

69225-9

69225-9

8

No. 69225-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TOP LINE BUILDERS, INC., a Washington corporation,
Plaintiff/Respondent,

vs.

FREDERICK W. BOVENKAMP and SHARON M. BOVENKAMP,
husband and wife, and the marital community composed thereof, dba
BOVENKAMP FAMILY, LLC-SERIES 8466 CAMAS;

Defendants/Respondents

and

U.S. BANK, N.A.

Defendant/Appellant

and

FRED BOVENKAMP and SHARON BOVENKAMP, husband and wife,
dba BOVENKAMP FAMILY, LLC – SERIES 8466 CAMAS,

Third-Party Plaintiffs/Respondents,

vs.

OLD REPUBLIC SURETY COMPANY, Bond No. YLI264739,

Third-Party Defendant/Respondent

APPELLANT US BANK's OPENING BRIEF

*Roy T.J. Stegena, WSBA # 36402
BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101
Telephone: (206) 622-5306
Attorney for Appellant U.S. Bank, N.A.*

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
A.	Assignments of Error.....	1
B.	Issues Pertaining to Assignments of Error	3
II.	STATEMENT OF THE CASE.....	4
III.	SUMMARY OF ARGUMENT.....	11
IV.	ARGUMENT.....	13
A.	Standard of Review.....	13
B.	The Trial Court Erred in Reconsidering its Original Verdict and Holding that Top Line’s Quantum Meruit Recovery is Secured by its Mechanic’s Lien.....	15
C.	The Trial Court Erred in Reversing its Initial Verdict Based on Contract Principles Because Both its Initial Verdict and its Amended Verdict were in Equity in Quantum Meruit, to Which Contract Principles are Inapplicable.	24
1.	The Trial Court Erred in Ruling that Top Line’s Failure to Furnish Signed Change Orders was Merely a Technical, Non-Material Breach of the Construction Contract.	26
(a)	USB is Entitled to Enforce the Contract Rights Assigned to it by Bovenkamp.....	26
(b)	The Contract’s Change Order Requirement is not Ambiguous.	27
(c)	The Trial Court Incorrectly Interpreted the Contract’s Change Order Provision.	28
(d)	Top Line’s Breach was Material.....	32
2.	The Trial Court Erred in Ruling that Top Line and Bovenkamp Mutually Waived the	

	Change Order Requirement of the Written Contract.....	34
D.	USB’s Rights may not be Adversely Affected by Top Line’s Quantum Meruit Claim Under Washington Law.....	39
E.	Top Line’s Claim That its Quantum Meruit Recovery should be Added to its Mechanic’s Lien is Precluded by Estoppel and the Equitable Principles it Invoked.....	42
V.	CONCLUSION	44
	CERTIFICATE OF SERVICE	46

TABLE OF AUTHORITIES

Cases

<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992).....	15
<u>Berg v. Hudesman</u> , 115 Wn.2d 657, 670, 801 P.2d 222 (1990)	32
<u>Bering v. Share</u> , 106 Wn.2d 212, 220, 721 P.2d 918 (1986)	14
<u>Bingham v. Demopolis</u> , 111 Wn. App. 118, 127, 45 P.3d 562 <i>review denied</i> 114 Wn.2d 1018 (2003)	15
<u>CKP v. GRS</u> , 63 Wn. App.	35, 36
<u>Colorado Structures, Inc. v. Blue Mountain Plaza, LLC</u> , 159 Wn. App. 654, 246 P.3d 835 (2011).....	20
<u>Glaser v. Holdorf</u> , 56 Wn.2d 204, 208-09, 352 P.2d 212 (1960)	40
<u>Gross v. City of Lynnwood</u> , 90 Wn.2d 395, 401, 583 P.2d 1197 (1978)	15
<u>Heaton v. Imus</u> , 93 Wn. 249, 608 P.2d 249 (1980).....	21, 22, 23
<u>Holland v. Boeing Co.</u> , 90 Wn.2d 384, 390, 583 P.2d 621 (1978)	14
<u>Holmes v. Ralford</u> , 143 Wn.644, 255 P. 1039 (1927).....	22, 23
<u>In re A.V.D.</u> , 62 Wn. App. 562, 815 P.2d 277 (1991)	15
<u>In re Smith</u> , 93 Wn. App. 282, 287, 968 P.2d 904 (1998)	40
<u>Kessinger v. Anderson</u> , 31 Wn.2d 157, 169, 196 P.2d 289 (1948).....	42
<u>Lehrer v. State Dep't of Social & Health Servs.</u> , 101 Wn. App. 509, 515, 5 P.3d 722 (2000).....	28, 30
<u>Mayer v. Pierce County Medical Bureau, Inc.</u> , 80 Wn. App. 416, 423, 909 P.2d 1323 (1995).....	31
<u>McGary v. Westlake Investors</u> , 99 Wn.2d 280, 285, 661 P.2d 971 (1983)	28
<u>Miller v. Badgley</u> , 51 Wn. App. 285, 290, 753 P.2d 530, <i>review denied</i> 111 Wn.2d 1007 (1988)	14, 15
<u>Modern Builders v. Manke</u> , 27 Wn. App 86, 615 P. 2d 1332 (1980)18, 19, 20, 24, 37	
<u>Noble v. Lubrin</u> , 114 Wn. App. 812, 817-818, 60 P.3d 1224 (2003)	15
<u>Park Avenue Condo. Owners Ass'n. v. Buchan Devel. L.L.C.</u> , 117 Wn. App. 369, 71 P.3d 692 (2003).....	33
<u>Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System</u> , 104 Wn.2d 353, 365, 705 P.2d 1195 (1985)	35
<u>River House Development Inc. v. Integrus Architecture, P.S.</u> , 167 Wn. App. 221, 231, 272 P.3d 289 (2012)	14, 35, 44
<u>Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.</u> , 76 Wn. App. 267, 275, 883 P.2d 1387 (1994), <i>review denied</i> , 127 Wn.2d 1003, 898 P.2d 308 (1995).....	28

<u>Skansgaard v. Bank of America, N.A.</u> , 2011 WL 9169945, *4, W.D. Wn. --- F.Supp.2d ---- (2011)	28, 30
<u>Smith v. Spokane County</u> , 67 Wn. App. 478, 480, 836 P.2d 854 (1992)	40
<u>Thomas v. Ruddell Lease-Sales, Inc.</u> , 43 Wn. App. 208, 212, 716 P.2d 911 (1986)	15
<u>Tomlinson v. Clarke</u> , 118 Wn.2d 498, 500, 825 P.2d 706 (1992)	40
<u>Wendle v. Farrow</u> , 102 Wn.2d 380, 382, 686 P.2d 480 (1984)	15

Statutes

RCW 60.04.011(2).....	12, 16, 22, 23
RCW 60.04.021.....	12, 16, 18, 20, 22, 36
RCW 60.04.091.....	39
RCW 60.04.181.....	9

Other Authorities

WPI 302.03	33
------------------	----

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

Following a three day bench trial on November 1-3, 2011, the Honorable Steven J. Mura of the Whatcom County Superior Court entered Judgment, Findings of Fact and Conclusions of Law, and then on reconsideration, amended his Judgment, Findings of Fact and Conclusions of Law on July 20, 2012. US Bank now appeals the entry of this order and contends the trial court committed error as follows:

1. The trial court erred in reversing its initial decision on reconsideration by ruling that the amount secured by Top Line's mechanic's lien included charges for extra work that exceeded the fixed price of the construction contract even though the extra work was not approved by signed, written change orders as required by that contract. (Clerk's Papers 160, Conclusions of Law #15, 22 & 25, hereinafter "CP").

