70335-8

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No. 70335-8-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

STOCK & ASSOCIATES, INC., a Washington corporation,

Plaintiff/Appellant,

v.

STUART McLEOD, an individual and McLEOD DEVELOPMENT COMPANY, a Washington corporation,

Defendants/Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a contract case. Appellant Stock & Associates, Inc. ("Stock") entered into a stipulated fixed sum contract to design an office/mixed use project in downtown Kirkland. The fixed sum contract was based on Stock's own proposed and agreed-upon fee and scope of work for the architectural services. One year after agreeing to the stipulated fixed sum agreement and billing monthly its fees and costs based on a percentage of completion of the work, Stock first provided notice to Respondent, McLeod Development Company ("MDC") that it claimed more than $350,000 of Additional Service Requests ("ASRs") for services it claimed were outside the agreed scope of services. The issues tried to the jury were whether (i) the ASRs were included in the agreed scope of work of the fixed sum agreement, and (ii) whether Stock had agreed to provide and was required to provide advance notice of any ASR requests prior to performing the work.

The overwhelming evidence presented established an agreement for a stipulated fee of approximately $1.41 million based on an agreed scope of work, that the ASRs (with the exception of ASR 6 which was agreed) were within the scope of work and stipulated sum, and that Stock

had failed to provide notice of any such claims until September 24, 2008, one year after commencement of the work.

At the trial court's request, both parties submitted proposed jury instructions prior to the commencement of the trial. Stock proposed several instructions on quantum meruit, or remedies related to quantum meruit, and MDC proposed an instruction for its counterclaim. Before submitting the case to the jury, the trial court proposed its set of instructions to the jury, which did not include Stock's proposed quantum meruit instructions, but did include MDC's proposed instruction for its counterclaim. The trial court asked both counsel if they were prepared to make any exceptions to the trial court's instructions and counsel for Stock advised the trial court that they had *no exceptions* to the instructions and the same were read and provided to the jury.

The jury properly found that a contract for a stipulated sum and scope of work had been agreed to and that the ASRs were not outside the agreed scope of work. The jury also held for MDC on the counterclaim, which judgment was later vacated by the trial court.

Stock now claims the trial court erred in failing to instruct the jury on quantum meruit. As a threshold matter, Stock's claim fails because it waived any objection to the jury instructions by failing to take exception

or otherwise object to the trial court's proposed instructions. Further, even had Stock properly objected to the proposed instructions, an instruction on quantum meruit would be inappropriate. The theory of quantum meruit allows for recovery of the reasonable value of services provided *in the absence of a contract*. Where, as here, a contract exists between the parties, quantum meruit cannot be used to circumvent the terms of the contract.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the trial court's decision to not issue a jury instruction on quantum meruit not subject to review by this Court because Stock failed to take exception to the jury instructions?

2. Did the trial court correctly refuse to issue an instruction on quantum meruit because recovery in quantum meruit is not available to a party to an express contract?

3. Is the trial court's admission of evidence and testimony related to McLeod's payments to subconsultants not subject to review by this Court because Stock failed to object to the evidence and testimony?

4. Did the trial court correctly admit such evidence and testimony because, even if Respondents' counterclaim was improper, the evidence and testimony were relevant to the issue of Stock's damages?

5. If the trial court erred in admitting the evidence and testimony, was that error harmless because the challenged evidence and testimony is merely cumulative of other evidence?

III. STATEMENT OF FACTS

A. The Parties Entered Into a Stipulated Fee Contract

Respondent, Stuart McLeod ("McLeod") acquired several parcels of property in downtown Kirkland over a period of time ending approximately 10 years prior to trial.[1] RP 10/16/13, McLeod Testimony, 5:6-20.[2] McLeod intended to acquire, own and hold the property for his own investment. RP 10/16/13, McLeod Testimony, 6:5-11. McLeod visualized a development of the property approximately four or five years prior to 2008. RP 10/16/13, McLeod Testimony, 6:12-19.

