70335-8

70335-8

ORIGINAL

NO. 70335-8-1

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

STOCK & ASSOCIATES, INC., a Washington corporation,

Appellant,

vs.

STUART MCLEOD, an individual and MCLEOD DEVELOPMENT COMPANY, a Washington company

Respondents.

APPELLANT'S BRIEF

THE COLLINS LAW GROUP PLLC
Jami K. Elison WSBA #31007
Sheri Lyons Collins WSBA #21969
2806 NE Sunset Blvd., Suite A
Renton, WA 98056
Telephone: (425) 271-2575
Facsimile: (425) 271-0788

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

RULES

INTRODUCTION

Appellant, Stock & Associates, Inc., provided professional architectural and design services to Respondents, Stuart McLeod and McLeod Development Company (collectively "McLeod"), for a commercial development project. To save McLeod from a million dollar impact fee and to meet all required deadlines, Stock & Associates provided those services even after the parties' contract negotiations failed to conclude in an agreement.

Stock & Associates fully performed its obligations even including changes to the work scope. The crux of the parties' dispute at trial was whether Stock & Associates, plaintiff below, was entitled to payment for services actually provided. Appellant contends that the parties agreed upon a base price of approximately $1.41 million for identified work but that additional work was required and necessary to complete the project. In contrast, McLeod contends that despite the failure to conclude contract negotiations payment was limited to $1.41 million regardless of what work was actually performed.

Under Washington law parties will be held to their agreed contract terms; however, this dispute arises from the parties' failure to reach an agreement on compensation for extra work which distinguishes this matter from the Court of Appeals decision in *Hensel Phelps Constr. Co. v. King*

Cty, 57 Wn. App. 170, 787 P.2d 58 (1990). Instead, the Supreme Court authorities in *Bignold v. King County,* 65 Wn.2d 817, 399 P.2d 611 (1965) and *V. C. Edwards Contracting Co., Inc. v. Port of Tacoma*, 83 Wn.2d 7, 514 P.2d 1381 (1973) govern this matter.

While quantum meruit is largely dead in Washington contract law following *Hensel Phelps*, that holding is explicitly based on a contract dispute where the parties had an agreed written contract contemplating and defining compensation for extra work. In this case, in contrast, evidence from both parties establishes a failure of the parties to reach an agreement on compensation for extra work, in other words for justice to result the jury must have been instructed on quantum meruit as requested by Stock & Associates as the alternative ground for entitlement.

Stock & Associates and McLeod exchanged versions of a written agreement. Stock & Associates provided an industry standard draft form that allowed payment for work done outside an agreed upon scope of work. After a substantial delay, McLeod belatedly provided its own substantially altered draft, in which the payment scheme proposed by Stock & Associates was gutted because McLeod's draft marked out all provisions for extra payment.

Stock & Associates immediately communicated rejection of McLeod's alterations. By that time, a substantial delay having been

caused by McLeod's failure to return a draft form, McLeod had an urgent need to proceed with the project. If the project had not received approval by February 1, 2008, McLeod would be liable for nearly $1 million in additional transportation impact fees. For that reason, in response to disputes about payment for extra or changed work, McLeod elected to halt negotiations over an agreement, directed Stock & Associates to proceed and stated instead that he would "take care of" them, which can only mean that Stock & Associates would be fairly compensated.

Because the parties had a past relationship, Stock & Associates proceeded without a signed contract relying on McLeod's promise that he would "take care of" them. As the project proceeded there was substantial extra work primarily because of Respondent's ongoing and substantial changes to the project combined with the Kirkland Design Review Board's consequent requirement for additional meetings to address said changes. Stock & Associates invoiced McLeod for the extra work. However, in the end McLeod attempted to seize advantage from the failed negotiations and refused to pay any amounts for extra work necessitating a trial.

Prior to trial, Stock & Associates submitted proposed jury instructions on two alternative theories of the case for trial: that the parties had a contract whether written or oral that McLeod breached by not

compensating Stock & Associates for all sums billed; and alternatively, Stock & Associates sought recovery in quantum meruit on a quasi-contract theory for necessary services provided outside the scope of the agreement.

However, the trial court rejected and refused to give Stock & Associates instructions on quantum meruit and instructed the jury only as to breaches of contract. Consequently, Stock & Associates was unable to present this issue to the jury and was denied the legal right to argue the alternative entitlement to recovery. Without the instruction about how to handle failed negotiations, the jury determined Stock & Associates was not entitled to recover damages except for one item that during trial Stuart McLeod admitted to be covered by an agreement.

