to be resolved by contractual dispute resolution.

4. Arbitration Was Not Optional.

The Leonards argue that submitting completed construction claims to dispute resolution was optional because the contract did not say "exclusive", "sole", or "only". *App. Brf.* at 24. The contract provides:

DISPUTE RESOLUTION

If a dispute arises between owner and contractor as to performance of contractor's obligations under this agreement, such dispute shall be resolved as follows:

Appendix A, CP 411. Emphasis added.

The Leonards fail to explain why “shall be resolved” does make the provision mandatory. In fact the provision uses “shall” eight times.

The Leonards rely on *Pederson v. Klinkert*, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960). In *Pederson* a party attempted to get a default judgment set aside by arguing that an optional arbitration clause prevented the superior court from having jurisdiction to enter the default. The court summarily rejected this argument as “not the law”.¹²

The Leonards attempt to equate the optional arbitration clause in that case with the “shall be resolved” language in this case. The *Pederson* arbitration clause read “All questions in dispute under this agreement, **shall be submitted to arbitration at the choice of either party.**”¹³ There is no “choice” provision in the contract here. In fact the term “shall” is repeatedly used in describing the procedure to be employed. *Appendix A*, CP 411. The provision is mandatory.

The alternative dispute resolution for completed construction claims was mandatory and binding under this contract. Both parties were to receive the benefit of a quick and binding resolution. Unlike in *Pederson*, it was not an optional process.

¹² *Pederson* at 320.

¹³ *Pederson* at 320. *Emphasis added.*

C. **Shepler Did Not Waive the Leonards' Obligations Under the Arbitration Provision by Litigating Its Claims Against the Leonards.**

Shepler was required by statute to file its lien and enforce it by a lawsuit. Its claims against the Leonards for breach of contract and lien foreclosure were not subject to arbitration under the contract.

In its verified complaint Shepler alleged:¹⁴

The Leonards have absolutely refused to abide by the dispute resolution provisions of the contract despite numerous demands by Shepler. It is believed that the Leonards have so modified the status of the construction as to render the dispute resolution provision nugatory.

Appendix C, pg. 4, ¶7. CP 273.

The allegation that the Leonards had breached the contract by “refusing to abide by the dispute resolution provisions” was set forth again under the breach of contract section. *Appendix C, pg. 4, ¶2. CP 274.*

The Leonards twice denied the allegation in its answer. *Answer* ¶7, CP 283, ¶2, CP 284. It was therefore a contested issue. The denial would seem to be an assertion that the Leonards were not in breach because it had no claims subject to arbitration. The vaguely worded counterclaim could be interpreted as providing notice of a claim

¹⁴ The copy of the complaint in the appendix to the Leonards' brief is missing several pages. A complete copy is included as Appendix C to this brief.

concerning completed work. CP 285-287. Shepler therefore used discovery to try and determine what the Leonards were claiming.

The Leonards' own expert, (Ken Sliger) the contractor that had completed the house, testified at deposition that there was no defective work, just unfinished work. Shepler then moved for, and was granted, summary judgment as to completed construction claims.

The Leonards make much of the length of time between the two dismissals of its allegations of defective completed construction. However, for the vast majority of the time between the dismissals the claim was not pending, it was dismissed. The parties were not litigating the dismissed claim. They were litigating Shepler's claims against the Leonards; claims not subject to the arbitration provision.

When considering the length of litigation a court considers only those time periods "reasonably chargeable" to the party allegedly waiving its arbitration rights. Time which elapsed due to the conduct of one party is not held to be evidence of waiver by the other party. *Modules Northwest, Inc.*, 28 Wn.App. 59, 63, 621 P.2d 791 (1980).

The vast majority of this litigation, including two trials, has focused on the Leonards' resistance to paying for the house they live in, and foreclosure of Shepler's lien, but it has been caused by the Leonards'

determined refusal to follow the dispute resolution provision of the contract they signed.

When the construction defect claim was reinstated on appeal, Shepler timely moved to dismiss it after the mandate was returned. It could not move to dismiss an already dismissed claim, and could not obtain a remedy for breach of the arbitration provision until it had proved the breach.

D. **Shepler Did Not Need To Restate the Leonards' Breach of the Dispute Resolution Provision As An Affirmative Defense.**

The Leonards allege they are not bound by the contract's dispute resolution provision because Shepler did not restate as a defense the allegation in the complaint that the Leonards were in breach of the dispute resolution provision. The rules of court are to be construed and administered to secure the just, speedy and inexpensive determination of every action. CR 1. All pleadings shall be so construed as to do substantial justice. CR 8 (f).

Shepler affirmatively alleged in the complaint that the Leonards had breached the dispute resolution provision by not submitting its claims to arbitration, and further, that they had rendered the dispute resolution process “nugatory” by altering and completing Shepler's work.

Shepler has consistently, from the very beginning of this case, sought a remedy for the breach of the dispute resolution provisions of the contract. It was not required to restate its cause of action as a defense.

The Leonards first rely on *Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn.App. 82, 246 P.3d 205 (2010). In *Verbeek* the contract provided that any claim or dispute “shall” be submitted to arbitration. Letters were written prior to litigation but no formal arbitration demand was served.

GreenCo claimed Verbeek had waived the right to arbitrate by failing to initiate an arbitration in compliance with the Uniform Arbitration Act, failing to demand arbitration in the complaint, attempting to have GreenCo's mechanics lien removed as frivolous, and by seeking relief that an arbitrator could not provide. All of these arguments were rejected. The court looked to the letters concerning arbitration sent by Verbeek and concluded that GreenCo did not meet its burden of showing conduct by Verbeek inconsistent with the intent to arbitrate.

Shepler never waived the requirement that the Leonards arbitrate any claims concerning completed construction. To the contrary, in its complaint it alleged the Leonards were in breach of contract because the Leonards refused to arbitrate, and when the Leonards denied the

allegation, Shepler proved at trial that the Leonards were in breach for not arbitrating, and after the first remand used the evidence from the first trial in a summary judgment motion to achieve a remedy. “Waiver cannot be found absent conduct inconsistent with any other intention but to forego a known right.” *Lake Washington School Dist. No. 414 v. Mobile Modules Northwest, Inc.*, 28 Wn.App. 59, 62, 621 P.2d 791 (1980)¹⁵ Nothing in Shepler's conduct supports the Leonards' claim of a waiver of their obligations under the contract.

Here Shepler alleged in its complaint that the Leonards were in breach of contract for failing to take any defective construction claims it might have to arbitration. If the Leonards had such claims it was up to the Leonards to pursue them in arbitration as required by the contract. They did not timely pursue them, but instead waived them by accepting the construction and moving into the house. Shepler also alleged that the Leonards had so altered the construction as to render arbitration unworkable. The trial court found for Shepler.

The trial court's denial of the Leonards' belated motion to compel arbitration has already been affirmed on appeal. The trial court order

¹⁵Citing *Bonanza Real Estate, Inc. v. Crouch*, 10 Wash.App. 380, 517 P.2d 1371 (1974); *Bowman v. Webster*, 44 Wash.2d 667, 269 P.2d 960 (1954).

striking claims that were required to be handled in arbitration under the contract should now be affirmed.

E. The Equitable Doctrines of Estoppel and Laches Do Not Aid the Leonards.

The Leonards argue that the equitable doctrines of laches or estoppel prevent Shepler from having a remedy for the Leonards' violation of the contract's dispute resolution provision. Neither of these defenses appear in the Leonards' answer. CP 285. The Leonards claim the trial court denied motions related to these doctrines, but does not set forth the ruling or the standard of review. A trial court's application of equity is reviewed for an abuse of discretion. *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 848, 999 P.2d 54 (2000).

Laches has no application unless the other party has altered their position or otherwise been injured by the delay.¹⁶ *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, FN 8, 98 P.3d 463 (2004). A party asserting equitable estoppel must establish 1) an admission, statement or act

¹⁶At FN 76 of their brief the Leonards quote from *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn.App. 84, 52 P.3d 43 (2002). The next sentence of the case reads "The doctrine of laches bars a cause of action if the defendant establishes that (1) the plaintiff knew, or had a reasonable opportunity to discover, the facts constituting a cause of action; (2) the plaintiff unreasonably delayed commencing an action; and (3) the defendant was materially prejudiced by the delay in bringing the action." Shepler brought its breach of contract cause of action for violation of the dispute resolution provision in its complaint.

inconsistent with the claim afterward asserted; 2) action by the other party on the faith of such admission, statement, or act; and 3) injury resulting from allowing the first party to contradict or repudiate such admission, statement or act. *Hunter v. Hunter*, 52 Wn.App. 265, 758 P.2d 1019 (1988). The elements must be established by clear, cogent and convincing evidence. *Wilhelm* at 849.

The Leonards make general arguments, but fail to explain how Shepler caused the Leonards to breach the dispute resolution provision of the contract. Shepler sent letters and then filed suit alleging the breach and seeking a remedy. The Leonards admit they understood the provision. They were not tricked or lured to sleep, their conduct was intentional.

The Leonards rely on *Johnson v. Schultz*, 137 Wash. 584, 243 P. 644 (1926), as authority for their laches and estoppel argument. *Johnson* is a venerable case which stresses that a party claiming laches has the burden of showing not mere delay, but delay that works to the disadvantage of the other party. The court quotes with approval from a prior case: "It is quite as important, as a matter of public interest and welfare, that individuals be not allowed, with impunity, to transgress their solemn undertakings, advisedly entered upon, as it is that the public have protection in other respects." *Johnson* at 591.

Here the Leonards flaunted and intentionally breached the dispute resolution provision. Shepler consistently, from the filing of the complaint on, has sought a remedy for the breach. Shepler was not using the dispute resolution provision as a defense, it was seeking a remedy for its breach. Equity cannot reward the Leonards' breach, or penalize Shepler for seeking the benefit of the parties contract.

F. The Leonards Were Not Prevented From Introducing Evidence of Recoupment or Setoff.

On the morning of trial the Leonards claimed for the first time that it had an affirmative defense called recoupment.¹⁷ RP (Aug. 8 2011) 5. This affirmative defense does not appear in their answer, and was not offered at the first trial. The pleadings had not been amended to allow it, and no prior notice had been given. During argument recoupment was equated with setoff by the Leonards. The court simply ruled, consistent with its summary judgment order, that it would not consider construction defects that should have been handled by the dispute resolution provision of the contract. RP (Aug. 8, 2011) 26-27.

The Leonards made no offer of proof as to what evidence concerning setoff or recoupment it was prevented from placing in

¹⁷ At page 5 of the Leonards' brief they allege, without citation that "At the start of the trial, the Leonards asked for clarification or revision of the order." No ruling is cited.

evidence. A footnote on page 32 of the Leonards' initial brief cites repeated attempts to violate the summary judgment order. However there is no doubt the court dismissed claims that the Leonards were required to submit to dispute resolution. What is missing is any evidence of what claims of setoff or recoupment were not allowed. It is missing from the evidence because the Leonards failed to make an offer of proof.¹⁸ Appellate review can not take place in the absence of an adequate offer of proof. *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 864 P.2d 921 (1993).

The Leonards claim that Shepler was somehow required to prove the Leonards' construction claims against Shepler. The Leonards place what appears to be a quote from the Supreme Court on page 30 of their brief. However the quoted language, “[T]he underlying basis for a lien claim is proof that the work was executed in a proper and workmanlike manner.” does not appear in the cited case, *Lundberg v. Corporation of Catholic Archbishop of Seattle*, 55 Wn.2d 77, 346 P.2d 164 (1959). The case concerned who was contractually responsible for the misalignment of sewer construction, there was no contractual dispute resolution provision.

¹⁸ The Leonards seem to argue, without citation to authority, that their trial brief is evidence.

In fact the court allowed all evidence related to the defense of setoff, and made extensive findings supporting its decision. *Appendix B, Findings 35-43.* Error has not been assigned to the trial courts findings of fact concerning the defense of setoff.

G. The Second Appellate Opinion Did Not Determine the Remedy for Breach of the Dispute Resolution Provision.

The Leonards base much of its argument on a footnote in the 2010 appellate decision. In that appeal the question before the court was whether or not the trial court was correct in denying The Leonards' motion to compel arbitration.¹⁹ On this issue the court wrote “We hold that the trial court did not err in denying the motion to compel arbitration.” *Appendix to Appellant's Brief, at 3.*

Although the Leonards asked the court to review the summary judgment order dismissing their claims, and Shepler did not object, the court expressly declined to reach the remedy issue because the summary judgment ruling dismissing claims that were subject to arbitration did not prejudicially affect the denial of the motion to compel arbitration. *Appendix to Appellant's Brief, at 3.* The court left the remedy review to a later court.

¹⁹ Shepler's request to reinstate the verdict from the first trial was granted, but was removed when a substitute opinion was issued.

H. The Law of the Case Doctrine Does Not Limit Appellate Review of the Remedy Issue.

This court has the remedy issue squarely before it. The Leonards argue that the court is bound by the Leonards' interpretation of the prior decision under the law of the case doctrine. While the doctrine may have limited the court decades ago, it no longer does;

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c)(2)

Here the prior decision expressly did not reach the remedy issue, but even if it did, the court is free to revisit the issue when justice would be better served.

I. Neither a Jury Trial Nor Removal of the Trial Judge Should Be Mandated.

The Leonards assert, without analysis or citation to authority, that if the case is remanded the appellate court should mandate a jury trial. The majority of the claims in this case are equitable. The court has broad discretion in determining whether an action should be tried to a jury or to the court when there are both legal and equitable claims. Here the plaintiff seeks foreclosure of a mechanics lien. This is an equitable claim. The

overall nature of a civil action is determined by considering all the issues raised by all the pleadings. In determining whether a case is primarily equitable or legal in nature, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for a clear abuse. *King Aircraft v. Lane*, 68 Wash. App. 706, 846 P.2d 550, (1993). There is no showing of a clear abuse by the trial court.

The Leonards, citing a juvenile court sentencing case, allege that Judge Churchill will not be fair if there is a remand.²⁰ The cited case did not remove the judge, rather it gave the juvenile a choice between withdrawing a plea (which could result in trial before the same judge) or sentencing before a different judge. It provides no authority for the removal of a judge that has sat on a civil case for 10 years, and made rulings favoring and disfavoring each party. The argument appears to be an attempt at an after the fact affidavit of prejudice.

J. Shepler Should Be Awarded Attorney Fees on Appeal.

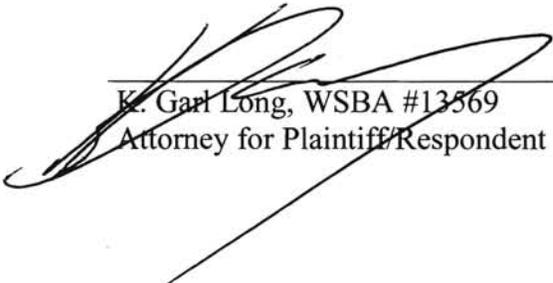
The contract between the parties provides for an award of attorney fees. Previous awards have been made. Shepler should be awarded its attorney fees and costs on appeal.

²⁰ *State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997).

IV. CONCLUSION

The Leonards intentionally and persistently breached the contract's dispute resolution provision. They wrongly took Shepler's work and draw payments. For the last decade they have lived cozily in the house they did not pay for. Such conduct should not be rewarded. The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of September, 2012.



K. Garl Long, WSBA #13369
Attorney for Plaintiff/Respondent

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC., a
Washington corporation,

Plaintiff,

v.

**GARY LEONARD and SUSAN KIRALY-
LEONARD**, and the marital community thereof,
and **PHH MORTGAGE SERVICES
CORPORATION**, a New Jersey corporation,

Defendants.

No. 02-2-05162-7

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW IN
SUPPORT OF DENIAL OF
ORDER TO COMPEL
ARBITRATION**

[PROPOSED]

THIS MATTER having come regularly before the Court on the motion of Gary and Susan Leonard to compel arbitration, and having denied the motion, and being familiar with the records and files herein, and having heard motions for summary judgment and a prior bench trial in this matter, and relying on the declarations and testimony before it, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Shepler Construction (Shepler) filed this action to collect amounts due under the contract, including change orders, to establish lien priority over Defendant PHH, and to foreclose a mechanics lien for the amount owed.

1

o/c 7-30-05 kj

APPENDIX A

399

1 2. In June of 2000 the parties had entered into a \$280,444.37 flat fee contract for
2 construction of a home in San Juan County.¹ The contract provided for additional compensation
3 for change orders.² *Contract, 1, CONTRACT PRICE; 3, COMPENSATION FOR CHANGE*
4 *ORDERS.*

5
6 3. The contract required the Leonards to make progress payments “equal, in full, to
7 the percentage of work completed by the contractor”. The contract forbid them from
8 withholding signature on construction draw checks issued by a lender. *Contract, 3-4,*
9 *PROGRESS PAYMENTS.*

10 4. The Leonards were required to use all reasonable diligence to discover and
11 immediately report any material or labor that was not satisfactory. If not timely reported, the
12 objection to the work was waived. *Contract 3, INSPECTIONS AND DISCOVERY OF*
13 *NONCONFORMING WORK.*

14
15 5. An informal dispute resolution process was agreed upon to provide an
16 inexpensive, quick, and final resolution for any owner complaints about the completed
17 construction. The contractor had the right and obligation to “repair or replace” any construction
18 which was determined by a panel of contractors to be “not in conformity” with the contract.
19 *Contract, 5, DISPUTE RESOLUTION.*

20
21 6. The parties agreed that upon the contractor providing a notice of completion, the
22 owner would have ten days to provide a “punch list” of items that were not acceptable. A
23

24 ¹ The contract, called a Building Agreement, is *Exhibit A.*

25 ² Shepler Construction seeks payment for the extra work in the following areas: Foundation
26 Height, Vaulted Ceilings, Stairs to the Apartment, Deck on Apartment, Round to Square Corner,
27 Furnace Exhaust, Laundry, Chimney Chase, Deck Stairs, Stone work, Two Tones of Paint,
28 Roofing Upgrade.