2. The trial court erred in concluding that a quantum meruit award may be added to the amount secured by a contractor's lien under the Mechanics' Lien statute, when the parties executed a fixed price construction contract that required written and signed change orders to increase the contract price. (CP 160, Conclusions of Law #15 and 25).

3. The trial court erred in ruling that USB did not have the right to object change orders, had they been made in compliance with the

parties' construction contract. (CP 160, Conclusion of Law 11).

4. The trial court erred in its finding that the fixed price of the construction contract plus the value of all changes never exceeded the amount the bank agreed to lend Bovenkamp, because USB never agreed to lend Bovenkamp money for the cost of extra work exceeding the fixed price in the absence of signed change orders. (CP 160, Finding of Fact 33).

5. The trial court erred in modifying its quantum meruit award based on contract terms and principles not applicable in quantum meruit.

6. The trial court erred in subjecting the unambiguous terms of the parties' construction contract to judicial interpretation, and erred in its interpretation by relying upon language of an assignment of Bovenkamp's contract rights. (CP 160, Finding of Fact 22, Conclusion of Law 11).

7. The trial court erred in ruling that Top Line and Bovenkamp mutually waived the change order requirement of the fixed price construction contract, where Top Line contended that the requirement did not exist, and Bovenkamp asserted that the requirement was fully applicable and insisted on Top Line's adherence to it. (CP 160, Conclusion of Law 10).

8. The trial court erred in concluding that the purposes of the assignment of the construction contract from Bovenkamp to USB was

merely to protect USB from having the cost of construction exceed the total potential loan commitment, rather than from exceeding the contract's fixed price. (CP 160, Finding of Fact 23, Conclusion of Law 14).

9. The trial court erred in ruling that the Top Line's failure to furnish written change orders was not a material breach of the fixed price construction contract. (CP 160, Conclusion of Law 11).

10. The trial court erred in awarding equitable relief in favor of Top Line and against USB when Top Line admitted acted inequitably towards USB to induce it to finance the construction project. (CP 160, Conclusions of Law 15, 22 & 25).

11. The court below erred in reversing its award of attorney's fees in favor of USB.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err in ruling that Top Line's quantum meruit recovery should be added to the amount secured by its mechanic's lien?

2. Did the trial court err in inconsistently applying the contract principles of waiver and materiality of a breach to an award in equity?

3. Did the trial court err in ruling that Top Line and Bovenkamp mutually waived the change order requirement of the parties'

fixed price construction contract?

4. Did the trial court err in ruling that Top Line's breach of the change order provision of the fixed price construction contract was not a material breach of the contract?

5. Did the trial court err in subjecting the unambiguous fixed price construction contract and the unambiguous assignment of Bovenkamp's rights under that contract to judicial interpretation, and fail to properly apply the rules of construction?

6. Did the trial court err in declining to rule that USB was a bona fide encumbrancer for value without notice of Top Line's claims for the cost of extra work furnished in the absence of signed change orders?

7. Did the trial court err by failing to estop or otherwise prevent Top Line from profiting from its wrongful conduct by awarding a recovery as against USB?

II. STATEMENT OF THE CASE

Plaintiff, Top Line Builders, Inc. ("Top Line"), a construction contractor, filed this action to foreclose a mechanic's lien for work and materials it furnished to the property owner, Defendant Frederick Bovenkamp ("Bovenkamp"), in connection with the construction of a residence at 8466 Camas Drive, Blaine, Washington. Defendant / Appellant U.S. Bank ("USB") provided the financing for the project, and

holds a security interest in the subject real property by virtue of a Deed of Trust Bovenkamp executed. (Exhibit D-45, hereinafter "EX").

Top Line obtained a default order against USB (CP 38) as well as an order of partial summary judgment establishing that Top Line's mechanic's lien had first priority. (CP 39). However, the total amount secured by Top Line's mechanic's lien remained to be adjudicated at trial.

USB thereafter appeared and moved to vacate the orders of default and partial summary judgment. (CP 45). The trial court denied USB's motion to vacate (CP 55), but ruled that USB may participate in the case with respect to the issues that remained unresolved following the grant of partial summary judgment as to the priority of Top Line's lien. (Report of Proceedings 2/4/11, p.11, l. 14 – 19, hereinafter "RP").

Several weeks prior to trial, Top Line filed a motion for leave to file a second amended complaint (CP 73), which the court granted (CP 85). The second amended complaint added an equitable claim in quantum meruit for the cost of extra work and materials that were not set forth in the fixed price contract or supported by the signed change orders that contract requires. (CP 86).

The primary contested issues at trial were the total amount secured by Top Line's mechanic's lien, and whether the construction contract between Top Line and Bovenkamp was a verbal cost-plus contract as Top

Line contended, or the written fixed price contract, which required signed change orders to increase the otherwise fixed price of the contract.

Bovenkamp and USB testified that the written fixed price construction contract signed by Top Line and Bovenkamp was the controlling agreement, and that signed change orders were required for payment of any extra work or materials. Top Line made conflicting, irreconcilable assertions under oath regarding the nature of the construction contract. Top Line alleged in its pleadings and testified at trial that it reached a *verbal* agreement with Bovenkamp to construct the various improvements on a *cost-plus basis*, and that this cost-plus agreement was the basis for its claim of lien. (CP, 86, ¶ 32, RP 11/1/11, p. 48, l. 23 – p. 49, l.1; p. 147 l. 7 – p. 148, l. 7). However, contrary to Top Line’s pleadings and testimony, Top Line’s president, Travis Rohrer, stated in his sworn declaration in support of Top Line’s motion for partial summary judgment that the construction was governed by the *written fixed price contract* signed by Top Line and Bovenkamp, which required signed change orders for the payment of any extra work or materials that increased the contract’s otherwise fixed price. (CP 24, ¶ 4).

When confronted with this conflicting testimony at trial, Mr. Rohrer testified that because Bovenkamp was unable to secure financing based on a cost-plus construction contract, Mr. Rohrer drafted a fixed

price contract requiring signed change orders for extra work exceeding the fixed price, which Top Line and Bovenkamp signed and presented to USB for the *sole* purpose of inducing USB to provide financing it would not have provided if the if the work was governed by a cost-plus contract. (Notes of Proceedings 11/1/11, p. 149 l. 13 – p. 154, l. 14, hereinafter “RP”). Mr. Rohrer insisted, however, that the actual agreement with Bovenkamp was a cost-plus agreement requiring no signed change orders for extra work or materials, and indeed, he admittedly provided no written change orders for Bovenkamp to sign for any of the numerous items of extra work and materials. (RP 11/1/11, p. 122 l. 3 – 6).