Also, prior to trial, McLeod revealed its intent, for the first time, to pursue a "counterclaim" against Stock & Associates based on its voluntary payment to one of Stock & Associates' subcontractors. The trial court initially refused to dismiss the claim and the jury awarded sums to McLeod for a purely voluntary payment. The trial court corrected this legal mistake after trial; however, the proceedings had already been tainted with confusion as to whether Stock & Associates was failing to meet its own contract obligations to McLeod and others. Allowing that legally erroneous claim to be presented constituted a statement on the evidence because it gave the jury the impression that McLeod had contract

rights against Stock & Associates which it in fact and law did not possess.

Plaintiff Stock & Associates appealed the final judgment. Under Washington law the judgment should be reversed and remanded for a new trial. Deprived of its right to pursue a legal ground of entitlement that exists outside of agreed contract provisions, Stock & Associates was prejudiced by the failure to instruct on quantum meruit and by the presentation of a counterclaim that erroneously suggested to the jury the existence of a contract.

ASSIGNMENTS OF ERROR

1. The trial court erred by rejecting Stock & Associates' proposed instructions and refusing to instruct the jury on quantum meruit as a quasi-contract remedy. Given the facts presented at trial, this failure materially harmed Stock & Associates' legal rights and prevented it from having the jury decide whether to award in quantum meruit and the reasonable value of services provided by Stock & Associates for the benefit of McLeod under quasi-contract law regardless of whether there was otherwise a contractual agreement.

2. The trial court erred by allowing the jury to hear legally untenable argument about McLeod's payment to a subcontractor for Stock & Associates and in instructing the jury that it could find for McLeod about failures to honor contract commitments. In conjunction with the failure to give a quantum meruit instruction, this prejudiced Stock & Associates by suggesting the existence of contract agreements that may not have existed.

STATEMENT OF FACTS

Appellant Stock & Associates, Inc., plaintiff at trial, is a Washington corporation that performs professional architectural services with its principal place of business located in Seattle.[1] Respondent Stuart McLeod, defendant at trial, is an individual and developer who resides in Washington who either contracted for or received professional services from Stock & Associates individually and though his company McLeod Development Company.[2]

McLeod hired Stock & Associates to provide architectural services to with regard to a Kirkland project to which the parties refer as the Lake Street Place project.[3] The project was initially a hotel project. Around the end of September 2007, McLeod changed it to a mixed use project that would have retail, restaurants and office space.[4]

Stock & Associates had previously worked with McLeod on other projects, including the restaurant Hector's and a nine unit apartment

---

[1] CP 1.
[2] CP 2.
[3] See RP, Testimony of Bruce Stock ("Stock") at p.9 ll. 6-7 & 17-19; RP, Testimony of Stuart McLeod from Transcript of designated excerpt beginning at 1:49:47 ("McLeod II") at p. 9 ll. 1-3.
[4] RP, Stock at p.10 ll. 19-21, p. 12 ll.1-11; RP, Testimony of Mark Smedley ("Smedley") at p.13 ll. 4-15; See RP McLeod II at p.9 ll 1-22, p.19 ll.

building among others.[5] In particular, Stuart McLeod had a trusting relationship with Shelly Stock of Stock & Associates.[6]

Respondent developer Stuart McLeod engaged construction professional Jim Alekson to administer contract negotiations and contract performance.[7] Jim Alekson handled the contract negotiations and day to day business dealings as an authorized agent.[8] Stock & Associates had never worked with Jim Alekson on any prior projects.[9]

At Alekson's request, in October 2007 Stock & Associates provided McLeod with a bid price for the project as planned for that point in time.[10] As the project was not yet fixed, the bid price was based upon the project as known at the time.[11] At the time the bid price sent to Alekson, the project's scope was still being developed, changing "almost daily."[12]

---

[5]RP, Stock at p.7 l. 16 – p.8 l. 21; RP, McLeod II at p.7 l. 17 – p.8 l.25.
[6] RP, McLeod II at p.14 l. 25 – p.15 1 l.13, p.53 ll.18-19; RP, Testimony of Stuart McLeod from Transcript od designated excerpt beginning at 1:48:54 ("McLeod I") at p.31 ll.3-5.
[7] RP, Stock at p.11 ll.14-23; RP, Smedley at p.30 ll. 2-3 & 12-18; RP, Testimony of Jim Alekson from Transcript of designated excerpt beginning at 9:54:50 ("Alekson I") at p. 9 ll.21-23.
[8] RP, Stock at p.11 ll.14-23; RP, Smedley at p.30 ll. 2-3 & 12-18; RP, Alekson I at p. 9 ll.21-23.
[9] RP, Stock at p.10 ll.9-12.
[10] RP, Smedley at p.14 l. 21 – p.20 l. 17.
[11] RP, Stock at p.13 ll.12-21, p.15 ll. 4-8, p.17 ll. 13-21; RP, Smedley at p. 13 l. 16 – p. 14 l. 12, p.15 l. 2 – p.21 l. 5, p.27 ll. 5-18, p.81 L.8 – p.82 l.16 & Ex. 46.
[12] RP, Stock at p.13 ll.18-21; RP, Smedley at p.21 ll.4-16, p. 83 L.11 – p.85 L.5; RP, Alekson I at p.42 l. 12 – p.44 l. 22; compare Ex. 167 and 210.