1 process was set by which the contractor could fix any work the owner did not find acceptable.

2 *Contract 4, FINAL PAYMENT.*

3 7. The contract barred the owner from occupying the building before the entire
4 amount of the contract was paid. *Contract, 4, FINAL PAYMENT.*

5 8. When the house was 90% complete, the Leonards were obligated to have paid 90%
6 of the contract, plus completed change order work. A progress payment for the difference between
7 what they had paid and what they needed to pay to reach 90% of the contract amount was
8 requested. The Leonards refused to make the progress payment. Refusing to make the progress
9 payment was in breach of contract.

10 9. In late November and early December of 2001, the Leonards promised to pay for
11 past work within 10 days of being provided with subcontractor lien releases. Shepler obtained
12 and provided the releases, but the Leonards did not keep their promise to pay. *Second*
13 *Declaration of Jay Shepler, Second Declaration of Jeff Shepler.*

14 10. On December 11, 2001, having provided the requested lien releases and waited
15 more than ten days for payment, Shepler sent a letter again requesting a progress payment through
16 90% completion. The letter requested \$35,926.50. It also informed the Leonards:

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20 As far as workmanship, there are several items you have not been happy
21 with. Many of these we are aware of and have intended to take
22 responsibility for them prior to completion of the house. Should any part
23 of the competed (sic) work remain unsatisfactory, we should both refer to
24 the Dispute Resolution portion of the Building Agreement and initiate
25 that process. While not a desirable, or hoped for event, it is the means
26 towards resolution.

27 *Emphasis added. Exhibit B.*

28 The Leonards did not respond to the letter.

1 11. On March 8, 2002, the Leonards wrote a letter terminating the contract and
2 barring Shepler from the work site. The letter expressed unhappiness with project delay,
3 mismanagement, and unfinished work. An attached list gave examples of alleged
4 mismanagement, delay, neglect, and unfinished work. The letter did not assert that payment had
5 been withheld because of a construction or workmanship complaint. *Exhibit C.*
6

7 12. On March 14, 2002, the Leonards, without Shepler's knowledge, obtained a
8 \$46,089.22 draw disbursement from construction lender PHH. This left only a \$10,000 balance
9 in the construction loan. The draw reflects a completion level of 96.5%. This money was kept
10 by the Leonards. *Exhibit D.*
11

12 13. Also on March 14, 2002, counsel for Shepler responded to the Leonards' letter of
13 March 8. The third paragraph of that letter reads:

14 Other items on the "punch list" challenge the quality of the work already
15 performed. The contract makes it clear that the Leonard's had the
16 responsibility to bring such issues to the contractor's attention in a timely
17 manner. It does not appear that they did so. In any event, these issues are
18 to be addressed under the dispute resolution provisions of the underlying
19 contract. Your letter reads as if your client is refusing to abide by this
20 aspect of the contract. Please confirm whether or not that is the case.

21 *Emphasis added.*

22 The final paragraph of the letter asks:

23 Please let me know at your earliest convenience whether or not the
24 Leonard's will abide by the payment and dispute resolution provisions of
25 the contract.

26 *Emphasis added. Exhibit E.*

27 14. On May 14, 2002, the Leonards wrote to Shepler inquiring as to what amount was
28 owed. The letter does not respond to Shepler's dispute mediation request. *Exhibit F.*

1 15. On May 21, 2002 Shepler replied with a letter explaining what was owed for
2 completed work and requesting payment. *Exhibit G*.

3 16. The Leonards never asserted that they were refusing to pay because any of the
4 finished construction was unacceptable. They took over the project either because they were
5 unhappy with the pace of construction or simply in an attempt to avoid paying Shepler.
6

7 17. The Leonards finished the house with contractors they hired. These contractors
8 altered areas, such as the heating, stairs, and siding, that the Leonards now complain about. In
9 addition, these contractors completed areas of construction, such as interior doors, cabinets and
10 trim, that were not complete when the Leonards barred Shepler from the work site.

11 18. After unilaterally terminating the contract, the Leonards occupied the house.
12 Occupying the house without paying was in breach of the contract between the parties.
13

14 19. The Leonards denied Shepler any opportunity to complete or correct its work.
15 This denial was in breach of the contract between the parties.

16 20. This Court found in the first trial that the Leonards refused to engage in dispute
17 resolution as called for by the contract. Shepler sent letters, including a letter of December 11,
18 2001, attempting to get them to honor the contractual provision. The Leonards' silence was not
19 an appropriate answer; it constituted a rejection of dispute resolution and was a breach of the
20 contract.
21

22 21. After remand Shepler moved to bar any claim that should have been resolved
23 under the dispute resolution provision of the contract. The Leonards agreed that the proper
24 remedy for refusing to follow the dispute resolution provision was the barring of any claim that
25 should have been resolved under the dispute resolution provision. The Court granted summary
26

1 judgment barring any such claims.

2 22. The Leonards never, despite a trial in which damages were sought for its refusal,
3 an appeal, and a summary judgment motion, asserted that it wished to follow the dispute
4 resolution provision.

5 23. Seven years after its breach of contract, after they completed the house with other
6 contractors, after they occupied the house for years, after a trial and an appeal in which their
7 refusal to follow the dispute resolution provision was an unchallenged fact, the Leonards now
8 assert that they want to follow the dispute resolution provision they refused to follow seven
9 years ago.

10 24. Only after this Court entered an order barring claims that were subject to the
11 dispute resolution provision have the Leonards moved to compel arbitration under the dispute
12 resolution provision.

13 25. The passage of time and the alterations made by the Leonards and their
14 contractors make the dispute resolution provision unworkable. It would be inequitable and
15 impracticable to enforce it this many years later and after the alterations to the property
16 performed by the Leonards.

17 26. The Leonards have failed to set forth specifically what construction they timely
18 objected to by giving the required notice to Shepler, or what construction they now believe
19 could be subject to the dispute resolution provision.

20 27. The Leonards have failed to produce any evidence that Shepler ever refused to
21 "repair or replace" any item of construction after being asked to do so. Identifying a specific
22 item of construction and requesting that it be repaired or replaced is a condition precedent to
23

1 invoking the dispute resolution process.

2 28. The Leonards did not just sleep on the dispute resolution right, they actively
3 refused to exercise it.

4 29. Shepler has and continues to suffer damages because amounts due it remain
5 unpaid. These amounts appear far in excess of any claim identified by the Leonards.³
6

7 30. As the Court has previously held, the contract payment, change order payment,
8 and lien foreclosure issues are not subject to the dispute resolution provision in the contract and
9 will need to be decided at trial. Compelling arbitration would not resolve these issues. It would
10 however, delay their resolution.

11 **CONCLUSIONS OF LAW**

12 1. Under the Doctrine of Laches it would be inequitable to attempt to apply the
13 dispute resolution provision seven years after the construction was performed.
14

15 2. The Leonards materially breached the contract by refusing to pay for construction
16 performed, refusing to follow the dispute resolution process, and barring Shepler from the job
17 site.
18

19 3. By refusing to follow the dispute resolution process, barring Shepler from the
20 work site, employing other contractors to finish the house, and occupying the house, the
21 Leonards repudiated the dispute resolution provision and may not now enforce it.
22
23

24 ³ After the bench trial the Court found: "The flat amount of the contract was \$280,444.37. The
25 amount unpaid under the original contract is \$67,451.60. The vast majority of this amount
26 represents profit and overhead on work that was performed. Mr. Shepler had hard costs of
27 \$253,247.98—he was only paid \$217,992.87; therefore, \$35,255.11 of the money to provide
28 materials to the Leonards' job site came out of his own pocket."

1 DATED this 30th day of July, 2008.

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4 157
The Honorable Vickie I. Churchill

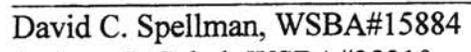
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8 LAW OFFICE OF K. GARL LONG

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12 K. Garl Long WSBA#13569
Attorney for Plaintiff

Approved for entry:

LANE POWELL PC

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David C. Spellman, WSBA#15884
Andrew J. Gabel, WSBA#39310
Attorneys for Defendants

SHEPLER CONSTRUCTION, INC.
BUILDING AGREEMENT

This contract is entered into this 14th Of June, 2000, by and between Gary Leonard and Susan Kiraly (Leonard) of Friday Harbor Washington, hereafter called the "Owners" and SHEPLER CONSTRUCTION, INC., hereinafter called the "Contractor."

The Contractor and the Owner, in consideration of the mutual covenants and agreements hereinafter set forth, agree as follows:

1. The Contractor shall furnish all the materials and perform all of the necessary labor for the construction of, or remodel of a residential/commercial building for the owners on their property, the common address of which is 459 Fairway Drive, Friday Harbor, Washington and which property is legally described as follows (if no legal description is inserted here, see attached property marked "Exhibit A"):

2. The labor and materials, including but in particular those in the attached specifications marked as "Exhibit B," shall be used in the construction of the building except as substitutions of materials is provided for herein. The building shall be constructed in accordance with the plans attached as "Exhibit C." Each of the aforementioned exhibits are incorporated by this reference as if set forth in full. If the plans must be changed or altered to achieve government approval the required changes will be billed as change orders.

The work to be performed under this contract shall be commenced and shall be substantially completed in a workmanlike manner according to standard practices of the area and in compliance with all applicable state and local building, electrical, and mechanical codes.

CONTRACT PRICE

The owner shall pay the contractor for the performance of the contract subject to any additions or deductions made pursuant to change orders, the sum of two hundred eighty thousand four hundred forty four and 37/100 Dollars (\$280,444.37) including Washington State Sales Tax.

DEPOSIT

Owner does herewith deposit with contractor the sum of five thousand Dollars (\$5,000.00) to secure contractor's services and perform initial grading and foundation work.

⑨

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Exhibit A

SITE PREPARATION

Contractor agrees to prepare the site for construction providing grading and backhoe service as necessary, based on contractor's physical inspection of the building site. Any additional costs for labor or materials associated with unforeseen geological, hydrological or structural work are not included in the contract price. Charges for heavy equipment, engineering, blasting, water drainage or diversion or soil erosion protection shall be an additional charge. Contractor agrees not to incur such additional expense at owners' cost in excess of \$2,500 without the owners' written consent.

DEVIATION FROM PLANS

It is understood and agreed between owner and contractor that contractor may be required to implement minor changes in the location of a wall, stairway, door, window, or fixture as a result of designer errors or omissions in plans. Such changes shall not be an additional cost to owners unless contractor secures a written change order as required below. Owner agrees to advise contractor of any portion of the plans whether interior or exterior which cannot be deviated from due to specific owner requirements such as furniture, appliances or owner supplied fixtures. Contractor agrees to advise owner if major deviations are required before implementing such changes in the plans.

SUBSTITUTION OF MATERIALS AND EQUIPMENT

Contractor has prepared his bid and this agreement with the intent of furnishing materials and equipment as specified. In the event original materials cannot be furnished as specified, substitute materials or equipment capable of equal performance may be used. If such substitution is necessary, contractor shall specify in writing the material and equipment to be substituted and the reason or reasons for his inability to furnish the specified items. Where substitutions are made, the construction contract is to be adjusted accordingly by a contract amendment with the difference in cost, if any, between the items furnished and the items specified being included in the contract amendment.

CHANGE ORDERS

Alterations or deviations from the plans as incorporated herein involving extra cost of material or labor will only be executed upon written orders for same, and will become an extra charge over and above the agreed price set forth in this contract. All agreements by the parties for changes must be made in writing. If the time for completion of the contract must be extended in order to accommodate the change order, the new time for completion of the project shall be stated in the change order. It is the responsibility of the owner to timely approve or reject all change orders submitted to him by the contractor to avoid work delay.

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INSPECTIONS AND DISCOVERY OF NON-CONFORMING WORK

Owner shall have the right at reasonable times to inspect the progress of the work being performed hereunder so long as such inspections do not interfere with contractor's work. Owner shall exercise all reasonable diligence in discovering and reporting to contractor, as the work progresses, all materials and labor which are not satisfactory to owner, to avoid trouble and cost to contractor in making good any defective parts or workmanship; otherwise, any objection thereto shall be deemed to have been waived if the same was reasonably discoverable upon physical inspection of the premises by the owner.

INSURANCE

Unless otherwise provided, owner will purchase and maintain property insurance upon the project to the full insurable value thereof and will provide proof to the contractor. This insurance shall include the interests of owner, contractor and subcontractors on work and shall insure against the perils of fire, extended coverage, vandalism and malicious mischief. Any insured loss under the policy of insurance required by this paragraph is to be adjusted with owner and made payable to owner as trustee for the insureds as their interests may appear, subject to the requirements of any applicable mortgage clause.

PERMITS

Permits are the responsibility of the Owner. Connection fees to public utilities are not included in the contract price unless specifically noted herein.

Owner requests that Contractor obtain permits and will pay the contractor separately for doing so.

COMPENSATION FOR CHANGE ORDERS

For all extra work of every description that may be ordered, not covered by the specifications or plans, contractor shall receive actual cost of material furnished and labor performed, plus fifteen percent (15%) for profit, use of tools, equipment, and general supervision, and any other overhead and fixed charges.

PROGRESS PAYMENTS

On or before the 5th day of each month, the owner shall make payments on account of the contract as provided herein, said payments to be equal, in full, to the

(11)

percentage of work completed by the contractor to that date since the last payment date, and to be made when information stated in the following paragraphs is presented by the contractor. Before the 5th day of each month, the contractor shall present to PHH MORTGAGE / USAA FED SAVINGS Bank, owner's lender or to owners, whichever is applicable, a statement showing the percentage of work done by the contractor to that date. Upon issuance of a progress payment by owner's lender in the name of owner and contractor, owner agrees not to withhold his signature on the check for said progress payment.

FINAL PAYMENT

The contractor shall give written notice to the owners and to owner's lender, PHH MORTGAGE / USAA FEDERAL SAVINGS Bank, that work is completed. The owners and said lender shall have the right and opportunity to make a final inspection of work and said materials within ten (10) days after receipt of notice of completion of the work. Upon acceptance thereof by the owners and said lender, payment of the remaining balance due the contractor shall be made. Such acceptance shall not be unreasonably withheld and if the owners or said lender refuse to accept, the owners shall within ten (10) days of receipt of the notice of completion from the contractor, notify the contractor in writing of such refusal, and shall specify the reasons therefor. The contractor shall within ten (10) work days of receipt of owners objection or "punch list" take appropriate steps to remedy any non-conforming work set forth as a reason for refusal. Upon completion of the owners "punch list" by contractor, contractor shall again give notice that the work is completed to the lender and the owner and within five (5) days thereof, owner and lender shall supply a supplemental "punch list" or pay the remaining contract balance due contractor.

INTEREST ON LATE PAYMENTS

In the event owner and/or lender unreasonably withholds progress payments or final payment to contractor, then the unpaid balance shall bear interest at the rate of twelve percent (12%) per annum from the date due and shall further be subject to a one-time late charge of five percent (5%) of the installment payment owed.

OCCUPANCY

The entire amount of the contract is to be paid prior to occupancy by the owners. The terms "occupancy" is defined for purposes of this agreement as the act of placing personal possessions or belongings in the residence or on the premises and the act of physically taking possession of the building. Until such time as contractor notifies owner of completion and the contract balance is paid, owner's access to the premises shall be subject to the complete control of the contractor in order to protect contractor's property and equipment which may be on the premises.

All personal property of owners placed on premises prior to giving of contractor's consent to occupy shall be at owner's risk.

12

DISPUTE RESOLUTION

If a dispute arises between owner and contractor as to performance of contractor's obligations under this agreement, such disputes shall be resolved as follows:

Each party shall employ a contractor of his or her choice to evaluate the work completed. The contractors then will select a third contractor to act as an impartial arbiter. This contractor shall, likewise, inspect the construction to determine if the work has been performed in accordance with this agreement, applicable building codes and in a good and workmanlike manner as provided hereinabove. If two of the three contractors determine that the work is not in conformity with the provisions of this agreement, then they shall state in writing the work in need of repair or replacement and contractor shall undertake to perform same as soon as reasonably practical. Contractor shall be responsible for owner's fees and costs associated with this arbitration as well as the impartial contractor's fees and costs. If no remedial work is recommended by the contractors, then the owner shall pay for the costs of the arbitration. The owner shall forthwith pay the amounts due to the contractor as established by the majority of the arbiters.