The trial testimony of all parties and witnesses was of accord in that USB would not in fact have loaned money for this project if the construction was not governed by a fixed price contract requiring signed change orders to increase the otherwise fixed price for extra work or materials. (RP 11/1/11, p. 150 l. 14 – 18; RP 11/2 & 3/11, p. 255, l. 6 – 19; p. 248, l. 22 – 250, l. 13; p. 244, l.16 – p. 245, l. 7).

According to Top Line’s trial testimony, the signed fixed price contact was merely a ruse to deceive USB into financing a project it would not have otherwise funded had the contract been a cost-plus construction contract. Top Line participated in inducing USB to fund the project by signing a contract that was then presented to USB. The fixed price

contract included protection against uncontrolled cost escalation by requiring signed change orders. Top Line, however, viewed its agreement with Bovencamp as a cost-plus contract and had no intention of executing change orders for extra work and, in fact, furnished not a single change order for any of the numerous items of extra work, the cost of which totaled in excess of \$79,000. (RP 11/1/11 p. 122, l. 3 – 6; RP 11/2 & 3/11 p. 222, l. 7 – 10).

At trial, Bovenkamp disputed Top Line's assertion that the written fixed price contract was a sham contract designed merely to deceive USB into providing the financing. Bovenkamp testified that the written fixed price contract signed by Bovenkamp and Top Line was controlling agreement between the parties and that signed change orders were required for payment of any extra work or materials. (RP 11/2 & 3/11, p. 226, l. 16 – p. 227, l. 14, p. 230, l. 7 – 25).

At the conclusion of the trial, the court ruled that the agreement between Top Line and Bovenkamp was the written fixed price contract that required written and signed change orders. (RP 11/3/11, p. 354). The court further ruled that “. . . plaintiff [Top Line] never complied with its change order obligations under the contract.” (RP 11/3/11, p. 357). The trial court concluded that “. . . Mr. Bovenkamp is in equity in quantum meruit obligated to the plaintiff in an amount of an additional \$79,731.15.

Plus the amount uRPaid under the contract of \$25,544.43.” (RP 11/3/11, p. 358).

With respect to the bank’s position and the amount secured by Top Line’s mechanic’s lien, the trial court initially ruled:

The bank is therefore obligated to the plaintiff only to the extent of the uRPaid contract amount, which is \$25,544.43. . .The plaintiff therefore has a valid and enforceable first priority lien against the property in the amount of \$25,544.43 and is entitled to a judgment of foreclosure on that amount.

(RP 11/3/11, p. 359).

Following the verdict, both USB and Top Line filed motions for an award of attorney’s fees based on the mechanic’s lien statute, RCW 60.04.181, and also based on the language of the fixed price construction contract, which Bovenkamp assigned to USB. The court ruled that Top Line was entitled to recover from Bovenkamp attorney’s fees in the amount of \$30,940.00 and costs of \$1,913.35. The court further ruled that USB was not entitled to recover any fees pursuant to the terms of the construction contract, but that USB was entitled to recover \$20,000 in fees from Top Line pursuant to RCW 60.04.181. (CP 128).

Thereafter, both Top Line and Bovenkamp filed motions for reconsideration of the court’s verdict. Bovenkamp’s motion was denied, and he did not appeal from that determination.

The trial court granted Top Line's motion for reconsideration and amended its prior decision, concluding that the written fixed price contract did govern the work, but that Top Line's failure to secure signed change orders was merely a technical, non-material breach. The court also made the conflicting ruling that the change order requirement was mutually waived by Top Line, which insisted that it did not exist at all, and by Bovenkamp, who insisted that it be complied with. The court did acknowledge that USB, to which Bovenkamp assigned his contract rights, did not waive the change order requirement. (CP 160, Conclusion of Law 11).

The court reversed its initial ruling regarding Top Line's claim for extra work performed without signed change orders, and instead held that the quantum meruit recovery for extra work will be added to Top Line's mechanic's lien. (CP 160, Conclusion of Law 25).

Following reconsideration, the trial court initially ruled that USB remained the substantially prevailing party for purposes of an award of attorney's fees, reasoning that USB was successful in demonstrating that the fixed price contract it relied upon in funding the project was the governing agreement rather than the cost-plus contract Top Line testified to. The trial court therefore initially left its award of attorney's fees in favor of USB and against Top Line intact. (RP 5/18/12, p. 10, l. 1 – 12).

However, without taking any further evidence, argument or briefing on the attorney's fee issue, the court below reversed its two previous rulings awarding fees to USB, and instead awarded no fees to USB.

USB filed a timely appeal to this Court, and Top Line filed a cross appeal.

III. SUMMARY OF ARGUMENT

The trial court's initial verdict included an award in equity in quantum meruit in favor of Top Line, the contractor, and against Bovenkamp the owner, for the cost of extra work performed without signed change orders as required by the parties' fixed price construction contract. The court concluded initially that the quantum meruit award should not be added to the amount secured by Top Line's mechanic's lien, but instead should be a judgment against Bovenkamp only.

Following Top Line's motion for reconsideration, the trial court amended its ruling and instead concluded that the costs of the extra work performed without signed change orders should be added to the amount secured by Top Line's mechanic's lien. In so ruling, the court below erred in several respects.

First, the mechanic's lien statute provides that where the parties to a construction contract agree on a price, that contract price shall be a

lien against the property. RCW 60.04.021 and RCW 60.04.011(2). Because the parties executed a fixed price contract with a specific mechanism by which to increase that price, i.e., signed change orders, it was error to add to the amount secured by mechanic's lien the quantum meruit award for extra work performed without the change orders required by the contract. The quantum meruit award is not based on the contract, is not part of the contract price and should not have been added to the mechanic's lien.

Second, the court below based the reversal of its ruling regarding the quantum meruit award on contract principles which are not applicable to the equitable quantum meruit award. The court erred in ruling that the change order requirement was waived under the facts. The trial court also erred in making a conflicting ruling that Top Line's breach of the change order requirement was a non-material breach, where the trial evidence demonstrated that the change order requirement was material to both Bovenkamp and USB, which would not have provided the financing without it.

Even if either of these conflicting rulings were correct, it was error for the court to apply contract principles to an equitable award in quantum meruit.

The court also erred in subjecting the unambiguous construction

contract's change order requirement to judicial interpretation, and also erred in basing its interpretation of the contract on an extrinsic document by which Bovenkamp assigned all his contract rights to USB. The assignment was also unambiguous and should not have been subject to interpretation itself, nor as a means by which to in effect modify the language of the contract in violation of the parol evidence rule.

Finally, Top Line insisted that the written fixed price contract did not constitute its actual agreement with Bovenkamp, and that it was created by Top Line merely as a ruse to induce USB to provide the financing it would not have provided in the absence of a fixed price contract requiring signed change orders to increase the otherwise fixed price. Top Line should be estopped from admittedly trying to deceive USB into providing the financing based on the belief that it would enjoy the protections provided by signed change orders, which Top Line did not intend to utilize, and did not in fact utilize on this project.