Later, Stock & Associates provided a draft scope of work, which had been revised from that which the bid had been based upon, in accordance with the evolution of the project.[13] At Alekson's request, Stock & Associates also provided McLeod with a draft contract. The initial proposed agreement was on a standard AIA B151 form which preserved the right to compensation for additional services such as added Kirkland Design Review Board ("DRB") proceedings, appeals to the City Counsel, third party charges, and Value Engineering under Section 3.3 Contingent Additional Services.[14] The contract form is an industry standard AIA form, prepared through a consensus process that includes participation of architects, owners and general contractors alike.[15]

The parties had meetings in which the failure to agree upon a contract was discussed.[16] McLeod's situation was urgent.[17] If drawings were not approved before February 1, 2008, McLeod as project developer would face an increase in the cost of construction project in the form of added Transport Impact Fees in the amount of nearly one million dollars.[18] Stuart McLeod expressed frustration that rather than working on the

---

[13] See Ex. 208.
[14] RP, Smedley at p.26 l. 7 – p.2, l. 3; Ex. 206.
[15] RP Stock at p.12 ll.16-19, p.57 l.19 – p.59 l.1.
RP, Smedley p.99 l.9 – p. 100 l. 15. [16]
[17] RP, Stock at p.123 l.16 – p.124 l.14.
[18] RP, Testimony of Jim Alekson from Transcript of designated excerpts beginning at 9:55:25 ("Alekson II") at p.2, l. 14 – p.24 l. 14; RP, McLeod II at p.14 l. 25 – p.15 l. 4; RP, Smedley at p.51 ll.2-6.

project Mark Smedley of Stock & Associates wanted to work on reaching an agreement on the form of contract.[19]

During a meeting about the impasse in reaching an agreed contract, Stuart McLeod directed Stock & Associates to start working.[20] He told Bruce and Shelly Stock of Stock & Associates that he would "take care of" them.[21] Stock & Associates commenced work, met every deadline, and completed the work necessary for McLeod to complete his project without incurring nearly $1 million in increased costs.[22] Stock & Associates continued to work on the project until McLeod directed it to cease work in December 2008.[23]

McLeod instructed Stock & Associates to first bill the portion of the project as it had been priced initially.[24] Stock & Associates billed as McLeod instructed.[25] During the course of the project, McLeod required significant extra work beyond the original scope of the bid.[26] McLeod was aware that Stock & Associates was requesting compensation for the

---

[19] RP, Smedley at p.98 ll.11-22.
[20] RP, McLeod I at p.5 ll.13-24, p.7 ll.11-20; RP, Stock at p.64 l.14 – p.65 l.9.
[21] RP, Alekson I at p. 50 ll. 15-17; RP, McLeod I at p.5 ll.13-24; RP, Smedley at p.100 ll.3-15.
[22] RP, Stock at p.65 ll. 18-22.
[23] RP, Stock at p.32 ll.17-23.
[24] RP, Stock at p.25 ll.11-17; RP, Smedley at p.90 L.6 – p.91 l.26, p.106 l.1 – p.108 l.18 & Ex. 61.
[25] RP, Stock at p.25 ll.11-17, p.65 ll.23-25; RP, Smedley at p.108 ll.5-18.
[26] RP, Stock at p.25 ll.18-22.

extra work, and even discussed extra costs involved from time to time.[27] For example, in connection with McLeod's attempt to avoid the new Transport Impact Fees, it was necessary to move up the deadline for submission of the drawings and accelerated work.[28]

In the meantime, McLeod was also changing the scope of the project by adding an additional half floor of parking necessitating structural changes, requiring updates to multiple sets of drawings as a strategic decision, requesting an antique bar be placed into a building requiring re-engineering floor joists, requesting shoring analysis regarding adjacent structures, requesting additional drawings for purposes of setting up a sales office, and changes of structural slabs.[29] McLeod's various changes and strategies resulted in additional DRB meetings beyond the three originally budgeted for and likewise a City Council appeal.[30]

Stock & Associates billed for the extra work beyond the scope of the project.[31] The billings for extra work were sent out in the form of

---

[27] RP, Stock p.26 ll.3-25, p.65 l.23 – p.66 l.6; RP, Smedley at p.113 l.8 – p.114 l.16.
[28] RP, Stock at p.34 l.2 – p.37 l.14, p. 137 l.5 – p.138 l.12; Ex. 138; RP, Smedley at p.41 l.2 – p. 42 l.16.
[29] RP, Stock p.27 l.7 – p.32 l.5, p.39 l.12 – p.40 l.11, p.40 l.24 – p.42 l.19; Ex. 139, p.45 l.14 – p.46 l.6, p.47 l.2 – p.53 l.12, p. 55 l.15 – p.57 l.5. See also RP, Smedley at p.43 l.11 – p.70 l.9, p.86 l.3 – p.90 l.2.
[30] RP, Stock at p.19 l.14 p.21 l.6, p.43 l.3 – p.44 l.25, p.140 l.15 – p.141 l.3.
[31] RP, Stock at p.33 ll.10-21.