Prior to May of 2007, McLeod had worked with Stock on six to eight projects that consisted mostly of interior design work with Shelly Stock. The total fees paid were approximately $200,000 and the largest

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[1] Stock's brief is virtually devoid of any meaningful chronology of events and misstates evidence and the sequence of events. To aid this Court in understanding the sequence and timing of the facts and evidence, Respondents have prepared a Chronology of Events, including citation to exhibits, attached hereto as Appendix 1.

[2] The transcript citations set forth in Stock's Brief are confusing, partly because Stock only ordered small portions of the trial testimony. In an effort to make citations clear all citations to the Report of Proceedings shall be cited by filing date and then by party name and page and line number. For example, RP 8/12/13, McLeod Testimony, Page:Line.

project was approximately $50,000. RP 10/16/13, McLeod Testimony, 7:17 - 8:25.

In May of 2007, McLeod engaged Stock to work on a mixed use project including a hotel, as a component, which project was known as the Hotel Project. The Hotel Project was eventually determined not to be financially feasible. Ex. 201 and RP 10/16/13, McLeod Testimony, 9:1-22. Once it was determined to not be financially feasible, the Hotel Project was terminated and the parties proceeded with a mixed use office project (the "Lake Street Project").

In June 2007, during the course of work on the Hotel Project, Stock hired Mark Smedley ("Smedley"), an architect known to Bruce Stock ("B. Stock") to have experience in larger mixed use projects. RP 10/16/13, B. Stock Testimony, 7:3-15. Smedley was hired to be the project manager with respect to the Hotel Project. The Hotel Project was terminated on September 30, 2007. RP 10/16/13, Smedley Testimony, 9:14-25.

Architects are responsible for ensuring that their building designs comply with applicable codes. RP 10/16/13, Jim Alekson ("Alekson") Testimony, 21:17-21. Both B. Stock and Smedley performed due diligence investigation into the City codes and Design Review Board

("DRB") procedures and process during work on the Hotel Project. In particular, Smedley and B. Stock new that:

- The DRB was only concerned with the exterior design of the project;
- The DRC process was a fluid process that would include a number of DRB meetings;
- The goal of the process was to reach a design that met the City's codes and was acceptable to the DRB;
- The Lake Street Project was in the waterfront district core of downtown Kirkland and would have a high profile with the DRB.

RP 10/16/13, B. Stock Testimony, 76:20 - 78:14; and RP 10/16/13, Smedley Testimony, 118:11-23, and 122:13 - 126:16.

Indeed, during his investigation, Smedley discussed the Kirkland DRB process with Steve Cox, a DRB member and fellow architect he knew while they both worked at Mithun. After his discussions with Mr. Cox, Smedley knew the DRB process for a project like the Hotel Project would take more than three DRB meetings and created a schedule for the Hotel Project that included *five* DRB meetings through May of 2008. RP 10/16/13, Smedley Testimony, 123:8 - 124:11.

During his investigation, Smedley discovered on September 23, 2007 that it was critical to the project that a building permit set of plans be filed with the City no later than February 1, 2008. RP 10/16/13, McLeod Testimony, 13:15 - 16:17. After that date, a Code change that altered the

calculation of traffic impact fees would take effect and would increase the fees by $957,000. Ex. 203; and RP 10/16/13, Smedley Testimony, 51:2-13. In Smedley's own words, filing prior to February 1, 2008 was "critical" to the project. Ex. 204.

By the end of September, McLeod had hired Alekson to be his project manager for the Hotel Project. RP 10/16/13, Smedley Testimony, 11:17 - 12:5; and RP 10/16/13, Alekson Testimony, 17:13-15. Alekson determined that the Hotel Project was not financially feasible but that a mixed use office project would likely succeed. RP 10/16/13, Alekson Testimony, 17:19 - 18:12 and 19:13 - 20:1. The work on the Lake Street Project commenced October 1, 2007. Ex. 204. From the inception, Stock understood that the agreement for architectural services would necessarily be a fixed fee/stipulated sum contract. RP 10/16/13, Smedley Testimony, 133:16-22 and 157:24 - 158:15; Ex. 58; and RP 10/16/13, Alekson Testimony, 22:21 - 23:13. The Lake Street Project was a very large project for McLeod and it was important to have the fees fixed to limit project costs and for financial purposes. RP 10/16/13, McLeod Testimony, 11:20 - 12:13; RP 10/16/13, Alekson Testimony, 21:22 - 23:3; RP 10/16/13, Smedley Testimony, 14:13 - 15:1; RP 10/16/13, B. Stock Testimony, 25:11-17.