USB is a bona fide encumbrancer without notice of Top Line's claims for the costs of extra work performed without change orders. The court below erred by permitting Top Line to profit from its deception at the expense of USB.

IV. ARGUMENT

A. Standard of Review

A trial court's ruling on a motion for reconsideration is reviewed for abuse of discretion; that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. River House Development Inc. v. Integrus Architecture, P.S. , 167 Wn. App. 221, 231, 272 P.3d 289 (2012). It is demonstrated below that the trial court granted Top Line's motion for reconsideration, thereby reversing its initial verdict, based on grounds that are untenable. That decision should be reversed by this Court and the trial court's initial verdict should be reinstated.

The standard of review regarding the trial court's findings of fact and conclusions of law has been summarized as follows: When the trial court has weighed the evidence, the appellate court's review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings, in turn, support the conclusions of law and judgment. Miller v. Badgley, 51 Wn. App. 285, 290, 753 P.2d 530, *review denied* 111 Wn.2d 1007 (1988) (citing Holland v. Boeing Co., 90 Wn.2d 384, 390, 583 P.2d 621 (1978)). "Substantial evidence" exists if the record contains evidence sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Bering v. Share, 106 Wn. 2d 212, 220, 721 P.2d 918 (1986).

Even where the evidence is conflicting, an appellate court, "need determine only whether the evidence most favorable to the respondent

supports the challenged findings.” Miller v. Badgley, 51 Wn. App. at 290 (citing Thomas v. Ruddell Lease-Sales, Inc., 43 Wn. App. 208, 212, 716 P.2d 911 (1986)).

Where no error is assigned to a trial court's finding of fact and the appellant's briefing fails to make the nature of the challenge clear, the finding is a verity on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992); Noble v. Lubrin, 114 Wn. App. 812, 817-818, 60 P.3d 1224 (2003). Further, an appellate court will nearly always refuse to reevaluate the credibility of witnesses. In re A.V.D., 62 Wn. App. 562, 815 P.2d 277 (1991).

A trial court's conclusions of law are reviewed de novo to see if they are supported by the trial court's findings of fact. Bingham v. Demoplis, 111 Wn. App. 118, 127, 45 P.3d 562 *review denied* 114 Wn.2d 1018 (2003).

A trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and proof. Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); Gross v. City of Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978).

B. The Trial Court Erred in Reconsidering its Original Verdict and Holding that Top Line's Quantum Meruit Recovery is Secured by its Mechanic's Lien.

The trial court's initial verdict was that the construction work was

governed by the written fixed price contract and the change order requirement it contained, rather than the verbal cost-plus contract alleged by Top Line. (RP 11/3/11, p. 354, l. 14). The trial court also ruled that that Top Line breached the contract's change order requirement. (RP 11/3/11, p. 357, l. 21, 22). These rulings remained undisturbed following reconsideration.

The court concluded that that Top Line was entitled to recover the costs of extra work furnished without signed change orders 'in equity in quantum meruit,' (RP 11/3/11, p. 358, l. 2 – 6), rather than pursuant to the contract Top Line breached. Accordingly, Top Line's quantum meruit award became a judgment lien against Bovenkamp, but was not added to the amount secured by its mechanic's lien.

USB has no quarrel with the several rulings that comprise the lower court's initial verdict as outlined above. However, the trial court erred when it reversed itself following Top Line's motion for reconsideration, and ruled instead that Top Line's recovery in quantum meruit should be added to the mechanic's lien.

Mechanic's liens are creatures of statute. RCW 60.04.021 provides that a contractor "shall have a lien . . . for the *contract price* of the labor, materials or equipment furnished at the insistence of the owner." (Emphasis added.) Pursuant to RCW 60.04.011(2), "'Contract price' means the

amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.”

Thus, the amount of a mechanic’s lien is determined in one of two ways, depending upon whether the parties actually reached an agreement on price. First, where the contractor and owner entered into a contract establishing a price, as Top Line and Bovenkamp have done here, the lien is for the amount the parties agreed upon in their contract. What these parties agreed on was a fixed price and a specific mechanism by which that fixed price may be increased to reflect the cost of extra work or materials.

Second, where there is no agreement as to the price, the lien is for the customary and reasonable charges for the work. This provision clearly does not apply because Top Line and Bovenkamp did in fact reach an agreement on price, specifically a fixed price and a particular mechanism by which that price may be increased, i.e. signed change orders. That agreement was relied upon by USB when it agreed to finance the project, and USB took an assignment of all of Bovenkamp’s rights under that agreement. (EX D-38).

Thus, the “contract price” for purposes of applying the mechanic’s lien statute is established by the fixed price contract Top Line and Bovenkamp signed, plus the cost of extra work or materials supported by

signed change orders. The court therefore correctly ruled, both initially and following reconsideration, that the extra work was not compensable under the contract. (RP 11/3/11, p. 358, l. 2 – 6; CP 160, ¶ 12). Because the cost of the extra work was not compensable under the contract as part of the contract price as the parties defined it in their contract, the costs of extras cannot be secured by Top Line’s mechanic’s lien, which is limited to the contract price. RCW 60.04.021, RCW 60.04.011(2)

The court in Modern Builders v. Manke, 27 Wn. App 86, 615 P. 2d 1332 (1980), discussed the difference between a recovery in equity in quantum meruit and a recovery under the contract in the context of a mechanic’s lien case, as follows:

The changes and modifications in the plans agreed to by the parties, however, may be recovered in quantum meruit in addition to the contract price. Such work qualifies as “extra work” arising outside and independent of the contract.

Id. at 95 (emphasis added).

The court in Modern Builders, Id., also discussed the limited circumstance, not present here, where the cost of extra work may be determined on the basis of quantum meruit for mechanic’s lien purposes.

The court stated:

Quantum meruit may substitute for the contract price and form the basis of total recovery only when substantial changes occur as work progresses which are not covered by

the original contract and which were not within the contemplation of the parties when the contract was formed.

Id. at 93,- 94 (emphasis added).

In Modern Builders, the trial court found that the parties abandoned their fixed price contract altogether, and the trial court used quantum meruit to measure the total recovery for all of the work, including both the initially contemplated work and the extra work that was necessitated by unforeseen conditions, where the parties made no provision in their contract for the possibility of changes in the work.

The appellate court reversed, concluding that, as in the present case, the extra work was not of a sufficient magnitude to take the entirety of the work out of the express contract and measure it all on quantum meruit. Significantly, however, the appellate court noted that, unlike Top Line and Bovenkamp, the parties in Modern Builders did not provide in their agreement for the possibility of a need or desire for any additional work. The appellate court ruled that, for this reason, certain properly proven costs could be added to the contract price, and thus to the mechanic's lien.

Unlike the construction contract in Modern Builders, the contract in the present case specifically provides for the possibility of additional work; and unlike the parties in Modern Builders, Top Line and

Bovenkamp agreed on a specific mechanism by which that additional work may be added to the contract price, i.e., signed change orders.