Additional Service Requests ("ASR").[32] McLeod did not pay any amounts on the bills for its ASRs, even amounts not disputed.[33]

Trial occurred before a jury. Evidence of contract negotiations and evidence of services performed was presented.[34] During his trial testimony Stuart McLeod changed his position on the smallest of the invoices, ASR 6. He testified that it was actually for something that Shelly Stock had discussed with him in advance so he agreed that should be part of the contract.[35]

Stuart McLeod admitted that Alekson and Stock & Associates were both partly to blame for not reaching agreement on a contract on additional items.[36]

> Q. …My question is: why wasn't the contract every signed?
> A. Because Stock & Associates never responded back to Jim Alekson's comment, "The ball was in their court."
> Q. In fact, you place accountability, though also on Jim Alekson.
> A. Absolutely. Not for not executing it, but for the first initial delay that was associated with him being out of the country other responsibilities they had with this company.[37]

Jim Alekson held a contract form for over six weeks, during which time it was necessary for Stock & Associates to continue work to stay on

---

[32] *Id.* See Ex. 138-143, 235.
[33] RP, Smedley at p.110 ll.15-17.
[34] *See supra.*
[35] RP, McLeod II at p. 24 l.4 – p.26 l.23.
[36] RP, Testimony of Stuart McLeod from Transcript of designated excerpt beginning at 1:48:54 ("McLeod I") at p.30 LL.8-14.
[37] RP, McLeod I at p.30 ll.16-24.

schedule.[38] He did not return the form until the evening of January 13, a Sunday night.[39] When he finally returned the contract form it was substantially altered from start to finish including substantial changes to fair allocation of risk provisions.[40] Stock & Associates did not accept the changes.[41] Contract negotiations broke down and hit an impasse.[42] But Stock & Associates provided the services for the benefit of McLeod nonetheless, relying on past practice and Stuart McLeod's promise.

At trial, over Stock & Associates' objections, McLeod argued that a payment he made directly to an engineering firm that subcontracted to Stock & Associates was a payment for which he was entitled to be reimbursed by Stock & Associates despite having not paid Stock & Associates for its work on that ASR.[43] McLeod had no contract pursuant to which they would be liable to the subcontractor, nor did the subcontractor have any unexpired lien rights against McLeod obligating McLeod to pay.[44] In fact, Stuart McLeod testified that he paid the

---

[38] RP, Stock at p.16 ll.3-24, p.59 L.2 – p.60 L.3, p.123 L.16 – p.124-14; RP, Alekson II at p.44 l. 22 – p.45 l. 3.
[39] RP, Smedley at p.92 ll.9-16; RP, Stock at p.59 ll. 2-13. Ex. 213.
[40] RP, Stock at p.16 l. 3-24, p. 60 l.1 – p.63 l.8; RP, Smedley at p.92 l.9 – p.93 l.13, p.95 l.18 – p.96 l.5.
[41] RP, Stock at p.64 ll. 4-13; RP, Alekson I at p.14 ll. 8-19.
[42] See RP, Stock at p.64 l.4-8, p. 124 ll.5-13; RP, Smedley at p.98 ll.11-22.
[43] See RP, McLeod II at pp. 46-51. See also Ex. 256.
[44] RP, McLeod I at p.9 ll.10-15.

engineering subcontractor because of the relationship of one of the principals to his sister.[45]

Stock & Associates moved the trial court to exclude that argument because it was legally impermissible as McLeod's voluntary payment.[46] The trial court let the matter go to the jury. The jury found Stock & Associates in breach and awarded that amount to McLeod.[47] Through post-trial motions, the trial court vacated that award and ruled that it was a voluntary payment.[48] However, the jury had already been instructed as though there was a contract claim.

In submitting proposed jury instructions, Stock & Associates asked the trial court to instruct the jury about breach of contract and also to give an instruction regarding quantum meruit recovery.[49] The quantum meruit instruction was requested because if the jury found that a contract did not arise from the promise to "take care of them," then Stock & Associates would not be entitled to recovery for additional services without that instruction regarding quantum meruit. Given the admissions about failures and impasse in contract negotiations, it was foreseeable that a jury required both instructions.