ATTORNEYS' FEES

In the event either of the parties hereto incur attorney's fees, expert witness fees or court costs in respect to enforcement of any term of this agreement, then the prevailing party shall be paid their fees and costs by the non-prevailing party.

ENTIRE AGREEMENT

This written agreement and the plans and specifications attached hereto as exhibits are intended by the parties to be a complete final expression of their agreement with respect to the terms contained herein. The contractor has made no promises or warranties other than those as may be contained herein or attached hereto. Any addition to, or alteration of, this agreement must be made in writing, signed by the parties hereto.

NOTICE TO CUSTOMER

This contractor is registered with the State of Washington, Registration No. SHEPLCI019RA, as a general contractor and has posted with the State a bond or cash deposit of \$6,000 for the purpose of satisfying claims against the contractor for negligent or improper work or breach of contract in the conduct of the contractor's business. The expiration date of this contractor's registration is November 30, 2000. This bond or cash deposit may not be sufficient to cover a claim which might arise from the work done under your contract. If any supplier of materials used in your construction project or any employee of the contractor or sub-contractor is not paid by the contractor or

sub-contractor on your job, your property may be liened to force payment. If you wish additional protection, you may request the contractor to provide you with original "lien release" documents from each supplier or sub-contractor on your project. The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the Department of Labor & Industries. This disclosure given pursuant to RCW 18.27.114.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

SHEPLER CONSTRUCTION, INC.

OWNERS

By: Jay Shepler
Its: President

J Shepler
6-14-00

Susan A. King
JLLC

Shepler Construction, inc.

6340 Chuckanut Dr.
Bow, WA, 98232

Phone (360) 766-6708
Cell (360) 661-3513
Fax (360) 766-7042

December 11, 2001

Leonard / Kiraly Completion Proposal

Gary and Susan,

In September of this year we were planning to complete the house prior to the end of the year. Subsequent events have not made this possible. We need to work together to complete the project and get you moved in.

With that goal in mind, it is necessary to re-visit our contractual obligations and devise a proposal that will lead us to obtaining a certificate of occupancy.

The proposal consist of only a few elements. First, the project must be funded to its current completion status. A progress payment in the amount of \$35,926.50 is required. Change orders and accompanying invoices have been written and are included. If we can get this project back on track we will defer collection of the change orders until house is completed. We need you to make decisions immediately on interior doors and trim, electrical trim, and plumbing trim.

With the dismissal of the finish installer, a word regarding subcontractors and workmanship is in order. As owners, you have the right to appoint a subcontractor of your choosing. As the general contractor, we will be obligated for the expense up to the previously budgeted amount. Any additional monies your subcontractor might require will be your responsibility. Further, we will not be held accountable for any work performed by said subcontractor.

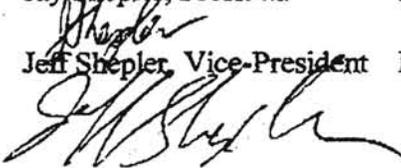
As far as workmanship, there are several items you have not been happy with. Many of these we are aware of and have intended to take responsibility for them prior to completion of the house. Should any part of the competed work remain unsatisfactory, we should both refer to the Dispute Resolution portion of the Building Agreement and initiate that process. While not a desirable, or hoped for event, it is the means towards resolution.

We should be able to complete the house within 30 days after receipt of the progress payment.

Thank You,

Jay Shepler, President December 11, 2001

Jeff Shepler, Vice-President December 11, 2001



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- 1111 R

HIGGINSON LAW OFFICES

A Professional Services Corporation
175 SECOND STREET NORTH
FRIDAY HARBOR, WASHINGTON 98250

CARLA J. HIGGINSON
Attorney & Counselor at Law

March 8, 2002

TELEPHONE: (360) 378-2185
FACSIMILE: (360) 378-3935

VIA CERTIFIED MAIL

Jay Shepler & Jeff Shepler
SHEPLER CONSTRUCTION, INC.
6340 Chuckanut Drive
Bow, Washington 98232

Dear Sirs:

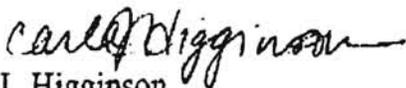
Our office represents Susan Kiraly and Gary Leonard, owners of real property located at 459 Fairway Drive, Friday Harbor, Washington. We understand that you were hired to construct their home on that property by contract dated June 14, 2000.

There have been numerous breaches of your contract which have resulted in delays and cost overruns. Those items are outlined in brief on the enclosed sheet. Therefore, please be advised that your services with regard to the above-referenced project are terminated, effective immediately. You should also be aware that our clients will be looking to you for reimbursement for their costs occasioned by your actions or neglect of their project. When these numbers are available, we will again be in contact with you.

All further communications regarding this matter should be directed to the undersigned.

Very truly yours,

HIGGINSON LAW OFFICES



Carla J. Higginson
Attorney & Counselor at Law
CJH/tbm
Encl.

cc: Susan Kiraly & Gary Leonard (w/encl.)
Shepler Construction, Inc.(w/encl.) - via regular mail

16

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Exhibit C.

KIRALY-LEONARD LIST OF ISSUES RE CONSTRUCTION OF THEIR HOME

1. Inexperienced crew handling job -- had to do things three or four times.
2. Roofing & siding supplies were ordered and paid for in January 2001, well before they were required, but roofing & siding was not completed.
3. Interior painting not completed; garage and stairwell painting not completed.
4. Deck rail not completed.
5. Exterior doors not finished.
6. Window screens not installed.
7. Some of the cabinets were installed but not all of them, and the new carpenter hired by Jeff ruined some of the cabinets.
8. Jeff said there was a professional finisher for the doors but Jeff and his father finished the three leaded glass front doors (which cost \$7,000 each). Doors were improperly prepared and now need to be refinished.
9. Sauna space was to be installation-ready by July 10, 2001; an installation appointment was scheduled for July 26th but since the space was not ready, installation could not occur. Owners were charged by the sauna installers for a trip charge anyway.
10. There is a weak chimney chase on the roof that sways and which needs to be strengthened. Jeff said that the chimney chase was actually framed incorrectly, and should have been framed into the roof trusses according to the blueprints. Jay had said he would "fix it with guide wires."
11. Grouting was not completed and was never sealed on the river rock wainscoting. This work has remained undone throughout the fall and winter, as it cannot be done until the warm & dry season.
12. Jay indicated that he wanted his brother, a licensed industrial electrician (not a licensed residential subcontractor), to do the electrical work on the house, and wanted owners to get a permit as owner-builder. Owners obtained a permit, but Jay's brother didn't show up, so Jay contractor hired an electrical subcontractor. The cost of

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the electrical permit which owners had obtained could not be refunded.

13. Neither Jeff nor Jay ever gave owners information to make choices regarding the interior trim & doors, electrical trim or plumbing trim.

14. The scissor trusses changed the pitch of the finished ceiling. Jay had said to owners at the time of delivery that they were not right, but he "would use them even though they were weren't what he wanted." Owners did not order the scissor trusses.

15. The contractor's draw schedule did not jibe with the contract. E.g.: Shepler Construction's draw schedule ("cost breakdown and request for payment") claims 2% of the loan was for permits, whereas the contract states that owners would buy them; Shepler Construction's draw schedule indicates 4%, or \$11,500, for cabinetry, whereas the "itemized allowances" states \$6,500; Shepler Construction's schedule states there was to be an appliance allowance, the "itemized allowances" indicates there would be no such allowance (owners were to purchase appliances separately).

16. Plumbing was not completed before the interior was sheetrocked. This was not discovered until February 28, 2002 when the plumber who had been hired by the contractor told Mr. Leonard of this.

17. Construction is not yet complete and there may be other items to add as they are discovered.

March 14, 2002

Mr. and Mrs. Gary Leonard
555 Park Street
Friday Harbor, WA 98250

PHH

Dear Mr. Leonard and Mrs. Kirly-Leonard:

Re: Construction Loan #0013718853

Per your request, a draw disbursement in the amount of \$39,657.68 was sent to you. Listed below is a break down of your disbursement:

| | | |
|---|------------|------------------|
| Draw Amount Requested: | \$ | 46,089.22 |
| Minus | | |
| Interest on prior draws \$224,355.15 | | |
| From 09/25/01 to 10/03/01 @ 7.00% | -\$ | 387.27 |
| From 10/04/01 to 11/07/01 @ 6.50% | -\$ | 1,398.38 |
| From 11/08/01 to 12/11/01 @ 6.00% | -\$ | 1,253.93 |
| From 12/12/01 to 03/14/02 @ 5.75% | -\$ | 3,286.96 |
| Inspection Fee: | -\$ | 105.00 |
| Title Bringdown: | -\$ | 00.00 |
| NET CHECK: | =\$ | 39,657.68 |

We have disbursed \$270,444.37 to date. The balance remaining to complete your project is \$10,000.00. **Please be advised that you will be responsible to reimburse your builder for all deducted accrued interest, inspection and title charges (if applicable).**

Reminder: Final disbursement request forms must be received by the 21st of the month in which you are completing your home to a lot sufficient time to gather all final requirements. Refer to your construction loan agreement for your "Scheduled Completion Date". If construction is delayed beyond the initial term, additional fees and/or rate protection must be renegotiated. The following documents will be required prior to disbursing the funds, modifying your interest rate and converting your loan to a permanent mortgage:

- Final Inspection evidencing property 100% complete (we will order).
- Final Title Bringdown (we will order).
- Final Survey (**Is not required by the Title Company**)
- Lien Waivers (from builder and sub-contractors).
- Certificate of Occupancy (if required by county)
- Homeowner's Insurance Policy and one year's paid receipt.
- Flood Insurance**

If you have any questions, please feel free to call me at 1-800-446-0963, extension 81070 and fax number 856-917-6308.

Very truly yours,

Allan J. Louie
Construction Draw Specialist



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Exhibit D

March 14, 2002

Carla J. Higginson
Higginson Law Offices
175 Second Street North
Friday Harbor, Washington 98250

RE: Shepler Construction/Leonard

Dear Ms. Higginson:

Shepler Construction has referred your letter of March 8, 2002 to this office. Attempts to obtain payment for completed work from the Leonard's and or their lender have not been successful. Shepler Construction was therefor forced to place a lien against the property. Please let me know what steps are being taken to arrange for payment.

Attached to your letter is what appears to be a "punch list". Items on the list that are in need of completion can be addressed when the payment obligations under the contract have been met. Some of the items, such as the absence of window screens, are associated with the Leonard's choice of materials rather than with any action of the contractors.

Other items on the "punch list" challenge the quality of the work already performed. The contract makes it clear that the Leonard's had the responsibility to bring such issues to the contractor's attention in a timely manner. It does not appear that they did so. In any event these issues are to be addressed under the dispute resolution provisions of the underlying contract. Your letter reads as if your client is refusing to abide by this aspect of the contract. Please confirm whether or not that is the case.

Finally, some of the items in the "punch list" appear not to be construction issues. The choice and timing of subcontractors, the ordering of materials, and the timing of construction are all matters under the province of the contractor.

Please let me know at your earliest convenience whether or not the Leonard's will abide by the payment and dispute resolution provisions of the contract.

Sincerely yours,



K. Garl Long
Attorney at Law

KGL: mm
c:client

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HIGGINSON LAW OFFICES

A Professional Services Corporation
175 SECOND STREET NORTH
FRIDAY HARBOR, WASHINGTON 98250

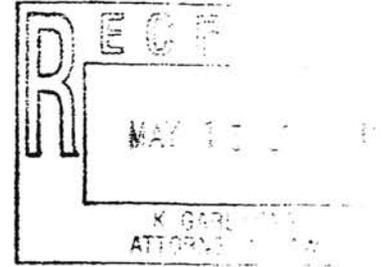
CARLA J. HIGGINSON
Attorney & Counselor at Law

May 14, 2002

TELEPHONE: (360) 378-2185
FACSIMILE: (360) 378-3935

VIA FAX AND REGULAR MAIL

K. Garl Long
LAW OFFICE OF K. GARL LONG
1215 S. Second Street, Suite A
Mount Vernon, WA 98273



Re: Kiraly/Leonard vs. Shepler Construction

Dear Mr. Long:

We are in receipt of a copy of your letter to PHH Mortgage Services dated May 6, 2002. We apologize for the delay in getting back to you on this matter, which was caused by our clients' unavailability and my absence from the country for three weeks.

In a letter from Jay and Jeff Shepler to our clients dated December 11, 2001 (a copy of which is enclosed for your reference), the Sheplers offered to complete the construction project for \$35,926.50. However, the Claim of Lien recorded on February 7, 2002 indicates a principal amount of \$60,667.64. Before our clients are able to determine how to respond, please provide an explanation of what you clients feel is actually owed. Thank you.

Very truly yours,

HIGGINSON LAW OFFICES

Carla J. Higginson
Attorney & Counselor at Law

CJH:cd

Encl.

cc: Susan Kiraly & Gary Leonard (w/o encl.)

(21)
419

Exhibit F

Law Office of

K. Garl Long

Voice (360) 336-3322

Email longlaw@nwlink.com

Fax (360) 336-3122

May 21, 2002

Carla J. Higginson
Higginson Law Offices
175 Second Street North
Friday Harbor, Washington 98250

RE: Kiraly/Leonard vs. Shepler Construction

Dear Ms. Higginson:

Thank you for your letter of May 14, 2002. Your letter refers to an offer "to complete the construction project for \$35,926.50." Please note that the December 11, 2001 letter you referenced makes no such offer. The letter states that \$35,926.50 is due under the progress payment provisions of the agreement. If the payment had been timely made progress on the project would have continued. The unpaid contract amount (without consideration of change orders) is \$62,451.50.

Copies of invoiced but unpaid change orders totaling \$35,115.20 are attached. In addition \$25,552.20 is owed for completed work not included in the change orders. Thus, without regard to interest and fees, \$60,667.64 is owed for completed work. A lien for this amount is in place.

We will refrain from taking further action for ten days so that your clients may respond.

Sincerely yours,



K. Garl Long
Attorney at Law

KGL: mm
c:client

Enclosure

22
420

Exhibit G

COUNTY CLERKS OFFICE
FILED

JAN 10 2005

MARY JEAN CAHAIL
SAN JUAN COUNTY, WASHINGTON

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC.,

No. 02-2-05162-7

Plaintiff,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

vs.

~~PROPOSED~~ *me*

GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community thereof,
and PHH MORTGAGE SERVICES
CORPORATION, a New Jersey corporation,

Defendants.

THIS MATTER having come regularly before the court for bench trial, and the parties having appeared through their counsel, examined witnesses, introduced evidence and presented argument, and the court having considered the evidence and arguments of counsel, and being familiar with the records and files herein, the court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In June of 2000, the parties entered into a contract for the construction of a residence in San Juan County. This action was filed to collect amounts due under the contract, to foreclose a lien for the amount owed, and to establish the priority of the lien over defendant PHH.

ORIGINAL
APPENDIX B

23
LAW OFFICE OF
K. GARL LONG
ATTORNEY AT LAW
1215 S. SECOND STREET, SUITE A
MOUNT VERNON, WASHINGTON 98273
Telephone: (360) 336-3322
Fax: (360) 336-3122 *43*

1 2. Summary judgment was previously granted against the Leonards on their construction
2 defect allegation. The summary judgment decision was not appealed.

3 3. Summary judgment has previously been granted to Shepler Construction as to the
4 priority of its lien over PHH. The summary judgment decision was not appealed.

5 4. The flat amount of the contract was \$280,444.37. The contract between the parties
6 stated that that amount presumed the drawings provided by the Leonards were correct. In fact, the
7 drawings were incorrect or lacking in several respects. Some of the construction was beyond that
8 which was set forth in the plans.

9 5. Although the contract provided for written change orders, the Leonards either requested
10 or were aware that extra work was being done on their home and accepted that work. The Leonards
11 assured Shepler Construction that cost of the extra work "would be taken care of" and Shepler
12 Construction performed the work on that basis.

13
14 MK ^{for} Some of the
15 6. [^] ~~The~~ extra work set forth in the written change orders later prepared by Shepler
16 Construction, was performed and was of the value stated. The Leonards have not produced any
17 evidence to the contrary.

18 7. The amount unpaid under the original contract is \$67,451.60. The vast majority of this
19 amount represents profit and overhead on work that was performed. ^{* Add} ~~^~~ After barring Shepler
20 Construction from the work site, the Leonards obtained a \$46,089.22 draw on the PHH construction
21 loan. At that point the Leonards' new contractor had performed only \$4,039.22 worth of work. A
22 substantial amount of this draw therefor represented payment for construction work done by Shepler
23 Construction.

24
25 MK
26 8. The lien was not contested; it was properly and timely served and filed, and all required

27 ^{Had} * After the Leonards failed to pay Shepler Construction, Shepler
28 Construction withdrew from the job site but continued to offer
to return to work upon
payment. The Leonards
banned Shepler Construction
from the job site on
March 8, 2002.

1 notices were given.

2 9. Jay Shepler borrowed money personally to pay subcontractors and suppliers for work
3 done on the Leonards' residence. He testified that the loan was in the amount of \$100,000.00. Shepler
4 Construction's hard costs, which include some amounts applicable to change orders, exceeded
5 \$253,247.98. Draw payments to Shepler Construction totaled \$217,992.22. The difference between
6 these amounts and what was due under the original contract exceeds \$100,000.00.