Simply stated, the contract in Modern Builders did not address possible changes in the work, while the contract in the present case does. Consequently, the limited circumstance in which a mechanic's lien may include a recovery in quantum meruit is not present in the case at bar. Because Top Line and Bovenkamp did include in their written contract a specific mechanism by which the fixed price may be increased, the costs of extra work may only be added to the otherwise fixed contract price in accordance with their agreement. Thus, the quantum meruit recovery in the present case is outside and independent of the contract, and is in addition to the contract price rather than part of it.

Pursuant to statute, it is the contract price that establishes the amount of a mechanic's lien. RCW 60.04.021.

This conclusion was recently supported in Colorado Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wn. App. 654, 246 P.3d 835 (2011), wherein the court stated:

. . . we agree with the respondents that a contract is essential to claiming a [mechanic's] lien. Any other construction reads the words "contract price" out of the statute in derogation of the duty to render no part meaningless. It also is consistent with the duty to "strictly

construe” the statute to require that labor and services be provided pursuant to contract.

Id. at 664.

Here, the trial court was therefore correct when it initially ruled that the quantum meruit recovery for extras did not become part of the mechanic’s lien, but its ruling became untenable when it reversed that decision on reconsideration.

The court in its initial decision did not award Bovenkamp a windfall by excusing him from paying for the extra work and materials he requested, but for which no change orders were issued. Rather, the court ruled that “. . . Mr. Bovenkamp is in equity in quantum meruit obligated to the plaintiff in an amount of an additional \$79,731.15,” which represents the net amount the court found Bovenkamp owed for the extra work he requested and obtained. (RP 11/3/11, p. 358, l. 2 – 6). Top Line is therefore entitled to a judgment lien against Bovenkamp for the quantum meruit recovery rather than a mechanic’s lien.

Notwithstanding the requirements of the mechanic’s lien statute outlined above, Top Line argued that its quantum meruit recovery should be added to the amount of secured by its mechanic’s lien. Top Line relied primarily on Heaton v. Imus, 93 Wn. 249, 608 P.2d 249 (1980) for the proposition that “a contractor is entitled to a lien even for work recovered

in quantum meruit.” (CP 148, p. 5). However, the appellate court in Heaton accepted the trial court’s finding that there was there was *no contract* governing the work at issue, and therefore no agreement on price. *Id.* at 252. Accordingly, pursuant to RCW 60.04.011(2), because no price was agreed to, the ‘contract price’ under the mechanic’s lien statute in Heaton was “the customary and reasonable charge therefor.”

The holding in Heaton therefore has no application to the present case. Top Line and Bovenkamp entered into a contract for a fixed amount plus the cost of any extra work which is supported by signed change orders. Accordingly, the amount of the lien is determined under the statute by the agreed-upon price as a matter of law, not by the customary and reasonable charges which apply only in the *absence* of an agreement on the contract amount pursuant to RCW 60.04.021 and RCW 60.04.011(2).

Top Line’s reliance on Holmes v. Ralford, 143 Wn. 644, 255 P. 1039 (1927), is similarly misplaced. The Supreme Court in Holmes affirmed the trial court’s finding that there was *no contract*, and therefore no agreement on price, governing the architect’s services that were at issue. *Id.* at 646, 650. The court found that where there is no agreement on price, the compensation due is the customary and reasonable charge for such work. *Id.* at 650. Because there was in fact a contract between Top

Line and Bovenkamp which established a fixed price as well as a mechanism for charges for extra work, neither Heaton nor Holmes is applicable to the present case.

In summary, neither Heaton nor Holmes, *Id.* stands for the proposition that ‘a contractor is entitled to a mechanic’s lien even for work recovered in quantum meruit’ under facts like those in the present case where the contracting parties agree on a fixed price and on a specific procedure for increasing it, and USB’s research has failed to locate any decisions so holding. Indeed, the mechanic’s lien statute provides a well recognized analysis for determining the proper amount of Top Line’s lien. Either the contractor and owner agreed on a price and a means to increase that price, or they did not. If, as in the present case, they agreed on a price and a process by which it may be increased, the amount of the mechanic’s lien is equal to the contract price they agreed on, i.e., the fixed price plus the cost of extra work supported by signed change orders. RCW 60.04.011(2).

Accordingly, a mechanic’s lien may only be based on a quantum meruit recovery where there is no agreement on price or on price increases between contractor and owner. RCW 60.04.011(2). The quantum meruit portion of Top Line’s recovery, therefore, cannot be added to the indebtedness secured Top Line’s mechanic’s statute under the facts of this

case. Top Line is entitled to a *judgment* lien as to its quantum meruit recovery against Bovenkamp, but not to a statutory mechanic's lien. The trial court's decision to reverse its initial decision and hold that the quantum meruit portion of Top Lines recovery is untenable, not supported by substantial evidence or case law and should be reversed.

C. The Trial Court Erred in Reversing its Initial Verdict Based on Contract Principles Because Both its Initial Verdict and its Amended Verdict were in Equity in Quantum Meruit, to Which Contract Principles are Inapplicable.

In both its initial and final verdicts, the trial court awarded compensation to Top Line for the extra work performed without change orders "in equity in quantum meruit," rather than pursuant to the terms of the construction contract. (RP 11/3/11, p. 358, l. 2 – 6; CP 160 ¶ 12).

A recovery in quantum meruit arises outside and independent of the contract. Modern Builders v. Manke, 27 Wn. App 86, 615 P. 2d 1332 (1980). The trial court itself described quantum meruit as follows, "It's an equitable principle. It's not based on contract law, it's based on equity." (RP 3/2/12, p. 6. L. 25 =- p. 7, l.2).

It necessarily follows that contract principles such as breach and waiver are not applicable in quantum meruit, in which the focus is on equitable considerations. Similarly, the terms of the written contract are not relevant to a quantum meruit claim.

Yet the lower court's stated rationale for modifying its quantum meruit verdict was based on specific terms of the written contract, and on principles of law that are distinctly contract-related, specifically breach and waiver.

The court's final ruling was that Top Line and Bovenkamp mutually waived the written contract's change order requirement but, significantly, that USB, to which Bovenkamp assigned his contract rights, did not. Additionally, the court changed its initial ruling that Top Line breached the change order requirement, to conclude that its breach was merely technical and immaterial. (CP 160, Conclusion of Law 11.)

Because the court below awarded Top Line a recovery in equity in quantum meruit for extra work performed without change orders both in its initial and modified verdicts, contract terms and principles should not have been used as the bases on which to modify the quantum meruit award.

Thus, since the award was not premised on the contract, neither the materiality of Top Line's breach of the change order requirement, nor its waiver, should not have affected the verdict.¹

¹ It may be parenthetically noted that waiver and breach, when they relate to the same contract provision as they do here, i.e., the written contract's

To the extent, if any, that such contract principles are somehow deemed relevant to Top Line's quantum meruit award in equity, it is demonstrated below that the lower court erred with respect to its modified rulings both as to waiver and the materiality of Top Line's breach. However, the lower court's final rulings on waiver and breach are not supported by substantial evidence or controlling case law.

1. ***The Trial Court Erred in Ruling that Top Line's Failure to Furnish Signed Change Orders was Merely a Technical, Non-Material Breach of the Construction Contract.***
 - (a) USB is Entitled to Enforce the Contract Rights Assigned to it by Bovenkamp.