---

[45] RP, McLeod II at p.46 l.3 – p.47 l.9 & ll.19-21; RP, McLeod I at p.10 ll.8-17.
[46] CP 327-35.
[47] CP 356.
[48] See Order Granting Plaintiff's Motion to Amend Judgment at CP 596-602.
[49] See generally Plaintiff's proposed jury instructions, CP 64-119, and Instruction 27 on Quantum Meruit at CP 103.

The Court rejected Appellant's proposed instruction on quantum meruit. The jury was not instructed about that legal ground for recovery for services performed.[50] The jury returned a verdict in favor of McLeod with the exception of the smallest invoice, upon which Stuart McLeod had changed his story, and admitted there was an agreement for those work items.[51]

AUTHORITY

The trial court erred by refusing to instruct the jury on quantum meruit as requested by Stock & Associates and by allowing McLeod to present evidence regarding direct payment to Stock & Associates' subcontractor, thereby portraying Stock & Associates as a bad actor that did not honor contract commitments. To the extent that McLeod's undertaking to "take care of" Stock & Associates did not constitute a contract to pay reasonable value for extra work, Stock & Associates was entitled to seek recovery under a quantum meruit theory.

A. Standards of Review

Jury instructions must be allowed when they "permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole, properly inform the jury of the applicable law." *Anfinson v. Fedex*

---

[50] CP 362-86.
[51] CP 355-57.

Ground Package System, Inc., 159 Wn. App. 35, 35, 244 P.3d 32 (2010). A court's decision regarding whether to give a particular instruction is reviewed for abuse of discretion. *Id.* at 36; *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

A trial court's decision to give or not give an instruction based on a ruling of law is reviewed de novo. *Id.* (citing *State v. Walker*, 136 Wn.2d 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997))). Trial court error on jury instructions is a ground for reversal if it is prejudicial, meaning if it affects the outcome of the trial. *Stiley*, 130 Wn.2d at *id.*

Improper statements regarding evidence of a contract claim existing is reviewed "in the context of the argument as a whole, the issues involved in the case, the evidence referenced in the statement, and the trial court's jury instructions." *State v. Fuller*, 169 Wn. App. 797, 812, 282 P.3d 126 (2012). Because presenting the counterclaim to the jury was over Stock & Associates' objection, the standard of review is "whether there was a substantial likelihood that the improper comments prejudiced the [party] by affecting the jury." *Id.*

B. Quantum meruit is a recognized legal theory implied in every contract claim and Appellant Stock & Associates was entitled to present that theory to the jury as alternative ground for entitlement.

The jury could have concluded, but apparently did not conclude, that the parties reached an agreement based on Mr. McLeod's statement that he would "take care of" Stock & Associates. However, the alternative right to compensation under quasi-contract law was vital to Stock & Associates' legal rights. The trial court committed reversible error by depriving Stock & Associates of that legal right.

Washington law has long recognized that in certain circumstances justice cannot be served without quantum meruit entitlement to recover for damages. There are two types of recovery encompassed by the term quantum meruit, the first is restitution, such as where full performance on a contract has been prevented by a total breach of the contract by the other party. *Dravo Corp. v. L. W. Moses Co.*, 6 Wn. App. 74, 90, 492 P.2d 1058 (1972). The second type is recovery for work performed, either in absence of a contract, or where a substantial change not within the contemplation of the parties occurs with resulting benefit to one party and expense to the other. *Id.* at 91.

Before this Court of Appeals is the issue of whether Appellant was deprived of the legal right to request recovery pursuant to the second type

of quantum meruit theory. Quantum meruit "provides an appropriate basis for recovery when substantial changes occur which are not covered by the contract and were not within the contemplation of the parties, if the effect is to require extra work and materials or to cause substantial loss to the contractor." *Bignold v. King County,* 65 Wn.2d 817, 826, 399 P.2d 611 (1965). That Supreme Court authority continues to be Washington law.

In *Bignold* King County appealed a trial court decision awarding the contractor in a road construction contract damages in quantum meruit. Much of the excavated material intended to be used for embankment purposes was unsuitable and wasted at the project engineer's direction, resulting in increased expenditures to the contractor for which he was not compensated. *Id.* at 819. The appellate court held that the trial court properly allowed the contractor recovery in quantum meruit for items outside the coverage of the contract and not included in its provisions. *Id.* at 826.

This entitlement to pursue quantum meruit recovery is implied in every construction contract.

> In every construction contract there is an implied term that the owner or person for whom the work is being done will not hinder or delay the contract, and for such delays the contractor may recover additional compensation.

V. C. Edwards Contracting Co., Inc. v. Port of Tacoma, 83 Wn.2d 7, 13,

514 P.2d 1381 (1973). Thus, where it is the owner or developer's actions or inactions that result in the changed condition, it follows that the contractor "should not have discovered or anticipated the changed condition[s]." *Id.* at 13-14.