7
8 10. Mr. Shepler had hard costs of \$253,247.98—he was only paid \$217,992.87; therefore,
9 \$35,255.11 of the money to provide materials to the Leonards' job site came out of his own pocket.

10 11. Although Mrs. Leonard complains that Jay Shepler was not at the project site more,
11 nothing in the contract required him to be at the site.

12 12. Jay Shepler was credible when he discussed the extra work required on the project. He
13 documented the work with change orders after the fact. Several of the change orders, although
14 documenting changes or extra work, did not request additional payment. Those requesting payment
15 were:
16

17 Foundation Height: Excavation for the foundation exposed the need for unanticipated work.
18 This included dealing with a "sink hole" and increasing the height of the foundation. The Leonards
19 paid an invoice for this work when it was presented. The \$2,549.80 charge was reasonable and was
20 properly paid.
21

22 Vaulted Ceilings: The height of ceiling vaults was increased and extra storage space was added.
23 This greatly increased the finish surface as well as the difficulty of finishing the ceiling. The Leonards
24 wanted this change because they "liked the look" of the open ceiling and wanted the additional storage
25 space. The additional work this created was obvious to the parties. The \$16,052.93 charge is
26

1 reasonable and should have been paid.

2 Stairs to the Apartment: The drawing provided by the Leonards was not adequate as to the
3 apartment stairs. Shepler Construction was forced to design a set of stairs that would work. As built,
4 the stairs were accepted by the county; however, the court finds that the \$911.57 requested for this
5 change should not be awarded.
6

7 Deck on Apartment: Although initially built oversized, this deck was later shortened at the
8 request of Mrs. Leonard. Her request returned the deck to the size shown on the plans. The court finds
9 that the \$150.00 requested for this change should not be awarded.

10 Round to Square Corner: This corner was shown round on the plans and constructed round.
11 Mrs. Leonard had earlier said she wanted it square, but the message did not get to the framer. Although
12 Mrs. Leonard then accepted the corner round, the sheetrockers arrived without the materials to cover
13 the round corner and so it was made square. The court finds that the \$569.73 requested for this change
14 should not be awarded.
15

16 Furnace Exhaust: The exhaust was moved from one roof to another at the request of Mrs.
17 Leonard for aesthetic reasons. The \$990.84 charge is reasonable and should have been paid.

18 Laundry: The Leonards' choice of a nonstandard machine, apparently from Europe, required the
19 modification. The \$123.86 charge is reasonable and should have been paid.
20

21 Chimney Chase: The chimney chase was enlarged from what is shown on the plans. The court
22 finds that the \$798.86 requested for this change should not be awarded.

23 Deck Stairs: The extra excavation required for the foundation caused a change in the length of
24 the deck stairs. The \$222.94 charge is reasonable and should have been paid.

25 Stone work: The stone is not shown on the plans. Additional stone had to be added because of
26

1 the extra excavation required for the foundation. The Leonards decided how high the stone should run.
2 The \$7,833.83 charge is reasonable and should have been paid.

3 Two tones of paint: The plans do not identify a two-tone paint scheme. Mrs. Leonard's
4 testimony that two tones was not a change because she was given a paint chip card that showed a
5 house with a two-tone paint job was not credible. The \$3,158.30 charge is reasonable and should have
6 been paid.

7
8 Roofing upgrade: The plans call for a 25-year roofing material. The Leonards chose a 50-year
9 material that cost more and was much more difficult to install. The \$4,266.80 charge is reasonable and
10 should have been paid.

11 13. The Leonards failed to engage in dispute resolution as called for by the contract. Shepler
12 Construction sent letters, including a letter of December 11, 2001, attempting to get them to honor the
13 contractual provision. The Leonards' silence was not an appropriate answer; it constituted a rejection
14 of dispute resolution and was a breach of the contract.

15
16 14. The contract calls for a 5% late payment penalty and 12% interest on past due amounts.
17 Shepler Construction is entitled to these amounts.

18 CONCLUSIONS OF LAW

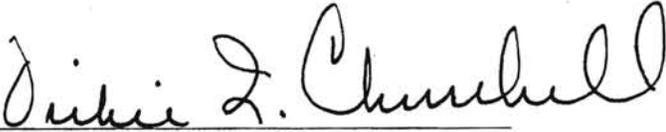
19 1. Shepler Construction is entitled to the benefit of its bargain on the contract and should
20 be awarded the remaining balance of \$67,451.60.

21 2. Shepler Construction deserves to be paid \$32,649.50 for the extra work completed under
22 the doctrine of Quantum Meruit and to prevent the unjust enrichment of the Leonards.

23 3. Shepler Construction is entitled to late fees, interest, costs and attorney's fees pursuant to
24 the contract.
25

1 4. Shepler Construction is entitled to foreclose its lien for the judgment amount.

2
3 DATED this 10 day of January, 2005.

4
5 
6 The Honorable Vickie I. Churchill

7
8
9 Presented by:

10 LAW OFFICE OF K. GARL LONG

11
12
13 
14 K. Garl Long WSBA#13569
Attorney for Plaintiff

Approved for ~~entry~~ ^{As to Form:}

15 LAW OFFICE OF JOHN O. LINDE

16
17
18 
19 Mark Kaiman, WSBA#31049
20 Attorney for Defendants

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

GARY LEONARD AND SUSAN
KIRALY-LEONARD,

Appellants,

v.

SHEPLER CONSTRUCTION, INC.,

Respondent

No. 55651-7-1

UNPUBLISHED OPINION

FILED: **May 8, 2006**

PER CURIAM -- Evidence that Shepler Construction, Inc., performed unprofessional work and used incorrect methods in building a house for Gary Leonard and Susan Kiraly-Leonard created an issue of material fact about whether Shepler met its contractual obligation to perform in a workmanlike manner. We reverse the trial court's order of summary judgment dismissing the Leonard's counterclaim for Shepler's breach of contract and remand for trial.

FACTS

The Leonards contracted with Shepler to build a custom home. The fixed price contract contained a dispute resolution mechanism and a provision for Shepler to remedy nonconforming work before final payment. After construction began, disputes between the Leonards and Shepler's employees led to difficulties between the parties. Progress payments eventually stopped, work

APPENDIX C

29

ceased, and the Leonards notified Shepler through their lawyer that its employees were not allowed on the site.

Shepler filed a mechanic's lien. When attempts to invoke the contract's dispute resolution provisions went unanswered, Shepler filed suit to enforce the lien and obtain damages for breach of contract. The Leonards filed counterclaims including a construction defect claim alleging Shepler breached the contract by failing to complete the work in a workmanlike manner. Meanwhile, the Leonards hired another contractor, Sliger Construction, to finish construction of the home.

Shepler moved for summary judgment on the lien and the Leonards' construction defect counterclaim. In support of the motion, Shepler relied on the deposition of Ken Sliger of Sliger Construction. According to Sliger, Shepler's work was not shoddy and the only real problem was it was incomplete. In opposition, the Leonards submitted the declarations of the finish carpenter, Gerald Green, the siding installer, Kevin Taylor, and heating contractor Dick Wilson. These declarations contained several criticisms of Shepler's work, including specific points regarding interior walls, vinyl siding, house wrap under the siding, the chimney chase and the heating system. In reply, Shepler provided the declarations of Michael Drake, who installed the heating system, Jay Shepler, Shepler's president and additional excerpts from the Sliger deposition, listing the areas Shepler and its subcontractors would have addressed had they completed the work. The court granted Shepler's motion for summary judgment.

After summary judgment was granted, the Leonards obtained new counsel and filed a declaration by construction consultant Richard Russell in support of a motion to reconsider. In Russell's opinion the construction was defective for several reasons in addition to those described in Leonards' response to the original motion. The trial court denied the motion, concluding the Leonards had not shown good cause for reconsideration under CR 59.

Though the parties had previously stipulated discovery was complete and the matter ready for trial, the Leonards sought to add Russell as a trial witness. The court denied the motion.

Jay and Jeff Shepler and Susan Leonard testified at trial. The court ruled the lien was valid and the Leonards breached the contract. The court concluded, however, that some of Shepler's change orders claims were not supported, and rejected Shepler's request for additional damages because the Leonards did not comply with the contract's dispute resolution provision. The court entered judgment in favor of Shepler and awarded Shepler attorney fees under the contract.

The Leonards appeal, challenging the trial court's summary judgment order, denial of their motion for reconsideration, and the order prohibiting Russell from testifying at trial. Shepler cross-appeals, assigning error to the trial court's decision not to award additional damages.

ANALYSIS

The Leonards' primary argument is the trial court erred in granting summary judgment dismissing their counterclaim. Summary judgment is appropriate if the pleadings, affidavits, depositions, answers to interrogatories,

and admissions on file demonstrate the absence of genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 662, 63 P.3d 125 (2003). Review of summary judgment is de novo. Denaxas, 148 Wn.2d at 662.

At issue is whether Shepler's work was defective within the meaning of the contract, which required the work to be "substantially completed in a workmanlike manner according to standard practices of the area and in compliance with all applicable state and local building, electrical, and mechanical codes."¹ The Leonards contend the declarations submitted in opposition to summary judgment create genuine issues of material fact precluding summary judgment on their counterclaim.² We agree.

Shepler correctly points out that none of the Leonards' three responsive declarations expressly describes its work as insufficient under the precise terms of the contract. But viewed in the light most favorable to the Leonards, the declarations nonetheless support the reasonable inference that Shepler failed to meet the agreed to standard in the contract.

¹ Repeating an argument it made in the trial court, Shepler cites Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 522, 799 P.2d 250 (1990) for the proposition that a homebuyer is not entitled to a perfect house. Atherton is not helpful because it involved the parameters of the implied warranty of habitability, not an express contractual provision for workmanlike construction of the type in this case.

² While the Leonards have attached to their brief a copy of Russell's declaration submitted to the trial court in support of the motion to reconsider summary judgment, that declaration is not relevant to our review of the order granting summary judgment and we do not consider it.

32

For example, Green stated that among the reasons he found Shepler's work "very unprofessional" was that some of the walls were visibly out of plumb, one to the extent it "did not even come close to a right angle", which resulted in a situation where interior doors could not be properly installed. Similarly, according to Taylor, house wrap was not used where it should have been, which created a substantial risk of dry rot in the material under the siding. Drawing all reasonable inferences in favor of the Leonards, the declarations support the conclusion that Shepler's work failed to meet the contractual standard of being "workmanlike according to standard practices of the area."

Shepler also contends the responsive declarations failed to rebut Sliger's opinion that the work was merely incomplete.³ This is arguably true of some of the listed complaints. But the evidence supports the reasonable inference that Shepler would have done no further work to correct the problem of out-of-plumb walls because those walls were finished and Jay Shepler regarded the issue as simply a question of adjusting finish molding. Likewise there is a reasonable inference that Shepler would not have installed additional house wrap. Jay Shepler believed it unnecessary to use on the lower story because of the foam and concrete construction used on the lower story.

Viewing the record in the light most favorable to the Leonards, there is a material issue of fact as to whether Shepler breached its contractual obligation to

³ In a statement of supplemental authority, Shepler has suggested an alternative basis for affirming the trial court under RCW 64.50.020 as a result of the holding in Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge L.P., 125 Wn. App. 71, 104 P.3d 22 (2005). That case, however, has now been reversed by the Supreme Court in a decision adverse to Shepler's position. See Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship, 2006 Wash. App. Lexis 271 (Wash. Apr. 6, 2006)

perform in a workmanlike manner. We therefore vacate the judgment, including the attorney fees award, and remand the case for trial.⁴

Both parties have requested reasonable attorney fees under the contract. The determination of who is the prevailing party under the contract, however, depends on the ultimate outcome of the trial. Stuart v. Am. States Ins. Co., 134 Wn.2d 814, 824, 953 P.2d 462 (1998) (attorney fees abide remand outcome); Schumacher Painting Co. v. First Union Mgmt., Inc., 69 Wn. App. 693, 702, 850 P.2d 1361 (1993) (prevailing party is determined by the outcome at the conclusion of the entire case). The award of fees and expenses shall be determined by the trial court at the conclusion of the trial.

Reversed and remanded for trial.

FOR THE COURT:

Schindler, ACT

Dwyer, J.

Columan, J.

⁴ Because we remand for trial, it is not necessary to address the Shepler's counterclaim for damages resulting from the Leonard's failure to abide by the contract's dispute resolution provisions. In light of the additional evidence that will be provided upon remand, the trial court's assessment of breach and damages by the parties may change. Any opinion this court could offer now would only be advisory.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
SAN JUAN COUNTY

SHEPLER CONSTRUCTION, INC., a
Washington corporation,

Plaintiff,

v.

**GARY LEONARD and SUSAN KIRALY-
LEONARD**, and the marital community
thereof, and **PHH MORTGAGE SERVICES
CORPORATION**, a New Jersey corporation,

Defendants.

No. 02-2-05162-7

**DECLARATION OF K. GARL LONG
IN OPPOSITION TO MOTION TO
STRIKE**

The undersigned declares as follows:

1. I am counsel of record for Shepler Construction in this matter, I have personal knowledge of the facts described below, and I am competent to testify.
2. *Exhibit A*, attached hereto, is an email sent the morning of July 14, 2008, informing counsel for Leonard that I would not be available the week of July 21 through July 25, 2008.
3. In the late afternoon of Friday, July 18th my office received a Motion to Strike. I was unable to review the motion and prepare a response until my return to the office on July 28, 2008.
4. On July 7, 2008 I informed counsel for the Leonards that Shepler was willing to arbitrate in accord with the contract. I followed up with a letter.

- 1 5. *Exhibit B*, attached hereto, is a true and correct copy of the letter dated July 9, 2008. It
2 again requests that the Leonards follow the dispute resolution provision of the contract
3 and outlines the process.
- 4 6. On July 17, 2008 the Leonards responded with a letter refusing to engage in dispute
5 resolution as called for in the contract. Because the letter bears the legend
6 CONFIDENTIAL FOR SETTLEMENT PURPOSES ONLY it is not attached hereto.
- 7 7. The Leonards' July 17, 2008 letter also asserts that there is no basis for the trial court to
8 enter conclusions of law and findings of fact in support of its denial of the Leonards'
9 Motion to Compel Arbitration.
- 10 8. At this point the Leonards have appealed the denial of their Motion to Compel
11 Arbitration, are attempting to prevent the trial court from entering findings and
12 conclusions in support of its decision, and are refusing to arbitrate.
- 13 9. The Court should enter findings and conclusions in support of its denial of the Motion to
14 Compel Arbitration.

15 I declare under penalty of perjury under the laws of the State of Washington that the
16 foregoing is true and correct.

17 DATED this 27 day of July, 2008.

18
19
20
21 
22 K. GARL LONG, WSBA #13569
23 Attorney for Plaintiff

Subject: Re: Shepler v. Leonard, request for dates to hear a motion to strike your noting of presentation of proposed findings and conclusions on July 30
From: "K. Garl Long" <Garl@longlaw.biz>
Date: Mon, 14 Jul 2008 09:04:27 -0700
To: "Spellman, David" <SpellmanD@LanePowell.com>
BCC: Jay Shepler <"jayshepler"@wavecable.com>

David:

I am on vacation next week. The week of the 29th is available, except July 31. This case is already set for July 30.

KGL

Spellman, David wrote:

Please provide us with your available dates. We will file a motion to strike.

You signed and the court signed the order on June 18. Now 21 days later you are proposing findings and conclusions. The 10 day time period for a motion to alter or reconsider expired eleven days ago.

Based upon your prior motions for sanctions, I tempted to file a motion for sanctions since you did not respond to my prior email requesting a procedural basis for the presentation of findings and conclusions on issues on appeal. Furthermore, the pleading contains new arguments and unsupported facts and fails to contain proper citations. It is also an untimely reconsideration motion and fails to address RAP 7.2 (a).

This message is private or privileged. If you are not the person for whom this message is intended, please delete it and notify me immediately, and please do not copy or send this message to anyone else.

Please be advised that, if this communication includes federal tax advice, it cannot be used for the purpose of avoiding tax penalties unless you have expressly engaged us to provide written advice in a form that satisfies IRS standards for "covered opinions" or we have informed you that those standards do not apply to this communication.

Law Offices of K. Garl Long - Mount Vernon, Washington - (360) 336-3322

37

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EXHIBIT A

July 9, 2008

Messrs. Spellman and Gabel
Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

RE: *Shepler v. Leonard*

Dear Mr. Spellman and Mr. Gabel:

Pleadings recently filed assert that the Leonards are now demanding that the dispute resolution provision in the contract be implemented. However, the Leonards still have never provided a list of those items of construction they want Shepler to repair or replace. The contract contemplates the following steps:

- 1) Identification of a discrete item or items of construction that the Leonards are asking Shepler to repair or replace.
- 2) Shepler's examination of the item or items.
- 3) Shepler is to then either repair or replace the item to the Leonards' satisfaction, or, if it believes the request is unreasonable, refuse to do so.

If further construction is to occur it will be scheduled and performed.