Once the Lake Street Project commenced, Smedley continued to investigate the DRB process. RP 10/16/13, McLeod Testimony, 11:20 - 12:13; RP 10/16/13, Alekson Testimony, 21:22 - 23:3; RP 10/16/13, Smedley Testimony, 14:13 - 15:1; RP 10/16/13, B. Stock Testimony, 25:11-17.. He advised McLeod that the work on the Hotel Project would benefit the Lake Street Project. Ex. 204; RP 10/16/13, Smedley Testimony, 131:13 - 132: 4.

On October 11, 2007, Smedley wrote his consultant team to advise them about the Project description. Ex. 203. In particular, Smedley provided them with a general description of the project, site, and consultant responsibilities. He also advised them "[d]ue to impending changes in the way the City of Kirkland calculates Transportation Impact Fees, we are targeting a Core & Shell permit package for intake prior to February 1, 2008." Ex. 203. Although he indicated there would be DRB meetings, he did not specify or estimate a number.

By memorandum dated October 22, 2007 to McLeod regarding Contract Set Up, Smedley

(i) Enclosed the final invoices for the Hotel Project;

(ii) Confirmed that the new Lake Street Project would start October 1, 2007;

(iii) He was putting the "A Team" together to allow them to pursue a building permit set for submittal prior to the February 1, 2008 deadline that was "critical to the financial success of the project," and

(iv) He was putting the fee proposal together. Ex. 204; RP 10/16/13, Smedley Testimony, 131:3 - 133:11.

In the same memo, Smedley stated:

> **Invoice Review:**
>
> I would like to offer a narrative with the invoices so that we can be clear about our time, the progress made, and any concern about fees, contract, schedule, and changes to the process keeping you up to date with what our consultant team is doing.

(Emphasis added.)

Smedley testified that this "narrative" was intended to keep McLeod advised as to any issues with these areas of concerns and Alekson understood they would be advised of any changes in fees or contracts. RP 10/16/13, Smedley Testimony, 133:5-11; RP 10/16/13, Alekson Testimony, 24:21 - 25:10.

On November 27, 2007, Smedley again communicated with his consultant team regarding Project Milestones. Ex. 205, RP 10/16/13, Smedley Testimony, 147:22 - 150:11. In this memo, Smedley (i) confirmed the February 1, 2007 Building Permit Intake and (ii) that the

Core & Shell permit plans would be filed with the City on January 15, 2008 to give them time to make corrections to become vested before the February 1, deadline. Nothing in this November 27, 2007 communication indicated that the January 15, 2007 filing date was an "acceleration" that Stock ultimately claimed in ASR 1. Indeed, the Exhibit A Stipulated Fee breakdown for $1.41 million and Attachment B Scope of Work were delivered to McLeod 19 days later on December 16, 2007 with no notation or claim of acceleration. Ex. 209.

In late November Smedley also first sent a "form B-151" to Alekson and McLeod, which only had the name of the owner and project. RP 10/16/13, Smedley Testimony, p. 133. Smedley had negotiated 10 or more B-151 stipulated sum contracts in the past and expected that the owner or owners' representative would come back with suggested changes and he fully expected there would be modifications to the form B-151 proposed by Alekson. RP 10/16/13, Smedley Testimony, 134:8 - 135:8.

Smedley prepared and submitted to Alekson the Exhibit A Stipulated Fee breakdown in November. He also prepared a draft of the Attachment B Scope of Work dated November 2, 2007, but that draft was not delivered to Alekson or McLeod. It was not until December 16 that Smedley submitted both Exhibit A and Attachment B to Alekson. Ex.