Should this Court find that contract principles are applicable to Top Line's Bovenkamp recovery for extra work not supported by change orders, even though its recovery is in quantum meruit, contract principles support the lower court's initial verdict, not its reconsidered and amended verdict.

Bovenkamp assigned his rights under the construction contract in their entirety and without any modifications to USB. The assignment of Bovenkamp's contract rights to USB is, by its terms, a transfer of *all* of his

change order requirement, are mutually exclusive. A contract term cannot be both waived and breached by the same party.

contracts rights. It states, “The Borrower(s) does hereby grant, assign, transfer and set over unto Lender of *all of its right, title and interests* in and to the Construction Contract between the Borrower(s) and the Contractor . . .” EX D-38, ¶ 18, emphasis added. This document does not purport to diminish or otherwise modify any of the rights being assigned. It simply transfers all of those rights intact to USB.

Thus, USB could exercise all of Bovenkamp’s contract rights without limitation, and could properly raise the defense of Top Line’s failure to issue change orders exceeding the fixed price.

(b) The Contract’s Change Order requirement is not Ambiguous.

The contract states, “The change order will become an extra charge or credit *over and above the Contract Amount*,” which the contract defines as the fixed price of \$845,286.80. EX P-1, Articles 2 and 3, emphasis added. There is nothing ambiguous about this language, and there is no language in this contract providing that change orders are required only after some other amount such as the total potential loan commitment is exceeded.

“If the language of a contract is clear and unambiguous, the Court must ‘enforce the contract as written; it may not modify the contract or

create ambiguity where none exists.” Skansgaard v. Bank of America, N.A., 2011 WL 9169945, *4, W.D. Wn. --- F.Supp.2d ---- (2011), citing Lehrer v. State Dep't of Social & Health Servs., 101 Wn. App. 509, 515, 5 P.3d 722 (2000). The court in Skansgaard further stated:

A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 275, 883 P.2d 1387 (1994), *review denied*, 127 Wn.2d 1003, 898 P.2d 308 (1995). A provision, however, is not ambiguous merely because the parties suggest opposing meanings. Shafer, 76 Wn. App. at 275, 883 P.2d 1387. “[A]mbiguity will not be read into a contract where it can be reasonably avoided.” McGary v. Westlake Investors, 99 Wn. 2d 280, 285, 661 P.2d 971 (1983).

Id. at *4.

The trial court made no finding that the change order requirement was ambiguous, and did not otherwise identify any perceived ambiguity. None of the parties claimed that the change order provision was ambiguous, and no witnesses testified at trial to any such ambiguity.

Accordingly, the court below should have enforced the unambiguous contract as written, and should not have subjected it to its own interpretation.

(c) The Trial Court Incorrectly Interpreted the Contract’s Change Order Provision.

During argument on Top Lines motion for reconsideration, Judge Mura stated that it was his understanding that USB had no ability to object to any change orders had they been presented to the bank. (RP 5/18/12, p.9 l. 6). However, the record clearly reflects that, had change orders been issued, they would have been subject to USB's approval. (EX D-38, P-28, ¶ 18).

After USB cited in its proposed findings of fact and conclusions of law these portions of the record reflecting USB's right of approval (CP 123), the trial court reversed itself and acknowledged that change orders were indeed subject to USB's approval (CP 160, Finding of Fact #22). The court went on, however, to address the *purpose of the assignment* of Bovenkamp's contract rights to USB, and concluded that based on certain language in the document, it was 'evident' that the purpose of the assignment was to require Bovenkamp to deposit additional funds with the bank should the change orders result in construction costs in excess of the loan amount, i.e the total potential loan commitment rather than the contract's fixed price.

From this language of the *assignment*, the court below concluded that Top Line's breach of the change order requirement of the written *construction contract* was immaterial because the cost of extra work did not exceed USB's total potential loan commitment. (CP 160, Conclusion

of Law 11). In doing so, the court in effect re-wrote the contract's change order requirement so that it is triggered only after the changes exceed the total potential loan commitment, rather than after they exceed the fixed price as the contract actually states. EX P-1, Articles 2 and 3.

However, there is no ambiguity in the operative language of the assignment. It effectuates a full transfer to USB of all of Bovenkamp's contract rights. The court below made no finding that the operative language of the assignment was ambiguous in any way. Accordingly, there was no reason for the court to subject the assignment to its own interpretation to divine its purpose.

Perhaps more importantly, the court made no finding that the change order requirement itself was ambiguous, and a review of that language demonstrates no ambiguity. There was therefore no reason to subject that contract term to interpretation.

Even assuming, however, that the contract to be ambiguous and subject to interpretation, "[A]mbiguous contract language is strictly construed against the drafter." Skansgaard v. Bank of America, N.A., 2011 WL 9169945, *4, W.D. Wn. --- F.Supp.2d ---- (2011) (citing Lehrer v. State Dep't of Social & Health Servs., 101 Wn. App. 509, 515, 5 P.3d 722 (2000)). Top Line admitted that it furnished the written construction contract, with no iRPut into its terms from Bovenkamp. (RP 11/1/11. P.

148, l. 8 - 5). Accordingly, even if the contract was ambiguous and therefore subject to interpretation, construing the contract strictly against Top Line would result in a conclusion that the change order requirement was not subject to some unstated limitation such as the lower court imposed, but instead applied to charges for all extra work above the fixed price.

Additionally, “Courts favor the interpretation of a writing which gives effect to all of its provisions over an interpretation which renders some of the language meaningless or ineffective. Mayer v. Pierce County Medical Bureau, Inc., 80 Wn. App. 416, 423, 909 P.2d 1323 (1995). The contract requires change orders whenever changes in the work increase the contract price, which the contract defines as the fixed price of \$845,286.80.

The trial court interpreted the change order requirement to be wholly ineffective until after a different, *unstated* total was reached, the total potential loan commitment. The contract certainly does not say that. To the contrary, it states that signed change orders are required for the costs of any extra work exceeding the ‘*Contract Amount*,’ i.e., the fixed price of \$845,286.80. (EX P-1, Article 2).

The court also erred by basing its interpretation of the change order requirement on an altogether separate document, the assignment, rather

than on the relevant contract language which is itself unambiguous. In Berg v. Hudesman, 115 Wn. 2d 657, 670, 801 P.2d 222 (1990), our Supreme Court sitting en banc stated, “Under the parol evidence rule, parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.”

There is nothing ambiguous about the extent of the assignment. It was a full assignment of all rights. The purpose of that assignment, whatever it was, does not change the fact that Bovenkamp assigned all of his contract rights to USB, nor does it somehow alter the contract rights being assigned, which is prohibited by the parol evidence rule.

In summary, there is no indication in the record that the court below found either the construction contract or the assignment to be ambiguous, nor does a review of these documents reflect any ambiguity in their operative terms. The record reflects that the court incorrectly applied the well established rules of interpretation, the correct application of which does not support the court’s modified verdict.

(d). Top Line’s Breach was Material.