If Shepler decides not to repair or replace an item the Leonards may invoke the dispute resolution provision.

- 4) Appointment of arbitrators under the dispute resolution provision followed by their examination of the items the Leonards object to. If the arbitrators determine that further work needs to be done Shepler will be obligated to do it. The Leonards will be required to pay for the disputed item in any event.



EXHIBIT B

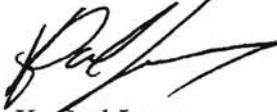
vs. Spellman and Gabel

July 7, 2008

Page 2

The Leonards cannot be allowed to claim that they want to follow the contract while simultaneously continuing their refusal to do so. If the list of discrete items of construction that the Leonards believe do not comply with the contract is not received within **seven days** of the date of this letter, appropriate relief will be sought from the courts.

Sincerely yours,



K. Garl Long
Attorney at Law

KGL: kjh
c:client

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COUNTY CLERK'S OFFICE
FILED COPY
JAN 4 2008
SAN JUAN COUNTY WASH DC

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC.,

No. 02-2-05162-7

Plaintiff,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

v.

[PROPOSED]

**GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community
thereof; PHH MORTGAGE SERVICES
CORPORATION, a New Jersey corporation,**

Defendants.

PROCEDURAL BACKGROUND

This case was first tried December 15-16, 2004. The court found for Shepler and awarded damages, attorney fees, and costs. Following that trial, the Leonards appealed the Summary Judgment dismissal of their counterclaims. On May 8, 2006, following a series of opinions, the Court of Appeals reversed the summary judgment ruling, stating that there was a disputed issue of material fact about whether Shepler Construction met its contractual obligation to perform in a workmanlike manner. The case was remanded for trial.

On January 4, 2008, Shepler brought a second motion for summary judgment on a different theory, i.e., that the Leonards breached the dispute resolution provision in the agreement between the parties and were therefore barred from bringing such claims in court. This court originally denied

COPY
ORIGINAL

CP222
LAW OFFICES OF
K. GARL LONG
ATTORNEY AT LAW
1215 S. SECOND STREET, SUITE A
MOUNT VERNON WASHINGTON 98273
Telephone: (360) 336-3322
Fax: (360) 336-3122

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1 Shepler's motion for summary judgment, but on a motion for reconsideration from Shepler, granted it
2 and signed an order to that effect on March 26, 2008. That order was filed on March 31, 2008. The
3 Leonards never brought a motion for reconsideration under CR 59 or a motion for relief from judgment
4 under CR 60 of the summary judgment. The order has never been appealed, either.

5 In the summary judgment motion entered on March 31, 2008, this court ruled that the dispute
6 resolution clause applies only when a dispute exists as to whether, "the work has been performed in
7 accordance with this agreement, applicable building codes, and in a good and workmanlike manner."¹
8 The aggrieved party who believes the contractor is not performing in a, "good and workmanlike
9 manner," has to utilize the dispute resolution provision. The "aggrieved party" who does not believe the
10 contractor is performing will always be the homeowner, not the contractor. It makes no sense to believe
11 that the contractor would be an "aggrieved party" under this dispute resolution process or in some
12 instances even know that the homeowner was aggrieved by certain work. For instance, the Leonards
13 were not pleased with the heating system, even though they chose it. Shepler never even knew the
14 heating system was in dispute for eight years because the Leonards never invoked the dispute resolution
15 process. In any event, the Leonards have a remedy with the manufacturer if they believe the heating
16 system is inadequate because the Leonards hold the warranty, not Shepler. Thus, this provision applies
17 to the homeowner, the Leonards, who never invoked the dispute resolution process, even when Shepler
18 asked the Leonards if they were going to invoke it.

19 On the other hand, if the contractor is not getting paid, the dispute resolution provision does not
20 cover that situation. Instead, the contractor's option to enforce payment is to file a lien within 90 days of
21 the last date of construction, and if not paid, then file suit within eight months of the lien. RCW
22 60.04.091 and RCW 60.04.141. Even though Shepler was not required under the contract to invoke the

23 _____
24 1 Shepler Construction, Inc., Building Agreement, Ex. 34-1.b., Second Trial on August 8-10, 2011.

1 dispute resolution process, he indicated in a letter to the Leonards dated December 11, 2001, that he was
2 willing to use the dispute resolution process and complete the house within 30 days.² The Leonards
3 never responded to Shepler's inquiry; their silence was refusal.

4 On February 7, 2002, Shepler filed a lien for \$60,667.64.³ The Leonards' attorney then wrote
5 Shepler's attorney on March 8, 2002, instructing Shepler not to return to the job site.⁴ On March 14,
6 2002, Shepler's attorney responded, inquiring whether the Leonards were going to invoke the dispute
7 resolution process. Shepler even had a contractor selected for the dispute resolution process. Again, the
8 Leonards did not respond. On October 4, 2002, Shepler then filed this lawsuit to enforce the
9 contractor's lien. If Shepler had not filed the contractor's lien or this lawsuit, he could have lost his
10 ability to file or to sue under the contractor's lien.

11 Ms. Leonard testified that she was aware of the dispute resolution process but never attempted to
12 invoke it. The Leonards' refusal to comply with the dispute resolution procedure set forth in the contract
13 waived any claim of construction defect.⁵

14 Thus, this court found that the Leonards' counterclaims for construction defects were barred by
15 the summary judgment decision in 2008 and did not allow those claims in the second trial in 2011. The
16 trial was limited to Shepler's claims for compensation and foreclosure, as well as the Leonards'
17 counterclaims for incomplete work or offsets to the contract.

18 ///

22 2 Ex. 3

23 3 Ex. 34(4g)

24 4 Ex. 34(3c)

25 5 *Absher Constr. V. Kent School Dist.*, 77 Wash.App. 137, 890 P.2d 1071 (1995).

1 **FINDINGS OF FACT**

- 2 1. In June of 2000, the parties entered into a \$280,444.37 flat fee contract for the
3 construction of a residence in San Juan County. This action was filed to collect amounts
4 due under the contract, to foreclose a lien for the amount owed, and to establish the
5 priority of the lien over defendant PHH.
- 6 2. Summary Judgment was previously granted against the Leonards on some of their
7 claims as set forth above. The Summary Judgment decision was not appealed.
- 8 3. Summary Judgment was granted to Shepler Construction as to the priority of its lien
9 over PHH prior to the first trial. The summary judgment decision was not appealed.

10 **Witness Credibility**

- 11 4. The court has heard testimony twice in this case, December 2004 and August 2011, and
12 in both trials found Shepler to be credible and straight-forward. Ms. Leonard was not.
13 She was on the site every day and micromanaged the project, changed her mind about
14 items she wanted in the house, caused delays by taking weeks to decide on flooring and
15 paint colors, and generally created strife on the worksite, not only with the workers but
16 with the mortgage lender inspector.⁶
- 17 5. Nancy Clifton, the mortgage appraiser, emailed the mortgage lender: "Mrs. Leonard
18 was rude, arrogant, and made it plain she didn't want me doing any inspections. So,
19 here we are. I will not work on the Leonard project." And, "Please reassign the Leonard
20 construction inspections to someone else. Life is too short and I am too busy with
21 appraisal work to put up with a rude, pompous, arrogant pain in the _____. I don't feel
22 any need to force myself on someone who doesn't want my services."⁷

23 ⁶ Ex. 34(4d).

24 ⁷ *Id.*

- 1 6. Ms. Leonard would promise to pay for upgraded materials but reneged several times.
2 She promised Shepler a bank draw if he would satisfy all liens with the subcontractors
3 and reneged on that promise as well after Shepler performed.
- 4 7. At trial, Ms. Leonard was argumentative, nonresponsive, and evasive until finally pinned
5 down to a specific point. For instance, she said she never met an inspector named
6 Nancy Clifton, then after several questions later, clarified that she met an appraiser
7 named Nancy Clifton, which is a distinction without a difference. Or, she denied
8 remembering that Shepler had asked her for a draw request, when the evidence is clear
9 that occurred. The transcript is replete with examples of Ms. Leonard's "memory
10 lapses" in this regard.
- 11 8. As another example, Ms. Leonard testified at the first trial that they signed the building
12 agreement with Shepler in June 2000 but construction did not begin until January 2001
13 because the Leonards were having difficulty in getting financial information from
14 Shepler that their bank needed. Unknown to Shepler, the Leonards had a dispute with a
15 septic tank installer who put a lien on their property until the Leonards paid him. The
16 Leonards' bank would not approve the financing until the Leonards removed the septic
17 tank installer's lien. In the second trial seven years later, Mr. Leonard admitted that their
18 financing approval was stalled because of the septic tank installer's lien.
- 19 9. The court did not find Ms. Leonard credible.
- 20 10. Ms. Leonard did not testify at the second trial in 2011, instead, Mr. Leonard testified.
21 While Mr. Leonard was more cooperative without being argumentative or evasive as
22 Ms. Leonard had been, nevertheless, Mr. Leonard is an airline pilot and was gone a lot
23 of time during the construction of the home. He relied on Ms. Leonard for the source of

1 his information.

2 11. Jeffrey Shepler, whom the court found credible, recalled one afternoon when Mr.
3 Leonard talked with him about some things that needed correcting, such as trimming
4 shingles around one skylight, adjusting a deck railing, and other smaller items. Jeffrey
5 Shepler was able to get to most of the items, with the exception of the work on the
6 chimney, before the relationship between the Leonards and Shepler disintegrated.

7 12. Other than this occasion, Jeffrey Shepler testified that when he was working late
8 painting the interior of the house, Mr. Leonard would visit with him and Mr. Leonard
9 never expressed any dissatisfaction with the job.

10 **Breach of Contract**

11 13. Shepler claims that the Leonards breached the contract with Shepler Construction by (1)
12 failing to remit to Shepler the full amount of the construction draws, (2) failing to make
13 progress payments, (3) failing to reimburse Shepler for materials purchased by Shepler
14 on Leonards' behalf, (4) refusing to follow the dispute resolution requirement of the
15 contract, and (5) refusing to allow Shepler Construction to complete the project.

16 *(1) Full Amount of Construction Draws*

17 14. The contract provided that Shepler would receive progress payments for the percentage
18 of the work completed by Shepler since the last payment date. In order to get
19 construction draws, Shepler had to submit written requests for construction draws to Ms.
20 Leonard, who would then contact the bank. The bank would send out an appraiser to
21 inspect the property to determine if the work had been done in accordance with the plans
22 and specification.⁸ The cost of the appraiser's inspection, title search and interest was

23 _____
24 8 Ex. 34 (4a)

CP2271 --

1 then deducted from the draw disbursement. The check was made out to both Shepler and
2 the Leonards. Shepler was to receive the bank disbursement, and the Leonards were
3 responsible for paying Shepler anything that had been deducted from the bank
4 disbursement.⁹

5 15. The draw disbursement letters received by the Leonards from their mortgage lender had
6 in bold letters this warning: **“Please be advised that you will be responsible to**
7 **reimburse your builder for all deducted accrued interest, inspection and title**
8 **charges (if applicable).”**¹⁰ Above the warning was an accounting of the draw amount
9 requested and any deductions.

10 16. The Leonards never paid Shepler the difference between the draw disbursement and the
11 expenses for the completed work. Leonard testified that he knew his agreement with the
12 mortgage lender required him to pay the interest. He also testified that he knew that he
13 was to pay the difference between the requested draw amount and the actual amount of
14 the progress payment to Shepler, but he never did.

15 17. The bank disbursed \$224,355.15 from the start of the project until December 2001.¹¹
16 Shepler only received \$217,992.87 during the time he worked on the project,¹² or
17 \$6,362.28 less than the draw requests. In essence, the Leonards were using Shepler's
18 construction draws to front their own financing costs, which they knew they were
19 required to pay to Shepler.

20 18. The court finds that the Leonards breached the construction agreement by failing to pay
21 Shepler the full amount of the disbursements from the mortgage lender.

22 ⁹ Ex. 34 (4c)

23 ¹⁰ Ex. 34 (4i)

24 ¹¹ Ex. 34 (4i), March 14, 2002, letter from PHH Mortgage Services to the Leonards.

25 ¹² Ex. 34(21), Ex. 34(4.f.), page two; and Ex. 73.

1 (2) *Failure to Make Progress Payments*

2 19. The last construction draw that Shepler received was in September 2001, although he
3 continued working on the project until November 28, 2001.¹³ When Shepler asked the
4 Leonards for another construction draw, the Leonards promised to pay Shepler within 10
5 days of getting lien releases from the subcontractors. Shepler borrowed money to pay the
6 subcontractors and provided the Leonards with the lien releases. However, Mr. Leonard
7 testified that he never intended to pay Shepler after receiving the lien releases. Instead,
8 the Leonards barred Shepler from the jobsite and convinced the mortgage lender to give
9 them the money directly, thus cutting out Shepler.¹⁴

10 20. The Leonards hired Ken Sliger, a finish carpenter to finish the house. They asked for
11 another draw of \$46,089.22 from PHH Mortgage services and received that amount, less
12 interest and inspection fees, for a total of \$39,657.68 on March 14, 2002.¹⁵ Sliger's first
13 invoice for materials and for work he had completed on the Leonard residence was
14 submitted three days later on March 17, 2002, for \$4,039.93.

15 21. Thus, out of the \$46,089.22 requested, there remained \$42,049.29 after Sliger was paid.
16 According to the letter Shepler wrote the Leonards dated December 11, 2001, he was
17 willing to continue working on the house if he received a progress payment of
18 \$35,926.50.¹⁶ In a later letter to the Leonards' mortgage lender dated January 18, 2002,
19 Shepler was willing to resume work if he was paid \$25,552.20 to bring him current.¹⁷

20 There were funds available for the Leonards to make a progress payment to Shepler.

21 _____
13 Ex. 34 (4g)

22 14 Ex. 34 (4m)

23 15 Ex. 34(4i)

16 Ex. 3

17 Ex. 34(4f)

1 22. The court finds that the Leonards breached the construction agreement by failing to make
2 progress payments to Shepler.

3 *(3) Failure to Reimburse Shepler for Materials*

4 23. Ms. Leonard ordered windows from Canada but did not have a way to haul them to the
5 work site, so she and Ms. Shepler went to pick up the windows. When they arrived to
6 pick up the windows, Ms. Leonard did not have the money to pay for them, so Ms.
7 Shepler put the cost, \$18,185 (after conversion to U.S. dollars), on Shepler's credit card.
8 Ms. Leonard promised to pay Shepler back but never did even though the Leonards were
9 obligated to pay for the upgrade under the contract.

10 24. Shepler also paid \$18,586 for the Leonards' upgraded cabinets and was never paid back.
11 The amount paid by Shepler for both the windows and the cabinets, \$36,771, was over
12 and above the amount allotted under the contract.

13 25. Shepler special ordered floor coverings that Ms. Leonard wanted, but when the shipment
14 arrived, Ms. Leonard rejected it because she had found something cheaper on the
15 Internet. Shepler paid \$15,000 for the floor coverings that Ms. Leonard ordered and
16 rejected, an expense he did not anticipate, but he was able to recover some of his loss by
17 using a portion of the flooring in other projects he had.

18 26. The court finds that the Leonards failed to reimburse Shepler for materials that he
19 purchased on the Leonards' behalf which the contract did not cover and which the
20 Leonards knew they were responsible for paying.

CP230/20

1 (4) *Failure to Follow the Dispute Resolution Requirement of the Contract*

2 27. The court finds that the Leonards refused to follow the dispute resolution process in the
3 contract. That issue has already been discussed by the court in the remarks about the
4 summary judgment entered on March 31, 2008.

5 (5) *Refusing to Allow Shepler Construction to Complete the Project*

6 28. As remarked above, the Leonards refused to reimburse Shepler for upgrades that he had
7 purchased for the Leonards in the amount of \$36,771. When Shepler would try to discuss
8 this or other change orders made by the Leonards, Ms. Leonard would reassure him that
9 they would take care of Shepler, leading Shepler to believe that the Leonards would pay
10 him for his extra work and for the upgraded materials he purchased for them.

11 29. However, when Shepler borrowed money to pay off the subcontractors and the Leonards
12 then refused to request a progress payment for Shepler as they had promised, Shepler
13 decided he could not continue working without getting paid. The breakdown between the
14 parties occurred when the Leonards wanted Shepler to order the garage doors, which the
15 Leonards had upgraded to more expensive models. Shepler said he would not order the
16 garage doors until the Leonards advanced the money to pay for them or until he received
17 the draw which he had requested. The Leonards refused, and the project came to a
18 standstill.

19 30. Shepler made overtures to the Leonards in his letter dated December 11, 2001, and
20 suggested that they use the dispute resolution process.¹⁸ His overture was met with
21 silence from the Leonards. In late December 2001, Shepler removed his equipment from
22 the jobsite. As Jeffery Shepler was removing the scaffolding from the site, he had a short

23 _____
24 18 Ex. 3

1 conversation with Mr. Leonard and told him that they were waiting for a check so they
2 could come back and finish the house. Unknown to Shepler, the Leonards were already
3 talking to Ken Sliger and making arrangements for him to complete the house.