209; RP 10/16/13, Smedley Testimony, 135:9 - 136:9. As of December 16, 2007, the Exhibit A Stipulated Fee proposal and the Attachment B Scope of Work were "married" and presented to McLeod as the agreement for the Stipulated Fee and Scope of Work. No changes were made thereafter for the remainder of the Lake Street Project. RP 10/16/13, Smedley Testimony, 136:20 - 137:22; RP 10/16/13, B. Stock Testimony, 99:6-12.

The December 16, 2007 email enclosing the documents also attached an invoice dated December 12, 2007 for work performed in October and November. The fee invoice was based on a percentage of completion using the Exhibit A Stipulated Fee and Attachment B Scope of Work. RP 10/16/13, Smedley Testimony, 136:20 - 137:22; RP 10/16/13, B. Stock Testimony, 99:6-12.

As of December 16, 2007, everyone knew, including Stock, that the process was fluid and there would be additional changes required by the DRB. RP 10/16/13, Smedley Testimony, 136:20 - 137:22; RP 10/16/13, B. Stock Testimony, 99:6-12. Nothing in the Scope of Work (i) limited the number of DRB meetings, (ii) excluded City Council meetings or appeals to the City Council; or (iii) limited design approval authority to only DRB approval. In fact, the Scope of Work stated on page 6:

"Schematic Design includes obtaining final Design Review approval from the City of Kirkland."

The first actual invoice for services and narrative report was dated January 2, 2008 for services performed in the month of October 2007. Ex. 212. This invoice was based on Exhibit A Stipulated Fee and Attachment B Scope of Work. Ex. 212, RP 10/16/13, Smedley Testimony, 159:19 - 161:23. Nothing in this invoice referenced any project acceleration, changes in the Scope of Work, extra DRB meetings, or any claimed extra fees and costs.

Alekson delivered his proposed modifications to Stock on January 12, 2008. Ex. 213. Stock never advised Alekson of any specific objections to his modifications and never proposed any revisions to the Alekson changes, even though Alekson repeatedly asked Stock to do so. RP, RP 10/16/13, Alekson Testimony, 34:3-11; RP 10/16/13, B. Stock Testimony, 117:13-17.

Significantly, Alekson made no changes to Section 3.1.1 of the B-151 form that allows the architect to receive compensation for additional services beyond those in the Scope of Work if authorized or confirmed in writing by the Owner. Exs. 206 & 213; RP 8/6/13, Alekson Cross Testimony, 17:3-10 and 26:6-24. Stock understood that this section

required that notice be provided to the Owner for any additional service requests. But Stock never provided notice to McLeod that there were additional service requests and, indeed, no such notice was ever provided. RP 10/16/13, B. Stock Testimony, 86:12 - 88:3 and 93:9-14; RP 8/6/13,Alekson Cross Testimony, 25:25 - 26:5.

Notice provisions are significant for a stipulated sum contract because if there are material changes in the scope of work, the architect needs to provide advance notice to the Owner so the Owner can determine which alternative to select, including (i) no, do not do the work, (ii) yes, do the work as proposed, or (iii) offer/negotiate an alternative to the proposed additional work. RP 10/16/13, Alekson Testimony, 9:14 - 12:9.

Following delivery of the Alekson proposed changes to the B-151, Stock and Smedley held the "take care of us" meeting at Stock's office on January 15, 2008. This meeting was not called or arranged to negotiate the B-151 contract, but rather was a regularly scheduled project meeting to finalize the plan set that was to be filed with the City on Friday, January 18, 2008. RP 10/16/13, B. Stock Testimony, 106:1-6. Stock was concerned about the pressure with getting the permit submittal to the City on time and McLeod told them that they should all focus energy on getting that submittal to the City. RP 8/6/13, McLeod Testimony, 5:13 - 8:8; RP

10/16/13, B. Stock Testimony, 109:15 - 111:10. Stock had been working on the project for three and one-half months and had not submitted the invoice for October work until January 2, 2008. Stock was concerned about getting paid under the fixed sum agreement and in that context, McLeod told them he would take care of them in accordance with that agreement. RP 8/16/13, McLeod Testimony, 5:13 - 8:8; RP 10/16/13, B. Stock Testimony, 114:4-22.