Even when there are failures in contract formation, quantum meruit is the method of recovery for contracts implied in fact. *Young v. Young*, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008); *see Eaton v. Engelcke Mfg., Inc.*, Wn. App. 677, 680, 861 P.2d 1312 (1984) (the person doing the work is entitled to recover "a reasonable amount for the work done") (citing *Heaton v. Imus,* 93 Wn.2d 249, 252-53, 608 P.2d 631 (1980)) (internal quotation marks omitted). Contracts implied in fact may arise where there is a failure of the contract with regard to offer or acceptance. They are based on the parties' conduct and arise "by implication from circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other." *Id.* (citing to *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)). "A true implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances." *Industrial-Electric-Seattle, Inc. v. Bosko*, 67 Wn.2d 783, 797, 410 P.2d 10 (1966) (citation omitted). Instructing the jury on quantum meruit recovery

would have properly instructed the jury on this controlling Washington law. Failing to instruct constituted an inaccurate statement of law.

McLeod requested Stock & Associates to commence work and promised to take care of Stock & Associates. This is sufficient to create a contract implied in fact. Implied contracts are "created by circumstances" and the implication must be a "reasonable deduction from all the circumstances and relations of the parties ... though it need not be evidenced by any precise words, and may result from random statements and uncertain language." *Kellogg v. Gleeson,* 27 Wn.2d 501, 504, 178 P.2d 969 (1947) (citation and internal quotation marks omitted) (when building manager requested contractor to make improvements per estimate and month-to-month tenant requested work that would exceed the estimate, contractor who performed such work without ascertaining who would pay for it was not liable to pay for work). Here Stock & Associates made it clear to McLeod that it did not want to perform work outside the identified scope of the changing and rushed contract without additional payment. This disagreement which prevented the parties from signing a written contract is exactly what elicited McLeod's promise to "take care of" Stock & Associates. Accordingly, it is evident that McLeod was aware that Stock & Associates was not willing to perform extra work outside the scope of work set forth in the contract documents the parties

had exchanged, absent additional payment.

McLeod requested and/or required the work, Stock & Associates clearly expected payment for the work and McLeod knew that Stock & Associates expected payment. McLeod attempted to seize an advantage from its own failed negotiations but under our law Stock & Associates had a viable claim for recovery in quantum meruit.

1. During trial Respondent admitted failures in the negotiating process including the failure to agree upon contract provisions regarding extra work.

As cited in the fact section herein, the record establishes evidence from both parties regarding the impasse in January 2008 and failure to reach an agreement on a form of contract. Respondent Stuart McLeod himself blamed both parties for this admitted failure.

Under Washington law, Stock & Associates has a viable claim in quantum meruit for jury determination. McLeod's extensive changes to its original scope of work were not part of the original agreement or original price. McLeod's changes necessitated substantial additional work beyond the scope. Such extra work included both additional work product requested by McLeod and participation in additional proceedings before the Kirkland DRB. Respondent's changing, evolving plans were based upon its own business decisions and thus not something that Stock & Associates could or should have discovered or anticipated. *See V. C.*

Edwards, 83 Wn.2d at 13-14. Additional work was necessary in order to make changes to the project and additional DRB proceedings occurred due to the changes.

2. Our courts do not instruct juries on quantum meruit when agreed contract provisions contemplate the damages claimed; however, here there was a failure to reach agreement on that exact issue so it was necessary to instruct the jury on quantum meruit.

By refusing to give a quantum meruit instruction, the trial court implicitly accepted and endorsed Respondent McLeod's argument that the only rights to recover compensation must arise from the failed contract negotiations. If the parties had reached an agreement and executed a written contract with provisions encompassing compensation for extra services, then this would be a different case. In that circumstance, the availability of quantum meruit as a ground for entitlement to compensation would be governed by *Hensel Phelps Constr. Co. v. King Cty.*, 57 Wn. App. 170, 787 P.2d 58 (1990).

In *Hensel Phelps* the Court of Appeals upheld dismissal of a quantum meruit theory of recovery, explaining:

> Here, we find no ambiguity in the terms of the contract sufficient to make the question one for the jury. A review of Phoenix's complaints reveals that for each, the contract specified a procedure for remedial relief.

Id. at 176. That holding has led to the near death of quantum meruit in

construction claims litigation. When the parties agree upon a contract that provides a procedure, it is not proper to rely on quantum meruit. However, the holding of *Hensel Phelps* leaves no doubt that quantum meruit is still a correct entitlement theory for the circumstances that match those of this appeal:

> Quantum meruit is an appropriate basis for recovery when substantial changes occur which are not covered by the contract and are not within the contemplation of the parties, and the effect of such changes is to require extra work or to cause substantial loss to the contractor. *Bignold v. King Cy.,* 65 Wn.2d 817, 826, 399 P.2d 611 91965). This doctrine is based on the concept of mutual assent and its limits: although a contractor is presumed to be bound by the terms to which he or she has agreed, he or she cannot be presumed to have bargained away his or her right to claim damages resulting from changes the parties did not contemplate at the time of contract formation.