4 31. In a letter dated January 18, 2002 to the mortgage lender, Shepler also affirmed that they
5 were "eager to receive payment of \$25,552.20 to bring us current so we can resume
6 work."¹⁹ Neither the lender nor the Leonards responded, and Shepler never received any
7 more money, so he filed his lien on February 7, 2002.²⁰

8 32. The court finds that Shepler remained ready and willing to complete the construction
9 work and any necessary remedial work, but he could not do so unless he received some
10 money for the work he was doing. The court finds that the Leonards breached the
11 contract by not allowing Shepler to complete the project.

12 33. In a breach of contract case, an injured party is entitled to his or her expectation interest
13 to obtain the benefit of the bargain.²¹ Shepler entered into a construction contract with
14 the Leonards for a flat fee of \$280,444.37, which included Shepler's profit. Shepler
15 received \$217,992.87, leaving a balance of \$62,451.50 on the contract. In addition,
16 Shepler paid \$36,771 for upgrades for the Leonards which they did not reimburse.
17 Shepler's benefit of the bargain under the contract was \$99,222.50.

18 34. However, the contract balance includes some items that Shepler would have had to pay,
19 which the Leonards paid and which should be offset against the \$99,222.50.
20

21
22

19 Ex. 34(4f)

20 Ex. 34(4g)

23 21 *Eastlake Constr. Co., Inc. v. Hess*, 102 Wash.2d 30, 46, 686 P.2d 465 (1984) (quoting Restatement
24 (Second) of Contracts. §347 cmt. a (1981)).

1 **Offsets to Contract Balance**

- 2 35. The contract provided for certain allowances to the Leonards for materials, which Shepler
3 did not install after the Leonards quit paying him. Those allowances were \$5,500 for
4 plumbing trim, \$19,125 for flooring, \$6,500 for cabinets, \$1,500 for countertop, \$2,400
5 for garage doors, and \$1,850 for lighting for a total offset to the contract of \$34,475.²²
- 6 36. The Leonards paid for one bathtub, which was included in the contract price. There was
7 no testimony about the allowance amount for the bathtub and it was not included in the
8 job estimate Shepler provided to the mortgage lender.²³ There is no way that the court
9 can offset that cost because there was not any testimony as to the amount.
- 10 37. The plans also provided for three skylights off the kitchen, but only one was installed.
11 However, Shepler put in four extra windows above the gable ends in the vaulted ceiling,
12 which were not called for in the plans. The skylights cost \$126 each, or \$252.²⁴ On the
13 other hand, the windows cost \$350 each, or \$1,400.²⁵ However, the court does not know
14 if these were same type of windows that Shepler installed at his expense in the vaulted
15 ceiling. Therefore, the court will consider this an even trade. Even though Shepler
16 testified that he paid more, he did not indicate how much more he paid.
- 17 38. Ms. Leonard had arranged for her sauna installer to come on July 10, 2001, which was a
18 date that Shepler said would work for the sauna installation. However, when the sauna
19 installer arrived, he had brought cedar boards to go in one direction, and the framing was
20 for the other direction. The sauna installer had to make another trip to put in the sauna

21
22 ²² Ex. 34 (1a), page three of the "Friday Harbor House Bid."

23 ²³ Ex. 65

24 ²⁴ Ex. 65

25 ²⁵ *Id.*

1 after the framing was changed. He charged the Leonards \$250 for the additional trip,²⁶
2 which the court will offset against Leonards' award.

3 39. The Leonards spent \$125 to obtain an electrical permit so that another brother of
4 Shepler, who was a licensed industrial electrician but not a contractor, could do the
5 electrical work on the house. The brother never did the work, so the electrical permit was
6 not used. The cost of the electrical permit, \$125, shall be offset against the contract
7 balance.

8 40. When Shepler quit work on the project, he estimated that he was 90% complete. He
9 reviewed the work done by Sliger and estimated that Sliger completed about 10% of what
10 he would have done under the contract. Much of the work done by Sliger, according to
11 Shepler, was extra and not required under the contract. The court agrees with Shepler.
12 Ms. Leonard throughout the project would upgrade or change construction when she
13 found something that she decided would look good in her house and continually
14 upgraded what the contract required.

15 41. Shepler had a flat fee contract with the Leonards. Sliger was billing under a time and
16 materials arrangement. It is difficult to determine the total amount the Leonards paid
17 Sliger. Sliger's invoices total \$38,333.29.²⁷ The total amount of checks written by the
18 Leonards to Sliger total \$44,267.37.²⁸ The lien waiver provided by Sliger for materials
19 and labor on June 21, 2002, was for \$58,000.²⁹ The court finds that the checks written to
20 Sliger are a better indication of the amount the Leonards paid to Sliger, \$44,267.37. If
21 the court provides an offset to the Leonards for work performed by Sliger that the

22 ²⁶ Ex. 2

23 ²⁷ Ex. 35

24 ²⁸ Ex. 49

25 ²⁹ Ex. 34(4n)

1 Leonards would have been required to perform under the contract, then the Leonards
2 would get an offset of \$4,426.74.

3 42. However, the court finds that Shepler remained ready, willing and able to complete the
4 construction work on the house and any "punch list" items of work, but the Leonards
5 barred him from the jobsite. Shepler was justified in suspending work on the project
6 when the Leonards refused to make a progress payment required under the contract. The
7 court finds that this repudiation by the Leonards of the construction contract excused
8 Shepler's performance.³⁰ The Leonards' actions are especially offensive because they
9 promised to make a progress payment to Shepler within 10 days of receiving the lien
10 releases from Shepler, a promise they never intended on keeping, even after Shepler
11 borrowed money to pay subcontractors and provided the lien releases.

12 43. The court will not provide an offset to the Leonards for incomplete work. The court will
13 provide an offset of \$34,475 for allowances for materials, \$250 for the sauna, and \$125
14 for the electrical permit, for a total offset of \$34,850 to the balance of \$99,222.50 owed
15 Shepler under the contract, for a total owed Shepler of \$64,372.50 due under the contract.

16
17 **Quantum Meruit**

18 44. The contract had a clause that required the parties to submit all change orders in writing.
19 When construction on the house began, Shepler enjoyed a good relationship with the
20 Leonards, so when the Leonards told him that they would take care of him in relation to
21 the changes they wanted, Shepler did not provide change orders in advance. Although a
22 contractor is presumed to be bound by the terms to which he agreed, he cannot be

23 ³⁰ *CKP, Inc. v. GRS Construction*, 63 Wash.App. 601, 620, 821 P.2d 63 (1991)(whether one party
24 repudiates a construction contract, excusing the other's performance, is a question of fact).

1 presumed to have bargained away his right to claim damages resulting from changes the
2 parties did not contemplate when making the contract.³¹

3 45. Under such circumstances, the law provides for recovery under the theory called
4 *quantum meruit*, which literally means “as much as deserved.”³² *Quantum meruit*
5 provides an appropriate basis for recovery when substantial changes occur which are not
6 covered by the contract and were not within the contemplation of the parties, if the effect
7 is to require extra work and materials or to cause substantial loss to the contractor.³³ In
8 *quantum meruit* cases, damages are measured by the reasonable value of the benefit
9 conferred on the defendant.³⁴ The burden is on the plaintiff to prove the reasonable value
10 of the services rendered.³⁵

11 46. At both trials, the first one in December 2004, and the second one in August 2011,
12 Shepler has argued breach of contract and *quantum meruit*. To the extent that the
13 *quantum meruit* claim may not have been raised by the pleadings, the pleadings are
14 amended to conform to the evidence presented at trial. The court finds that there is no
15 prejudice to the Leonards by doing so since this has been the position of the case almost
16 from the beginning in 2000.

17 47. The following are change orders Shepler provided the Leonards after the work was
18 completed which the court will consider under *quantum meruit*.

21

³¹ *Hensel Phelps Const. Co. v. King County*, 57 Wn.App. 170, 174, 787 P.2d 58 (1990).

22 ³² *Losli v. Foster*, 37 Wn.2d 220, 233, 222 P.2d 824 (1950).

23 ³³ *Schuehle v. City of Seattle*, 199 Wash. 675, 92 P.2d 1109 (1939).

24 ³⁴ *Ducolon Mech., Inc. v. Shinstine/Forness, Inc.*, 77 Wn.App. 707, 712, 893 P.2d 1127 (1995).

25 ³⁵ *Eaton v. Engelcke Mfg., Inc.*, 37 Wn.App. 677, 682, 681 P.2d 1312 (1984).

1 **Change Orders**

2 *(1) Change Order: Stick Framing on Apartment*³⁶

3 48. Instead of putting Quad Lock on the second floor which would have created a ridge with
4 a wall sitting on it, Shepler upgraded the apartment exterior wall to 12" stick frame so the
5 bottom and top floors would match. He also added R-30 insulation to match the R-value
6 of the Quad Lock. He did not charge the Leonards extra for this. Even though the
7 Leonards are now claiming that they should receive an offset because Shepler did not put
8 in the Quad Lock, the court finds that Shepler's actions were reasonable and did not harm
9 the Leonards. The Leonards got the equivalent of Quad Lock, and the exterior look of
10 their house was improved because of Shepler's actions.

11 *(2) Change Order: Foundation*³⁷

12 49. When Shepler began work on the project, he found that he had to dig deeper to find solid
13 ground because there was a "soft spot" where the foundation was to go. It was only later
14 that Shepler learned that the Leonards had a controversy with the septic tank installer
15 who had put the septic tank in the spot where the foundation was planned. The Leonards
16 required the septic tank installer to remove the septic tank and put it in another location,
17 which created a soft spot.

18 50. Because the foundation had to be dug deeper, there was more concrete used for the
19 foundation, which created additional costs. Shepler provided the Leonards a change
20 order after the fact for \$2,549.80, which the Leonards paid on April 13, 2001.

21 51. Ms. Leonard complained that she never authorized Shepler to alter the foundation height
22 due to the slope. The court does not find Ms. Leonard credible, especially since the

23 ³⁶ Ex. 34(1d), Invoice dated December 9, 2001.

24 ³⁷ Ex. 34(1d), Invoice 1101, dated February 11, 2001.

1 Leonards did not inform Shepler that the ground where the foundation was to go was
2 disturbed after the septic tank installer had to remove the septic tank at the Leonards'
3 insistence.

4 52. If the Leonards had told Shepler about the septic tank work, he would have been in a
5 position when he bid the job to factor in more foundation costs. As it was, the effect was
6 to require extra work and materials and a loss to the contractor. Even though the
7 Leonards paid for this change order, they are now asking that the court offset this cost
8 against what Shepler is claiming. The court finds that the change order was reasonable.
9 Because the Leonards have already paid this change order, there is nothing additional for
10 the Leonards to pay.

11 *(3) Change Order: Finish Work on Fir Doors, etc.*³⁸

12 53. Ms. Leonard special ordered some doors for her house, but they came unfinished.
13 Shepler was surprised because the doors he was going to order were finished.
14 Nevertheless, he finished the doors. Ms. Leonard was dissatisfied with the finish work,
15 and Jeffrey Shepler was going to work on the doors when he returned from his vacation
16 in Mexico. This change order reflected work that Jeffrey Shepler was going to do for free
17 once he returned, but he never got the chance. The Leonards want an offset for work
18 Sliger had to do to finish the doors to their satisfaction, but Ms. Leonard could not
19 determine what amount of Sliger's work was attributable to refinishing the doors, and the
20 court will not provide an offset to the Leonards. In any event, Shepler did not charge the
21 Leonards for this contemplated change order which reflects what is normally found on a
22

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24 38 Ex. 34(1d), Invoice dated November 11, 2001.

1 punch list at the completion of construction. Certainly, this change order reflects
2 Shepler's willingness to continue working on the house.

3 *(4) Change Order: Garage Door Upgrade³⁹*

4 54. Shepler did not incur this expense for the garage door and withdrew his claim for it at
5 trial. He provided the Leonards this change order when he still believed that he and the
6 Leonards could continue working together.

7 *(5) Change Order: Vaulted Ceilings⁴⁰*

8 55. The contract provided that if materials were substituted, the contract would be adjusted
9 accordingly by a contract amendment. The scissor trusses were a substitution, but no
10 contract amendments were made. The truss manufacturer could not manufacture the
11 trusses as set forth in the plans because they would not fit on the ferry. In order to make
12 the trusses work according to the plan, Shepler, at his own expense, was going to frame in
13 the trusses he received, which resembled an upside down "V," so the modified trusses
14 would provide the same vaulted look per the plan, similar to the letter "A" shape.

15 56. When the scissor trusses were installed and before Shepler could modify them for the
16 "A" vaulted look, the Leonards liked the spacious look the higher vault provided the
17 house and told him not to modify them, but to use them as they were. The court finds
18 that the Leonards knew and approved the substitution from the beginning. The court also
19 finds that both Mr. and Mrs. Leonard verbally approved the higher vaulted look because
20 they liked the open, spacious look that the higher vaulted ceiling provided.

21 57. As a result of the higher vaulted ceiling, additional storage areas were created over the
22 bathroom, one bedroom and the master bathroom. Ms. Leonard asked if Shepler could

23 ³⁹ Ex. 34(1d), Invoice dated November 11, 2001.

24 ⁴⁰ Ex. 34(1d), Invoice No. 1122, dated December 10, 2001.

1 frame in the space so she would have extra storage area, approximately 120 to 150 square
2 feet of additional storage, which Shepler did. However, the higher vaulted ceilings and
3 additional storage areas required more insulation and sheetrock, which took extra time to
4 complete because of the height. Shepler had to use scaffolding, which involved setting
5 up and tearing down each time the scaffolding was needed in a different room.

6 58. As reflected in the change order for the vaulted ceiling, the changes added 24 days to the
7 project, and cost an additional \$16,052.93, after sales taxes and profit are added. The
8 court finds that this is a reasonable price for the extra work that Shepler did on the
9 vaulted ceiling.

10 *(6) Change Order: Stairway Design⁴¹*

11 59. Ms. Leonard had designed some floor plans and sent them to an architect to have the
12 plans drafted professionally. The stairway to the upstairs bedroom had a design flaw
13 because there was no support for the platform that hung below the ceiling in the garage.
14 Plus, there was not enough room to get the two landings called for in the design. Shepler
15 compromised by adding two steps, rather than the landings, but the steps went into a
16 spiral and were not six-inches in depth at the spiral point.

17 60. Ms. Leonard, who at first refused to have Shepler put a post in the garage to support the
18 stairs, finally consented and the San Juan County building inspector approved the stairs
19 as constructed by Shepler. Later though, the building inspector rescinded the approval
20 because of the landing issue and the tread issue. Apparently, the Leonards decided to go
21 ahead and occupy the house without the building inspector's approval.

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24 41 Ex. 34(1d), Invoice No. 1123, dated December 9, 2001.

1 61. The stair treads may have been shortened by the Leonards' contractor who installed
2 natural stone on the stairs. Jeffrey Shepler, who worked on the stairs in the garage,
3 testified that the stair treads were installed with a 1-1/2 inch bull nose that hung over the
4 side. When he came back in 2008 to inspect the house for this lawsuit, the bull nose was
5 gone which would have shortened the treads and decreased the amount of tread. The
6 Leonards chose to put natural stone on the stairs, rather than carpet which would have
7 wrapped around the bull nose. Mr. Leonard was not present when his contractor, All Tile,
8 installed the natural stone on the stairs, but if there was a bull nose when Jeffrey Shepler
9 constructed the stairs, then the bull nose would have had to be removed to allow use of
10 the natural stone.

11 62. The court cannot determine whether the bull nose was cut off, but it is clear that the stair
12 design was a design flaw for which Shepler was not responsible. Even though Shepler
13 tried to make the stairs fit into the assigned space, the spiral effect at the top was not
14 approved by the San Juan County building inspector. Shepler is not responsible for
15 correcting a design flaw, but since he tried and did not succeed, the court will not approve
16 this change order.

17 *(7) Change Order: Shorten Overhang of Apartment Deck⁴²*

18 63. The building plans did not call for the deck to hang out three feet over the upstairs
19 apartment, and this change was not authorized by the Leonards. The worker on site did
20 this on his own because he thought it would look good. The Leonards should not have to
21 pay for this change order.

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24 42 Ex. 34(1d), Invoice No. 1124, dated December 9, 2001.

1 (8) *Change Order: Rounded Corner by Master Bedroom Door*⁴³

2 64. When Shepler went over the building plans with Ms. Leonard, she told him at that time
3 that she did not want the rounded corner that showed on the plans. Instead, she wanted
4 the corner squared. Shepler admitted that he forgot about this conversation and agreed
5 during trial that the Leonards should not have to pay for this change order.

6 (9) *Change Order: Furnace Exhaust Stack*⁴⁴

7 65. Shepler installed a furnace exhaust stack. Ms. Leonard told Shepler to move it because
8 she said she could not live with the pipe sticking out where it was. Shepler moved it to
9 the new location, which was more difficult to accomplish. He had to hide the pipe on the
10 second floor and still get access to the upper roof. The Leonards refused to pay for this
11 change order.

12 66. Despite Ms. Leonard's concern about aesthetics, it turned out that the furnace exhaust
13 stack was near an egress window and would not have been approved by the San Juan
14 County building inspector in any event. The work was required, and this change order
15 will not be approved by the court.