“A ‘material breach’ is a breach that is serious enough to justify the other party in abandoning the contract. A “material breach” is one that

substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.” WPI 302.03. Park Avenue Condo. Owners Ass'n. v. Buchan Devel. L.L.C., 117 Wn. App. 369, 71 P.3d 692 (2003).

Should this Court find the materiality of Top Line’s breach of the change order requirement to be of significance, notwithstanding that Top Line’s award for the extra work is in quantum meruit rather than in contract, the following should also be considered.

A fixed price contract with a change order requirement was material enough to USB that it would not have financed the project without it. It was material enough to Bovenkamp to insist that change orders be furnished before he would agree to pay for over \$79,000 in extra work. Top Line, of course, maintained that the requirement did not exist at all. But Top Line was acutely aware of how important a fixed price contract requiring change orders was to USB. Its president testified that he took the extraordinary measure of creating what he described as essentially a sham fixed price contract just to satisfy USB, which Mr. Rohrer knew would not have financed the project without it. Simply stated, the change order requirement as written was material to all parties, so much so that the project would not have been financed by USB without it.

Top Line's breach was a material breach, and Top Line should not profit as against USB as a result of it. The trial court erred in ruling otherwise.

2. *The Trial Court Erred in Ruling that Top Line and Bovenkamp Mutually Waived the Change Order Requirement of the Written Contract.*

At no time before the trial court announced its verdict did Top Line allege, testify or otherwise seek to prove that the written contract's change order requirement was waived. To the contrary, Top Line maintained, both in its pleadings and in the trial testimony of its president, that no such requirement existed, and that the work was instead governed by a verbal cost-plus agreement that did not include any change order requirement. (CP 86, RP 11/1/11, 9. 147, l. 22 – p. 148 l. 1).

Bovenkamp on the other hand, testified that the change order requirement was fully applicable, and insisted in pre-litigation e-mail messages to Top Line and testified at trial that it must be complied with before he was required by the signed contract to pay for extra work. EX P-28; 11/2/112 & 3, p. 300, l. 22 – p.3001, l. 15. Indeed, there was no trial testimony by any party or witness that the change order requirement was waived, and the trial court's initial verdict made no reference to waiver at all.

Waiver is the voluntary and intentional relinquishment of a known

right. River House Development Inc., 167 Wn. App. 221, 237, 272 P.3d 289 (2012). “It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage.” Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System, 104 Wn. 2d 353, 365, 705 P.2d 1195 (1985).

The trial record does not support a finding of the mutual waiver of a contractual term that one party, Top Line, insists does not exist, and that the other party, Bovenkamp, insists must be adhered to. Thus, no party asserted or testified that the change order requirement was waived.

It appears that the notion of waiver of the change order requirement first arose in supplemental briefing requested by the trial court on reconsideration, in which USB, while distinguishing a case cited by Top Line in its supplemental briefing on its motion to reconsider, noted that:

Top Line did not prove or attempt to prove a waiver of the change order requirement. Instead, Top Line attempted to prove that the fixed price contract and the change order requirement did not constitute the actual agreement with Bovenkamp.

(CP 151, p.6).

The case USB was distinguishing was CKP v. GRS, 63 Wn. App. 601, 821 P.2d 63 (1992). CKP involved a lien claim under a contract that

required written changes orders for extra work. Some of the claimed extra work was supported by signed change orders, other items of extra work were not. The Court's holding was that charges for the extra work for which there were no signed change orders were not 'liquidated' for purposes of determining whether prejudgment interest accrued on such charges. Id. at 617.

The court in CKP specifically found that the parties to the construction contract *waived* the change order requirement. Id. at 619. Thus, the absence of signed change orders in CPK did not constitute a breach the contract's change order requirement. Accordingly, the extra work was compensated *under the contract*. Because the extras were payable pursuant to the contract as part of the contract price, the cost of extra work was properly added to the mechanic's lien. RCW 60.04.021, RCW 60.04.011(2)

CKP holds that charges for the extra work for which there were no signed change orders were not 'liquidated' for purposes of determining whether prejudgment interest accrued on such charges. Id. at 617.

In *dicta*, the court in CKP noted that a lien may include items of extra work not supported by signed change orders, and may be quantified by the quantum meruit measure of recovery, i.e. the value of the benefit conferred, where the parties waived a contract's change order requirement,

because the extras were compensable *under the contract itself*. In the present case, Top Line's award for the cost of extra work is in equity in quantum meruit, *not under the contract itself*.

The trial record does not support a mutual waiver of the change order requirement, but does support a breach of that contract requirement by Top Line. The court below therefore erred in ruling that the change order requirement was mutually waived, especially in light of its conflicting ruling that the change order requirement was breached.

Finally, even if this court were to conclude that there was a mutual waiver of the change order requirement by Top Line and Bovenkamp, the cost of extras should still not be part of the mechanic's lien, for several reasons.

First, if there was an effective waiver of the change order requirement, the costs of extra work would be recoverable under the contract. However, that is not what the trial court ruled. The court below specifically ruled that Top Line's recovery for extra work was in equity in quantum meruit, rather than pursuant to the terms of the written contract. That ruling remained intact following reconsideration. Waiver of a contract term is simply not relevant to a quantum meruit award, which by definition is independent of the contract. Modern Builders v. Manke, 27 Wn. App 86, 615 P. 2d 1332 (1980).

Second, even if Top Line and Bovenkamp mutually agreed to waive the written change order requirement, USB certainly did not waive it, as the trial court specifically ruled. (CP 160, Conclusion of Law 11). USB was directly entitled to the protection the change order requirement provided because Bovenkamp assigned his rights under the construction contract to USB.

Third, assuming that Top Line and Bovenkamp waived the change order requirement but USB did not, the trial court's original verdict was appropriate. USB should not be saddled with liability for charges it did not bargain for, specifically those incurred in the absence of signed change orders that Top Line and Bovenkamp represented would be furnished.

In summary, the trial court erred in concluding the change order requirement was mutually waived by Top Line and Bovenkamp, and erred again in concluding that the waiver of a contract term renders a quantum meruit recovery subject to a mechanic's lien rather than a judgment lien.

Top Line should not be permitted to profit from its breach as against USB, the party Top Line admittedly tried to deceive into believing the change order requirement was in place and would be complied with. The lower court's ruling on waiver was incorrect, and even if it was not, it should not have resulted in a reversal of the initial verdict.

D. USB's Rights may not be Adversely Affected by Top Line's Quantum Meruit Claim Under Washington Law.

Top Line did not plead quantum meruit as a basis for its mechanic's lien claim until it filed its second amended complaint shortly before trial. Prior to that amendment, its claim of lien was based solely on contract. Given Top Line's failure to comply with the contract it created and signed, it is not surprising that it sought to pursue a different basis for recovery such as quantum meruit as trial approached.

However, Washington's mechanic's lien statute, RCW 60.04.091 states:

Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment.

(Emphasis added.)

This statute protects the interests of third parties such as USB, and permits the amendment of a mechanic's lien claim only to the extent that those interests are not thereby adversely affected. While it may have been appropriate for the court to grant Top Line leave to amend to add a quantum meruit claim as against Bovenkamp, given Washington's liberal approach to permitting the amendment of pleadings, the statute provides that such an amendment may not serve to adversely affect USB's interests.