Id. at 174 (final citation omitted). Accordingly, Appellant Stock & Associates was entitled to request quantum meruit recovery from a correctly instructed jury.

C. The court erred in refusing to instruct the jury on Stock & Associates' entitlement to recover in quantum meruit and the error was prejudicial because the jury was given no method of awarding damages except under draft contract forms that were not agreed upon or executed.

Prior to trial, Stock & Associates properly submitted its proposed jury instruction on quantum meruit. The instruction read as follows:

PLAINTIFF'S INSTRUCTION NO. 27

(Quantum Meruit)

> A contractor is entitled to recover in quantum meruit when substantial changes occur which are not covered by the contract and were not within the contemplation of the parties if the effect is to require extra work and materials or to cause substantial loss to the contractor.
>
> The amount of damages recoverable by a contractor in quantum meruit is the reasonable additional costs associated with performing additional work or work as changed by the unanticipated circumstances.
>
> Where a contractor is awarded his reasonable costs in quantum meruit, he is also entitled to profits thereon.
>
> *Bignold v. King County,* 65 Wn.2d 817 (1965).[52]

The requested jury instruction was not given.

Jury instructions should: 1) permit each party to argue its theory of the case; 2) not mislead the jury; and 3) when read as a whole properly inform the jury of the applicable law. *Anfinson v. Fedex Ground Package System, Inc.*, 159 Wn. App. 35, 35, 244 P.3d 32 (2010); *Cramer v. Department of Highways*, 72 Wn. App. 516, 520, 870 P.2d 999 (1994). At trial, the omission of Stock & Associates' proposed Instruction 27 did not permit Stock & Associates to argue its right to recover in quantum meruit for extra work.

It cannot be disputed that in Washington a party is entitled to

[52] CP at 103.

pursue multiple theories of recovery in a lawsuit. CR 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternatively or hypothetically."); *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 756-57, 162 P.3d 1153 (2007) (trial court erred in dismissing plaintiff's breach of contract claim on summary judgment because damages were duplicative of those sought on plaintiff's indemnity claim against the same party). Even if a case is commenced on one theory, such as breach of contract, a party may later pursue a second theory at trial, such as entitlement to recovery pursuant to quantum meruit. *V. C. Edwards*, 83 Wn.2d at 14 (citing CR 15(b)). Stock & Associates was entitled to pursue both its quantum meruit and its breach of contract theories of recovery at trial.

To prevent injustice particularly the exact type of injustice that occurred here, it is reversible error where a trial court instructs a jury on one theory of recovery but omits a proposed instruction on another theory of recovery. *Little v. PPG Indus., Inc.*, 92 Wn.2d 118, 594, P.2d 911 (1979). *See Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 705-06, 853 P.2d 908 (1993) (discussing court's decision in *Little*). *Little* was a wrongful death case in which the surviving spouse sued the manufacturer of a product she contended killed decedent, in negligence and strict liability based upon the manufacturer's failure to give adequate warnings of the

dangers of using the product. 92 Wn.2d at 119-20. Where adequacy of the warning was an issue in strict liability, the court erred in refusing to use plaintiff's submitted instruction regarding burden of proof because plaintiff's instruction would have drawn the jury's attention to the adequacy of the warning. *Id.* at 124-25. While an instruction defining the manufacturer's duty the warn was given, the only instruction apprising the jury of Plaintiff's contentions was one which stated that she claimed the manufacturer was negligent and that its conduct was the proximate cause of the decedent's death. *Id.* at 125. The effect of the jury instructions was to remove Plaintiff's strict liability theory from the case, which prejudiced Plaintiff and constituted reversible error. *Id.* at 125-26.

In the instant case, the trial court refused to give Stock & Associates' requested quantum meruit instruction. The trial court summarized Stock & Associates' claims as follows:

> The plaintiff claims: that it entered into an agreement to perform architectural services on defendant's project; that it provided a bid based upon a certain scope of work; that that [sic] parties failed to conclude negotiations on a written contract; and that Plaintiff invoiced for services actually performed. Plaintiff claims Defendants breached this agreement by failing to pay invoices which were billed in the form of Addition Service Requests.

CP 369 (excerpt of Instruction 5). Other instructions are in the same vein and omit any reference to recovery in quantum meruit. See generally CP

371-384. In one instruction, the trial court instructed the jury that:

> In order for either party to recover actual damages, that party has the burden of proving that the other party breached a contract with it . . . .