16 (10) *Change Order: Apartment Bath/Laundry Framing*⁴⁵

17 67. Shepler had to alter the upstairs apartment bath and laundry room to accommodate the
18 washer and dryer. The charge with tax and profit was \$123.86, which the court will
19 approve.

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22 _____
23 43 Ex. 34(1d), Invoice No. 1125, dated December 10, 2001.

24 44 Ex. 34(1d), Invoice No. 1126, dated December 8, 2001.

25 45 Ex. 34(1d), Invoice No. 1127, dated December 8, 2001.

1 (11) *Change Order: Chimney Boxes*⁴⁶

2 68. One of Shepler's workers decided to increase the height of the chimney so it would look
3 more compatible with the house. Unfortunately, the chimney turned out to be 10 feet tall
4 and was not framed into the roof structure making it unstable in the wind. Adding to the
5 instability was Ms. Leonard's decision to put stone veneer around the chimney so it
6 would match the stone veneer around the base of the house, which made the chimney
7 heavier. The plans called for a cricket, but Ms. Leonard directed Shepler's
8 construction crew not to put in the cricket because she did not like the look of the cricket.
9 As part of the ongoing work, Shepler was going to fix the chimney, but he was not given
10 an opportunity to do this. Instead, Sliger, who was hired by the Leonards to finish the
11 remaining work on the house, found someone else to work on the chimney. There was no
12 testimony as to how much this additional work cost. In any event, the court will not
13 approve the change since the chimney should have been tied into the structure at the
14 beginning.

15 (12) *Change Order: Deck Stairs*⁴⁷

16 69. Since the foundation altered the height of the house, the deck stairs required more treads.
17 This was work not contemplated by the parties. The court will approve this change order
18 for \$222.94, including tax and profit.

19 (13) *Change Order: Perimeter Stone Veneer*⁴⁸

20 70. The Leonards and Shepler talked early on about putting stone veneer around the base of
21 the house, instead of the siding called for in the plans. Shepler told Ms. Leonard that the

22 _____
46 Ex. 34(1d), Invoice No. 1128, dated December 8, 2001.

23 47 Ex. 34(1d), Invoice No. 1129, dated December 9, 2001.

24 48 Ex. 34(1d), Invoice No. 1130, dated December 11, 2001.

1 stone veneer and the siding was approximately the same cost for the material but that
2 installation would be almost four times as time-consuming. His labor cost for installing
3 the stone veneer was \$5.50 per square foot, while the cost for other vendors was
4 anywhere from \$7.50 to \$15 per square foot. Additionally, the bid provided for two-feet
5 of stone veneer, but again because of the changes caused by the additional foundation
6 work, the stone veneer turned out to be three-feet tall. Ms. Leonard approved the higher
7 height for the stone veneer.

8 Shepler installed 600 square feet of stone veneer. At \$5.50 per square foot, the
9 installation costs would be \$3,300, rather than the \$7,800 shown on Shepler's change
10 order. With tax and profit added, the court will approve \$4,087.22 for this change order.

11 *(14) Change Order: Painting⁴⁹*

12 71. Ms. Leonard wanted to have the interior painted with two tones, even though Shepler had
13 only contracted for one color. Shepler's brother, Jeffrey Shepler, told Ms. Leonard that it
14 would be more expensive to put on two colors because he would have to tape and cut in
15 the different color. Additionally, the new height of the vaulted ceiling would require
16 more paint and use of scaffolding. Jeffrey Shepler give Ms. Leonard three bids from
17 other persons. One from the drywaller was \$3,000, the second was from a person on the
18 island for \$7,000 to \$8,000, and the third was for \$10,000 to \$12,000.

19 72. Even though Ms. Leonard knew other contractors would charge more for the two-tone
20 paint job she wanted, she would not agree to pay the extra costs for Shepler to do it but
21 she still insisted on two tones. Jeffrey Shepler decided to go ahead with the paint job
22 because the paint needed to be done before the cabinets were installed. The cabinets

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24 49 Ex. 34(1d), Invoice No. 1131, dated December 1, 2001.

1 were being stored in the garage, which was open to the elements because Ms. Leonard
2 had not yet chosen the garage doors. Jeffrey Shepler was concerned that the cabinets
3 were starting to warp from the weather and wanted to get them inside the house in order
4 to minimize any damage, so he did the paint job even though the paint issue had not been
5 resolved.

6 73. The court finds Shepler's actions to minimize damages were reasonable and will approve
7 the change order of \$3,158.30, which includes tax and profit.

8 *(15) Change Order: Upgraded Roofing⁵⁰*

9 74. The bid called for Pabco Premier 40-year roofing material. Ms Leonard picked out
10 Presidential Shake 50-year roofing material. Shepler told the Leonards that their choice
11 of roofing material was more expensive and would be more time-consuming to install,
12 but they liked the texture and look of the roofing material they selected. The upgraded
13 material and the extra labor costs came to \$4,266.80 with taxes and profit. The court
14 approves this change order.

15 75. The court will approve the following change orders: \$16,052.93 for the vaulted ceilings,
16 \$123.86 for the apartment bath/laundry framing, \$222.94 for the deck stairs, \$4,087.22
17 for installing the stone veneer, \$3,158.30 for painting, and \$4,266.80 for the upgraded
18 roofing. The total of \$27,912.05 shall be added to the contract balance of \$64,372.50, the
19 total owed on the contract after offsets, for a total award to Shepler of \$92,284.55.

20 76. The contract calls for a 5% late payment penalty and 12% interest on past due amounts.
21 Shepler Construction is entitled to these amounts.

22 77. The damages due Shepler are liquidated.

23 _____
24 50 Ex. 34(1d), Invoice No. 1132, dated December 9, 2001.

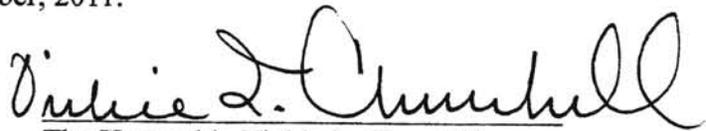
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1 78. The court has examined the fee and cost declaration of Plaintiff's Counsel and finds the
2 requested fees and costs to be reasonable, appropriate, and properly calculated under the
3 lodestar method.

4 **CONCLUSIONS OF LAW**

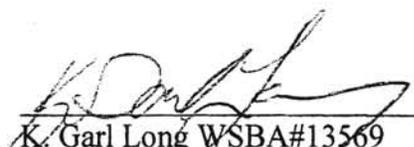
- 5 1. Shepler Construction is entitled to the benefit of its bargain on the contract and should be
6 awarded the remaining balance of \$64,372.50.
- 7 2. Shepler Construction deserves to be paid \$27,912.05 for the extra work completed under
8 the doctrine of Quantum Meruit and to prevent the unjust enrichment of the Leonards.
- 9 3. Shepler Construction is entitled to late fees, interest, costs and attorney's fees pursuant to
10 the contract.
- 11 4. Shepler Construction is entitled to foreclose its lien for the judgment amount.

12
13 DATED this 19 day of December, 2011.

14 
15 The Honorable Vickie L. Churchill

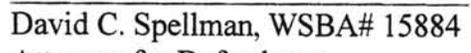
16 Presented by:

17 LAW OFFICE OF K. GARL LONG

18 
19 K. Garl Long WSBA#13569
20 Attorney for Plaintiff
21 Shepler Construction, Inc.

Approved for entry:

17 LAW OFFICE OF LANE POWELL PC

22 
23 David C. Spellman, WSBA# 15884
24 Attorney for Defendants
25 Gary Leonard and Susan Kiraly-Leonard

COUNTY CLERKS OFFICE
FILED COPY

OCT 04 2002

MARY JEAN DAHER
SAN JUAN COUNTY WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC., a
Washington corporation,

Plaintiff,

vs.

GARY LEONARD AND SUSAN
KIRALY-LEONARD AND THE
MARITAL COMMUNITY THEREOF;
PHH MORTGAGE SERVICES
CORPORATION, a New Jersey
corporation,

Defendants.

NO. 02 2 05162 7

**COMPLAINT FOR
FORECLOSURE OF LIEN AND
BREACH OF CONTRACT**

COMES NOW Shepler Construction, Inc., by and through attorney, K. GARL LONG, and
for causes of action against defendants, allege as follows:

I. Parties

1. The Plaintiff, SHEPLER CONSTRUCTION, Inc. ("Shepler") is a Washington corporation. Shepler is a licensed contractor in the State of Washington pursuant to *RCW Ch. 18.27*, has paid all fees due the State of Washington, and has otherwise satisfied all conditions precedent to the maintenance of this lawsuit. Shepler has a superior construction lien recorded against the property that is the subject of this suit that dates from February 7, 2002.
2. Defendants, Gary Leonard and Susan Kiraly-Leonard (Leonards) are residents of San Juan

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County, Washington and at all times relevant hereto are and have been husband and wife, and constitute a marital community. All acts performed by one are performed for and on behalf of the other and the marital community. The Leonards are the owners of the real property known as 459 Fairway Drive, Friday Harbor, Washington, more particularly described as:

Lot 22, SAN JUAN FAIRWAYS NO. 3, a private subdivision, according to the plat recorded in Volume 3 of Plats, page 19, and 19A, records of San Juan County, Washington.

- 3. Defendant PHH Mortgage Services Corporation ("PHH") is a New Jersey Corporation. PHH provided construction financing to the Leonards and is the beneficiary under a Deed of Trust filed in San Juan County, Washington under Auditor's File No. 20010117016. Some or all of PHH's interest in the property is junior to that of Shepler.

II. Jurisdiction and Venue

- 1. The Court has jurisdiction over the subject matter of this case and over the parties hereto pursuant to RCW 60.04 et seq.
- 2. This forfeiture action is against real property located in San Juan County, Washington. The Leonards are residents of San Juan County, Washington.
- 3. The construction that is the subject of the contract between the parties took place in San Juan County, Washington.

III. General Allegations

- 1. On June 14, 2000 Shepler Construction and the Leonards entered into a Building Agreement. The work to be performed consisted of new residential construction. Shepler dealt directly with the Leonards, the owners of the property. The contract signed by the

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1 parties included a notice of Shepler's right to claim a lien. *See attached Building*
2 *Agreement.*

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2. During construction the Leonards lived on the property in a travel trailer. They repeatedly interfered with subcontractors and Shepler Construction employees by making demands and issuing orders. Subcontractors were driven from the property by Susan Kiraly-Leonard's behavior.
 3. The contract between the parties called for progress payments to be made. Shepler Construction performed under the contract until the Leonards failed to make the progress payments, refused to abide by the dispute resolution provision of the contract and forced Shepler Construction to cease work on the project.
 4. The Leonards had requested additions and changes to the work as it progressed. These changes include, but are not limited to changing from flat to vaulted ceilings, adding additional storage space, changing the interior wall configuration, changing the paint scheme, changing chimney construction, changing roof penetrations, upgrading the roofing material, changing the size of a second floor deck, and adding stone on the exterior. The Leonards have refused to pay for the additional materials and labor required to complete the changes.
 5. When change orders consistent with the additional work were presented, the Leonards refused to sign or pay for the change orders.
 6. On February 7, 2002 Shepler Construction filed a Claim of Lien in the amount of \$60,667.64. Shepler Construction, despite the Leonards' refusal to pay, has paid all subcontractors and material suppliers that could have claims against the property.

- 1 7. The Leonards have absolutely refused to abide by the dispute resolution provisions of the
2 contract despite numerous demands by Shepler. It is believed that Leonards have so
3 modified the status of the construction as to render the dispute resolution provision
4 nugatory.
5
6 8. Shepler Construction repeatedly tried to get information from PHH as to the status of the
7 construction financing. PHH has refused to give any information. It is believed that
8 PHH distributed additional sums to Leonards despite its knowledge of the Claim of Lien
9 filed by Shepler.
10
11 9. Shepler Construction has not been fully paid for work performed under the contract. Labor
12 was performed and material furnished for which progress payments are past due. In
13 addition labor performed and materials furnished to complete the requested change orders
14 has not been paid. Invoices for this work have been ignored.
15
16 10. In accordance with the contract between the parties and the laws of the State of
17 Washington the Plaintiff is entitled to reimbursement for its costs and attorney's fees
18 incurred in bringing this action.

19 IV. Causes of Action

20 Foreclosure of Lien

- 21 1. The Plaintiff incorporates by reference the allegations in each paragraph above as if
22 fully set forth herein.
23
24 2. Shepler is entitled to an order foreclosing its Construction Lien, establishing its
25 priority in the property and directing sale of property.
26
27 3. Th foreclosure of lien is required and is to be in accord with RCW 60.04. et seq.
28

1 **Priority of Lien**

- 2 1. The Plaintiff incorporates by reference the allegations in each paragraph above as if
3 fully set forth herein.
4
5 2. Shepler is entitled to an order of lien priority against PHH for any moneys distributed
6 to the Leonards after PHH knew of the Leonards' failure to pay and/or Shepler's
7 construction lien.

8 **Breach of Contract**

- 9 1. The Plaintiff incorporates by reference the allegations in each paragraph above as if
10 fully set forth herein.
11
12 2. The Leonards have breached the contract by failing to make the required progress
13 payments, by interfering with the Plaintiff's performance, by forcing the Plaintiff
14 from the job site, by refusing to abide by the dispute resolution provisions of the
15 contract, by contracting with other parties and by occupying the property without
16 making the final payment called for under the contract.
17

18 WHEREFORE, Plaintiff prays for judgment against the Defendants for:

- 19
20 1. That judgment to be entered in favor of the Plaintiff in accordance with the filed lien in
21 the principal amount of \$60,667.64 against the Leonards plus prejudgment interest
22 thereon;
23
24 2. Establishment that the Plaintiff's lien is superior to any distribution made by PHH
25 directly to the Leonards;
26
27 3. An award of reasonable attorney fees and costs as allowed by law as a part of the
28 foreclosure action;

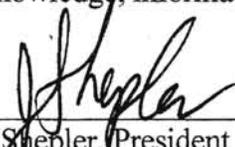
- 1 4. For such orders as allowed by law in and of execution of judgment, to include
2 garnishments;
3
4 5. That the lien be foreclosed and the real property sold by the sheriff of San Juan County,
5 Washington in the manner provided by the law of foreclosure in accordance with the
6 practice of this court, and that the proceeds of said sale be applied to the satisfaction of
7 any judgment given herein; and
8
9 6. For judgment against Defendants for breach of contract in an amount to be proven at
10 trial;
11
12 7. For Plaintiff's reasonable attorney's fees and costs incurred herein; and
13
14 8. For such other and further relief as the Court may deem just and equitable in the
15 circumstances.

16 DATED this 3rd day of October, 2002.

17 
18 K. GARL LONG, WSBA #13569
19 Attorney for Plaintiff

20 **VERIFICATION**

21 Jay Shepler, President of Shepler Construction, Inc., being duly sworn, deposes and says
22 that he is the president of the plaintiff herein, that he has read the foregoing Complaint and the
23 allegations thereof are true and correct to the best of his knowledge, information and belief.

24 
25 Jay Shepler, President
26 Shepler Construction, Inc.

1 STATE OF WASHINGTON)
2) ss.
3 COUNTY OF SKAGIT)

4 On this day personally appeared before me, Jay Shepler, President of Shepler Construction,
5 Inc., to me known to be the individual described and who executed the within and foregoing
6 instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for
7 the uses and purposes therein mentioned.

8 GIVEN UNDER MY HAND AND OFFICIAL SEAL this 5 day of October, 2002.



[Signature]
Notary Public in and for the State of Washington
Residing at Mt. Vernon, Washington
My appointment expires January 3, 2004.

SHEPLER CONSTRUCTION, INC.
BUILDING AGREEMENT

This contract is entered into this 14th Of June, 2000, by and between Gary Leonard and Susan Kiraly (Leonard) of Friday Harbor Washington, hereafter called the "Owners" and SHEPLER CONSTRUCTION, INC., hereinafter called the "Contractor."

The Contractor and the Owner, in consideration of the mutual covenants and agreements hereinafter set forth, agree as follows:

1. The Contractor shall furnish all the materials and perform all of the necessary labor for the construction of, or remodel of a residential/commercial building for the owners on their property, the common address of which is 459 Fairway Drive, Friday Harbor, Washington and which property is legally described as follows (if no legal description is inserted here, see attached property marked "Exhibit A"):

2. The labor and materials, including but in particular those in the attached specifications marked as "Exhibit B," shall be used in the construction of the building except as substitutions of materials is provided for herein. The building shall be constructed in accordance with the plans attached as "Exhibit C." Each of the aforementioned exhibits are incorporated by this reference as if set forth in full. If the plans must be changed or altered to achieve government approval the required changes will be billed as change orders.

The work to be performed under this contract shall be commenced and shall be substantially completed in a workmanlike manner according to standard practices of the area and in compliance with all applicable state and local building, electrical, and mechanical codes.

CONTRACT PRICE

The owner shall pay the contractor for the performance of the contract subject to any additions or deductions made pursuant to change orders, the sum of two hundred eighty thousand four hundred forty four and 37/100 Dollars (\$280,444.37) including Washington State Sales Tax.