The mechanic's lien statute does not provide the only authority that

supports the rights of innocent third parties such as USB. Washington has a well-established body of law protecting the rights of bona fide purchasers for value against competing claims, and more specifically, the rights of a bona fide encumbrancer, which is defined as “one who gives valuable consideration, in good faith, without actual or constructive notice of another's right, claim or interest in the property.” See Smith v. Spokane County, 67 Wn. App. 478, 480, 836 P.2d 854 (1992), citing Tomlinson v. Clarke, 118 Wn. 2d 498, 500, 825 P.2d 706 (1992); Glaser v. Holdorf, 56 Wn. 2d 204, 208–09, 352 P.2d 212 (1960).

A bona fide encumbrancer for value and without notice of another's claim holds the superior right. The court in In re Smith, 93 Wn. App. 282, 287, 968 P.2d 904 (1998) ruled that a lender held the status of a bona fide purchaser for value, frequently described as a ‘bona fide encumbrancer.’ The court stated, “The bona fide purchaser doctrine provides that a good faith purchaser [or encumbrancer] for value, who is without actual or constructive notice of another's interest in the property purchased, *has the superior interest in the property*,” (citing Tomlinson. (Emphasis added.)

As it asserted in the court below, (CP 151, p. 8 – 10), USB is a bona fide encumbrancer for value without notice of Top Line's quantum meruit claim, which was asserted for the first time just a few weeks before

trial. USB gave valuable consideration in the form of the loan proceeds, and had no notice of the performance of extra work exceeding the construction contract's fixed price, because Top Line and Bovenkamp failed to provide signed change orders, the specific mechanism agreed upon to provide such notice. Moreover, Top Line intended that USB would rely on the fixed price nature of the construction project in agreeing to provide the project's financing, as Top Line's president specifically testified at trial. (RP 11/1/11 p. 150, l. 14 – p. 151 l.3.) USB did in fact rely on the fixed plus nature of the construction contract, as its witness testified. (RP 11/1/11 p. 255.)

Authority for protecting the rights of third parties such as USB is therefore found in both Washington's mechanic's lien statute and in its appellate decisions involving the rights of bona fide encumbrancers such as USB. The trial court initially struck a proper balance between Top Line's claims against Bovenkamp on the one hand, and the interests of USB, which provided valuable funding without notice of Top Line's quantum meruit claim, on the other hand. The court's initial verdict prevented Bovenkamp from securing a windfall. Top Line would not be without a right to recover compensation for its work from Bovenkamp, and USB would not be saddled with liability for claims it did not bargain for, and which Top Line in fact concealed from USB. The grounds upon

which the court below disturbed that balance are untenable, and its decision to do so should be reversed.

E. Top Line's Claim That its Quantum Meruit Recovery should be Added to its Mechanic's Lien is Precluded by Estoppel and the Equitable Principles it Invoked.

The doctrine of estoppel alone is a sufficient basis upon which to eliminate the quantum meruit recovery from the Top Line lien, and the court below erred in rejecting USB's estoppel defense. The doctrine of equitable estoppel is well settled. As the Court held in Kessinger v. Anderson, 31 Wn. 2d 157, 169, 196 P.2d 289 (1948):

The doctrine of equitable estoppel, or estoppel in pais, rests upon the principle that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition, to his detriment or prejudice, the person performing such acts or making such representations is precluded from pleading the falsity of his acts or representations for his own advantage, or from asserting a right which he otherwise might have had.

This case presents a textbook example for the application of equitable estoppel. Top Line invoked the equitable jurisdiction of the court by asserting quantum meruit, an equitable doctrine subject to equitable defenses.

Consider the undisputed facts. According to Top Line's trial testimony, it created a written contract for the sole purpose of deceiving USB into financing the project. Every trial witness testified that USB

would not have provided the financing for this project if the contract was not for a fixed price.

Top Line then simply ignored that contract and its change order requirement, but only until the work was finished and it came time to file its motion for partial summary judgment to establish the priority of its position. Then Top Line swore to the court below that the *written contract* and the change order requirement it contained governed the work.

But then, after it obtained a priority determination by swearing the written contract governed the project, Top Line had the temerity to swear to the court below that the opposite was true, that the written contract did not govern the work, and was merely a sham to deceive USB.

Thus, Top Line's president made conflicting statements *under oath* to the court below, that its agreement with Bovenkamp was the written fixed price contract it created, and that it was not. Top Line's sworn statements to the court regarding this central issue in the case shifted with the perceived needs of its case.

Accordingly, Top Line should be estopped from recovering on any claims as against USB for charges Top Line in effect represented would not be incurred in the absence of signed change orders.

It is respectfully submitted that, based on the clear, cogent and convincing evidence in the trial record, the lower court erred by failing to

estop Top Line from profiting from its own wrongdoing at USB's expense, especially where Top Line admitted to the court that its intent was to deceive USB into bearing the loss of Top Line's breach of the contract it created but never intended to comply with.

The trial court's decision to permit Top Line to profit from such wrongdoing at the expense of its victim is based on untenable grounds and rises to the level of an abuse of discretion which this Court should reverse.

In summary, the court below initially struck a proper and equitable balance among the competing interests of the parties. The grounds upon which the court below reversed its initial rulings are untenable. The lower court's revised rulings should be reversed and its initial verdict should be reinstated in its entirety.

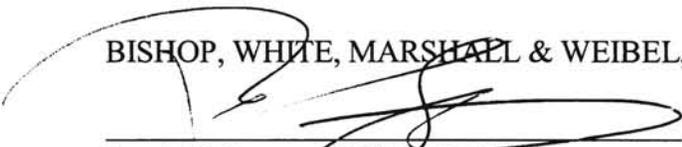
V. CONCLUSION

In essence, Top Line seeks court approval of its scheme to shift the consequences of its wrongful conduct to USB, which Top Line admittedly sought to deceive. If this Court permits the revised verdict to stand, Top Line will have accomplished that purpose. This Court should reverse the lower court as a matter of law, in accordance with the mechanic's statute, and as a matter of the proper application of the equitable principles Top Line invoked.

Dated this  day of December, 2012.

Respectfully submitted,

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.



Roy T.J. Stegena, WSBA #36402

Attorneys for Defendant/ Appellant U.S. Bank

CERTIFICATE OF SERVICE

I, Kay Spading, certify that on the 6th day of December, 2012, I caused the foregoing document, Designation of Clerk's Papers, to be delivered to the following parties in the manner indicated below:

Gregory E. Thulin [X] By First Class Mail
Law Offices of Gregory E. Thulin [] By FedEx Overnight
119 N. Commercial Street, Ste 660 [] By Email
Bellingham, WA 98225 [] By Facsimile
Attorney for Plaintiff

Frederick Bovenkamp [X] By First Class Mail
DBA Bovenkamp Family , LLC – [] By FedEx Overnight
Series 8466 CAMAS [] By Email
1101 McKenzie Ave, #207 [] By Facsimile
Bellingham, WA 98225
Defendants Pro Se

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 6th day of December, 2012, at Seattle, Washington.

Kay Spading
Kay Spading