CP 384 (excerpt of Instruction 17). Thus the trial court instructed the jury that the **only** way in which Stock & Associates could recover from MDC was through showing a breach of contract. Recovery via quantum meruit was presented as a possibility.

As in *Little*, the trial court completely removed Stock & Associates' quantum meruit claim theory from the case. As the instructions did not permit Appellant to argue its theory of the case, the trial court abused its discretion in not instructing the jury on quantum meruit. Error is prejudicial when a party cannot argue its theory of the case. *See Little*, 92 Wn.2d at 125-26; *Chunyk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 255, 232 P.3d 564 (2010) (error not harmless where without Plaintiff's proposed instructions she could not argue her theory of the case).

In the instant case, Bruce Stock and Mark Smedley testified that the original bid was based upon a very early version of the mixed-use project, developed in or around October 2007. However, the testimony was that the project was very fluid, changing almost daily. Furthermore, Mr. Stock and Mr. Smedley testified that Stock & Associates performed

substantial extra work beyond the scope of the original bid, including: adding an additional half floor of parking necessitating structural changes; requiring updates to multiple sets of drawings as a strategic decision; requesting an antique bar be placed into a building requiring re-engineering floor joists; requesting shoring analysis regarding adjacent structures; requesting additional drawings for purposes of setting up a sales office, and changes of structural slabs. Additionally, these frequent changes led to more than the three DRB meetings that had been budgeted for and a City Counsel appeal. Stock & Associates presented significant evidence of substantial extra work caused by McLeod. McLeod received the benefit of the extra work without compensating Stock & Associates. There is ample evidence in the record from which a jury could have awarded Stock & Associates damages in quantum meruit.

D. The trial court erred in allowing testimony and evidence regarding Stuart McLeod and McLeod Development Co.'s voluntary payment to Stock & Associates' subcontractor because that only confused the jury about the parties having a contractual relationship and thereby constituted a statement on the evidence.

Having failed to properly instruct the jury that under Washington law a plaintiff may be entitled to recover compensation even when there was a failure of contract formation, the trial compounded the problem by allowing the jury to consider a false contract claim alleged at the last hour by McLeod. McLeod argued to the jury that Stock & Associates was a

bad actor that was not honoring contract obligations. This argument was based on a payment that McLeod had made voluntarily to one of Appellant's subcontractors.

The trial court eventually vacated the judgment awarded by the jury to McLeod on the counterclaim that the trial allowed the jury to consider. By then the jury was already tainted with further statements about contract obligations and alleged breaches. Improper statements regarding evidence of a contract claim existing is reviewed "in the context of the argument as a whole, the issues involved in the case, the evidence referenced in the statement, and the trial court's jury instructions." *State v. Fuller*, 169 Wn. App. 797, 812, 282 P.3d 126 (2012). Because presenting the counterclaim to the jury was over Stock & Associates' objection, the standard of review is "whether there was a substantial likelihood that the improper comments prejudiced the [party] by affecting the jury." *Id.* This Court should rule that allowing this argument and submitting this claim to the jury caused a substantial likelihood of prejudice and confusion..

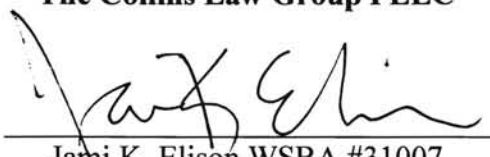
CONCLUSION

On the particular facts developed in this trial, a critical mistake occurred by the failure of the trial court to instruct the jury that Washington law authorizes recovery in quantum meruit. Appellant Stock

& Associates was deprived of a vital legal right. It was for the jury to decide whether to award damages in quantum meruit, and, if so, how much. To prevent an injustice resulting from incorrect instruction on controlling Washington law, and to remind the trial courts that quantum meruit still is a recognized remedy, and to prevent unscrupulous parties in a position of power from seizing unfair advantage from failures in contract formation, this Court should reverse and remand for a new trial on quantum meruit entitlement.

DATED this 2nd day of December 2013.

The Collins Law Group PLLC



Jami K. Elison, WSBA #31007
Email: jami@tclg-law.com
Sheri Lyons Collins, WSBA #21969
Email: sheri@tclg-law.com
2806 NE Sunset Blvd., Suite A
Renton, WA 98056
Tel: (425) 271-2575
Fax: (425) 271-0788

Attorneys for Appellant Stock & Associates, Inc.

PROOF OF SERVICE

I certify under penalty of perjury that on the 2nd day of December, 2013, I served a copy Appellant's Brief via email, per agreement of the parties, and U.S. Mail, postage prepaid on the following:

Christopher I. Brain, Esq.
1700 Seventh Ave., Suite 2200
Seattle, WA 98101
cbrain@tousley.com
swhitemore@tousley.com
Attorneys for Respondent

Dated at Renton Washington this 2nd day of December, 2013.

Jami K. Elison