DEPOSIT

Owner does herewith deposit with contractor the sum of five thousand Dollars (\$5,000.00) to secure contractor's services and perform initial grading and foundation work.

SITE PREPARATION

Contractor agrees to prepare the site for construction providing grading and backhoe service as necessary, based on contractor's physical inspection of the building site. Any additional costs for labor or materials associated with unforeseen geological, hydrological or structural work are not included in the contract price. Charges for heavy equipment, engineering, blasting, water drainage or diversion or soil erosion protection shall be an additional charge. Contractor agrees not to incur such additional expense at owners' cost in excess of \$2,500 without the owners' written consent.

DEVIATION FROM PLANS

It is understood and agreed between owner and contractor that contractor may be required to implement minor changes in the location of a wall, stairway, door, window, or fixture as a result of designer errors or omissions in plans. Such changes shall not be an additional cost to owners unless contractor secures a written change order as required below. Owner agrees to advise contractor of any portion of the plans whether interior or exterior which cannot be deviated from due to specific owner requirements such as furniture, appliances or owner supplied fixtures. Contractor agrees to advise owner if major deviations are required before implementing such changes in the plans.

SUBSTITUTION OF MATERIALS AND EQUIPMENT

Contractor has prepared his bid and this agreement with the intent of furnishing materials and equipment as specified. In the event original materials cannot be furnished as specified, substitute materials or equipment capable of equal performance may be used. If such substitution is necessary, contractor shall specify in writing the material and equipment to be substituted and the reason or reasons for his inability to furnish the specified items. Where substitutions are made, the construction contract is to be adjusted accordingly by a contract amendment with the difference in cost, if any, between the items furnished and the items specified being included in the contract amendment.

CHANGE ORDERS

Alterations or deviations from the plans as incorporated herein involving extra cost of material or labor will only be executed upon written orders for same, and will become an extra charge over and above the agreed price set forth in this contract. All agreements by the parties for changes must be made in writing. If the time for completion of the contract must be extended in order to accommodate the change order, the new time for completion of the project shall be stated in the change order. It is the responsibility of the owner to timely approve or reject all change orders submitted to him by the contractor to avoid work delay.

CP278

INSPECTIONS AND DISCOVERY OF NON-CONFORMING WORK

Owner shall have the right at reasonable times to inspect the progress of the work being performed hereunder so long as such inspections do not interfere with contractor's work. Owner shall exercise all reasonable diligence in discovering and reporting to contractor, as the work progresses, all materials and labor which are not satisfactory to owner, to avoid trouble and cost to contractor in making good any defective parts or workmanship, otherwise, any objection thereto shall be deemed to have been waived if the same was reasonably discoverable upon physical inspection of the premises by the owner.

INSURANCE

Unless otherwise provided, owner will purchase and maintain property insurance upon the project to the full insurable value thereof and will provide proof to the contractor. This insurance shall include the interests of owner, contractor and subcontractors on work and shall insure against the perils of fire, extended coverage, vandalism and malicious mischief. Any insured loss under the policy of insurance required by this paragraph is to be adjusted with owner and made payable to owner as trustee for the insureds as their interests may appear, subject to the requirements of any applicable mortgage clause.

PERMITS

Permits are the responsibility of the Owner. Connection fees to public utilities are not included in the contract price unless specifically noted herein.

Owner requests that Contractor obtain permits and will pay the contractor separately for doing so.

COMPENSATION FOR CHANGE ORDERS

For all extra work of every description that may be ordered, not covered by the specifications or plans, contractor shall receive actual cost of material furnished and labor performed, plus fifteen percent (15%) for profit, use of tools, equipment, and general supervision, and any other overhead and fixed charges.

PROGRESS PAYMENTS

On or before the 5th day of each month, the owner shall make payments on account of the contract as provided herein, said payments to be equal, in full, to the

percentage of work completed by the contractor to that date since the last payment date, and to be made when information stated in the following paragraphs is presented by the contractor. Before the 5th day of each month, the contractor shall present to PTH MORTGAGE / USAA FED SAVINGS Bank, owner's lender or to owners, whichever is applicable, a statement showing the percentage of work done by the contractor to that date. Upon issuance of a progress payment by owner's lender in the name of owner and contractor, owner agrees not to withhold his signature on the check for said progress payment.

FINAL PAYMENT

The contractor shall give written notice to the owners and to owner's lender, PTH MORTGAGE / USAA FEDERAL SAVINGS Bank, that work is completed. The owners and said lender shall have the right and opportunity to make a final inspection of work and said materials within ten (10) days after receipt of notice of completion of the work. Upon acceptance thereof by the owners and said lender, payment of the remaining balance due the contractor shall be made. Such acceptance shall not be unreasonably withheld and if the owners or said lender refuse to accept, the owners shall within ten (10) days of receipt of the notice of completion from the contractor, notify the contractor in writing of such refusal, and shall specify the reasons therefor. The contractor shall within ten (10) work days of receipt of owners objection or "punch list" take appropriate steps to remedy any non-conforming work set forth as a reason for refusal. Upon completion of the owners "punch list" by contractor, contractor shall again give notice that the work is completed to the lender and the owner and within five (5) days thereof, owner and lender shall supply a supplemental "punch list" or pay the remaining contract balance due contractor.

INTEREST ON LATE PAYMENTS

In the event owner and/or lender unreasonably withholds progress payments or final payment to contractor, then the unpaid balance shall bear interest at the rate of twelve percent (12%) per annum from the date due and shall further be subject to a one-time late charge of five percent (5%) of the installment payment owed.

OCCUPANCY

The entire amount of the contract is to be paid prior to occupancy by the owners. The terms "occupancy" is defined for purposes of this agreement as the act of placing personal possessions or belongings in the residence or on the premises and the act of physically taking possession of the building. Until such time as contractor notifies owner of completion and the contract balance is paid, owner's access to the premises shall be subject to the complete control of the contractor in order to protect contractor's property and equipment which may be on the premises.

All personal property of owners placed on premises prior to giving of contractor's consent to occupy shall be at owner's risk.

DISPUTE RESOLUTION

If a dispute arises between owner and contractor as to performance of contractor's obligations under this agreement, such disputes shall be resolved as follows:

Each party shall employ a contractor of his or her choice to evaluate the work completed. The contractors then will select a third contractor to act as an impartial arbiter. This contractor shall, likewise, inspect the construction to determine if the work has been performed in accordance with this agreement, applicable building codes and in a good and workmanlike manner as provided hereinabove. If two of the three contractors determine that the work is not in conformity with the provisions of this agreement, then they shall state in writing the work in need of repair or replacement and contractor shall undertake to perform same as soon as reasonably practical. Contractor shall be responsible for owner's fees and costs associated with this arbitration as well as the impartial contractor's fees and costs. If no remedial work is recommended by the contractors, then the owner shall pay for the costs of the arbitration. The owner shall forthwith pay the amounts due to the contractor as established by the majority of the arbiters.

ATTORNEYS' FEES

In the event either of the parties hereto incur attorney's fees, expert witness fees or court costs in respect to enforcement of any term of this agreement, then the prevailing party shall be paid their fees and costs by the non-prevailing party.

ENTIRE AGREEMENT

This written agreement and the plans and specifications attached hereto as exhibits are intended by the parties to be a complete final expression of their agreement with respect to the terms contained herein. The contractor has made no promises or warranties other than those as may be contained herein or attached hereto. Any addition to, or alteration of, this agreement must be made in writing, signed by the parties hereto.

NOTICE TO CUSTOMER

This contractor is registered with the State of Washington, Registration No. SHEPLCI0191A, as a general contractor and has posted with the State a bond or cash deposit of \$6,000 for the purpose of satisfying claims against the contractor for negligent or improper work or breach of contract in the conduct of the contractor's business. The expiration date of this contractor's registration is November 30, 2000. This bond or cash deposit may not be sufficient to cover a claim which might arise from the work done under your contract. If any supplier of materials used in your construction project or any employee of the contractor or sub-contractor is not paid by the contractor or

sub-contractor on your job, your property may be liened to force payment. If you wish additional protection, you may request the contractor to provide you with original "lien release" documents from each supplier or sub-contractor on your project. The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the Department of Labor & Industries. This disclosure given pursuant to RCW 18.27.114.

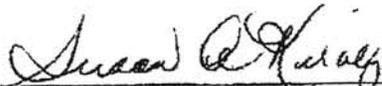
IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

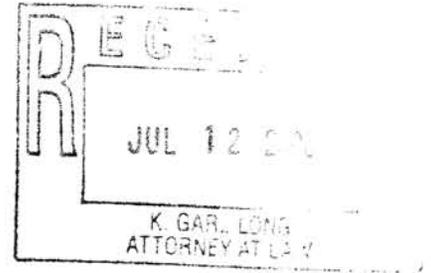
SHEPLER CONSTRUCTION, INC.

OWNERS

By: Jay Shepler
Its: President


6-14-00



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

| | | |
|--------------------------------|---|---------------------------|
| |) | |
| |) | NO. 55651-7-1 |
| SHEPLER CONSTRUCTION, |) | |
| |) | APPELLANTS' OPPOSITION TO |
| Respondent, |) | MOTION TO RECONSIDER |
| v. |) | |
| |) | |
| GARY AND SUSAN KIRALY LEONARD, |) | |
| |) | |
| Appellants. |) | |

COPY

INTRODUCTION

Appellants Gary and Susan Leonard oppose Shepler Construction's motion to reconsider on two grounds: (1) the Leonards asked for, and this Court granted, remand for retrial on all issues; (2) the trial court's erroneous grant of summary judgment and exclusion of the Leonards' construction defect evidence undermined all of the trial court's later rulings. This case is not a series of discrete issues, but rather a single construction dispute with multiple facets. By excluding evidence on why the Leonards lost faith in Shepler, the trial court found the Leonards responsible for breaching the construction contract. Because this finding led to all others in the case, the trial court must hold a new trial on all issues, not simply the Leonards' counterclaims.

em

1 **I. The Leonards Asked For, and Appropriately Received A Retrial On All**
2 **Issues**

3 Shepler begins its motion by asserting “the Leonards did not assign error to any
4 ruling at trial.” (Motion to Reconsider at 6). This is incorrect. The Leonards assigned
5 error to the trial court’s Findings of Fact and Conclusions of Law, entered after trial on
6 January 10, 2005, and to the court’s Judgment and Decree of Foreclosure, entered the
7 same day. (Opening Brief at 3-4). Furthermore, the Leonards requested reversal of all
8 the trial court’s rulings,

9
10 The [trial court’s] error invalidated the bench trial and judgment because
11 the court excluded all evidence of Shepler’s faulty construction from trial.
12 The court’s subsequent decisions on the lien claims, change orders, and
13 award of attorneys’ fees all relied on its dismissal of the defective
14 construction counterclaims. The appropriate remedy is to vacate the
15 judgment and remand for a *complete* retrial.

16 (Opening Brief at 19) (emphasis added). The Leonards challenged all the trial court’s
17 rulings, and this Court appropriately granted the relief sought by the Leonards – a
18 complete retrial.

19 Shepler’s suggestion that the Leonard’s claims “were limited to the summary
20 judgment decision and exclusion of their second expert” is inaccurate. (Motion to
21 Reconsider at 6). The Leonards challenged all of the trial court’s rulings, and
22 documented how they all rested on the assumption that Shepler did not breach its
23 contract. By requiring retrial on the issue of breach, this Court appropriately required
24 retrial on all issues in the case.

25 **II. Who Breached The Contract Affects All Other Claims**

26 After losing on appeal, Shepler seeks to salvage four rulings from the vacated
bench trial: (1) the Leonards breached the dispute resolution clause; (2) Shepler was

1 entitled to the remaining contract balance; (3) the Leonards were obligated to pay for
2 extra work; and (4) Shepler's lien was valid. Each of these findings is erroneous if
3 Shepler, not the Leonards, breached the construction contract and refused to cure the
4 breach. Retrial of the entire case is necessary because every finding depends on who
5 breached the contract.

6
7 A. Dispute Resolution

8 The Leonards did not participate in the dispute resolution process because it
9 would allow Shepler Construction, the company that created the defects, to repair them.
10 "If two of the three contractors determine that the work is not in conformity with the
11 provisions of this agreement, then they shall state in writing the work in need of repair or
12 replacement and contractor [Shepler] shall undertake to perform same as soon as
13 reasonably practical." (Building Agreement at 5; Exhibit F to Leonards' Opening Brief).
14 By the time Shepler demanded enforcement of this clause, the company had breached
15 the construction contract with defective work, walked off the job, and refused to speak
16 directly with the Leonards. Dispute resolution would have been a useless gesture.

17
18 The trial court's ruling on the dispute resolution clause accepted Shepler's side of
19 the story. Once that assumption is withdrawn, the Leonards can present their argument
20 that Shepler forfeited its right to demand dispute resolution by failing to construct the
21 Leonards' home correctly, refusing to fix it, and then walking off the job. Shepler's
22 severe breach of contract justified the Leonards in refusing to continue with the contract.

23
24 B. Contract Amount

25 Why is Shepler entitled to the remaining contract balance if it breached its
26 contract with the Leonards? The trial court awarded Shepler this amount because it

1 believed the Leonards caused the breach. Again, with this assumption removed, the
2 trial court's decision has no support. The trier of fact must determine whether Shepler
3 breached the contract, and if so, what, if any, compensation it deserves. This is not a
4 matter of offsetting the damages from defective construction; it instead requires
5 evaluating the entire construction job in light of Shepler's failure to perform as promised.
6 This is a disputed question of fact for retrial.
7

8 C. Extra Work

9 Like the remaining contract amount, the trial court's decision on extra work relied
10 on the assumption that Shepler performed adequately. Without that assumption,
11 Shepler's claim for payment is a disputed question of fact. As the Leonards proffered
12 unsuccessfully through Richard Russell, "based on my experience as a contractor, the
13 Shepler bid was so low so as to guarantee that corners would have to be cut, virtually
14 guaranteeing defective construction. It is a common disreputable construction tactic to
15 bid a job low, but attempt to make up the profit on charge orders." (Russell Dec. ¶ 24;
16 CP 119). Shepler on retrial must prove that the extra work was necessary, not because
17 of its inadequate work, but rather because legitimate changes required new
18 construction.
19

20 D. Validity of Lien

21 Shepler filed a lien against the Leonards' property, claiming the Leonards owed
22 the company money under the construction contract. The validity of this lien depends
23 directly on the validity of Shepler's claim against the Leonards. Because the issues of
24 breach and damages are now subject to retrial, the validity of Shepler's lien is also
25 subject to retrial.
26

1 In its motion for reconsideration, Shepler blends two issues into one argument for
2 the validity of its lien. First, Shepler argued that the lien met all procedural
3 requirements. (Motion for Reconsideration at 7) (timely served and proper notices
4 given). This has never been at issue. But second, Shepler argues that its lien was valid
5 – “although the amount of the lien would be adjusted if the Leonards were found to be
6 entitled to an offset based on a claim of construction defect, the defect claim does not
7 affect the validity of the lien.” This is incorrect. If the Leonards prove that Shepler
8 breached the contract and owes money for the defective construction, then Shepler’s
9 lien is invalid and Shepler is responsible for damages and attorneys’ fees. RCW
10 60.04.171 (foreclosure proceedings). A valid lien exists only if the underlying debt is
11 valid. Here, the validity of the debt is contested and subject to retrial.
12

13 The trial court’s error in dismissing the construction defect claims affected all the
14 court’s subsequent rulings. Because this case hinges on deciding who breached the
15 construction contract, the trial court on remand must retry the entire case to decide who
16 failed to perform as promised.
17

18 CONCLUSION

19 In its per curiam opinion, this Court ruled that the Leonards may present their
20 evidence of construction defects on retrial. Because this evidence affects all the trial
21 court’s decisions in Shepler’s favor, the entire case must be retried. Appellants Gary
22 and Susan Leonard respectfully request this court to deny Shepler’s motion for
23 reconsideration and remand this case for a complete retrial.
24
25
26

1 DATED this 11th day of July, 2006.

2 BURI FUNSTON, PLLC

3
4
5 By


Philip Buri, WSBA #17637
Attorney for Appellant

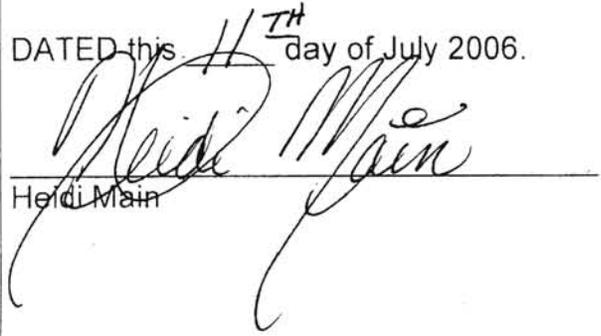
6
7
8 **DECLARATION OF SERVICE**

9 The undersigned declares under penalty of perjury under the laws of the State of
10 Washington that on the date stated below, I mailed or caused delivery of **Opposition to**

11 **Motion to Reconsider** to:

12 K. Garl Long
13 1215 S. Second Street, Suite A
14 Mount Vernon, WA 98273

15 DATED this 11th day of July 2006.

16
17
18 
Heidi Main