Indeed, in September 2009, Stock confirmed this understanding in a revised ASR 3 Invoice Narrative dated September 24, 2009, wherein it stated regarding the meeting that you "even stated that you would take care of us when it came to the agreement." Ex. 231 at p. 2; RP 10/16/13, B. Stock Testimony, 113:2 - 114:3 (emphasis added).

The only "agreement" that was in place at the time was the stipulated sum agreement confirmed by the Exhibit A Stipulated Fee and Attachment B Scope of Work. At no time did anyone indicate that there was some different form of agreement for architectural services. RP 8/6/13, McLeod Testimony, 5:13 - 8:8.

After the January 15, 2008 meeting, the plans were filed with the City on January 18, 2008 and on January 23, 2008, Stock submitted its next invoice for services. It based the invoice on the Exhibit A Stipulated

Fee and Attachment B Scope of Work without any reference or mention of a change in any agreement terms for compensation or reference to any additional service request. Ex. 214; RP 8/6/13, McLeod Testimony, 5:13 - 8:8; RP 10/16/13, Smedley Testimony, 161:24 - 163:5; RP 10/16/13, B. Stock Testimony, 115:17 - 117:12.

After the January 15, 2008 meeting, all monthly invoices through September 24, 2008 were billed based on a percentage of work completed based on the Exhibit A Stipulated Fee and Attachment B Scope of Work. Exs. 214-217 & 218; RP 8/6/13, McLeod Testimony, 6:24 - 7:7; RP 10/16/13, Smedley Testimony, 167:8 - 168:7. None of these invoices made any reference to extra fees and costs incurred for any reason including, specifically, those later claimed in the ASRs for (i) acceleration of the work schedule, (ii) the number of DRB meetings, (iii) the appeal to the City Council, or (iv) alleged changes in the Scope of Work for the garage or any other reason. Exs. 214-217 & 218; RP 8/6/13, McLeod Testimony, 6:24 - 7:7; RP 10/16/13, Smedley Testimony, 167:8 - 168:7.

On September 14, Stock, for the first time, raised a claim for additional service requests when it included with the monthly invoices claims for five ASRs. Ex. 219; RP 10/16/13, Smedley Testimony, 168:8-17 and 169:1-5. Thereafter, Stock continued to bill both based on a

percentage completion based on the Exhibit A Stipulated Fee and Attachment B Scope of Work "base contract" plus the ASRs that it claimed were changes in the Scope of Work. Exs. 219-236.

The Lake Street Project was terminated December 17, 2008. RP 10/16/13, Alekson Testimony, 39:13-19. Ultimately, Stock billed and was paid $1,098,043.77, representing 82.10% of the total fee based on the percentage of the work as defined by the Exhibit A Stipulated Fee and Attachment B Scope of Work (Ex. 228). Stock claimed an additional $357,825.50 for ASRs 1-7, all of which were disputed except for ASR 6. Exs. 229-235; RP 10/16/13, McLeod Testimony, 25:4 - 26: 25.

McLeod disputed ASRs 1-5 and 7 because the same were included in the Scope of Work and because no notice was provided to McLeod prior to Stock performing the alleged extra work. Exs. 238 & 239; RP 8/6/13, Alekson Cross Testimony, 20:2-8 and 22:14-18.

B. The ASRs Were Within the Scope of Work and Stipulated Fee

Examination of the three largest ASRs, ASRs 1-3, is illustrative of why they were properly included in the Scope of Work and Stipulated Fee. The same was true for ASRs 4, 5 and 7.

ASR 1 claims $34,000 in extra fees and costs for the alleged acceleration of the schedule for filing the plans with the City. Stock claims that:

> We believe these costs are justified since the proposed scopes and fees were determined prior to our knowledge of the need to accelerate the schedule to beat the February 1, 2008 deadline for changes to the Transportation Impact Fees for the City of Kirkland. We saved the project budget $957,082.96 by having a complete set for documents due to accelerating the project.

Exs. 229 & 219.

Although Stock claims that it did not learn of the February 1, 2008 deadline until *after* the Scope of Work and Stipulated Fee were determined, the evidence at trial was:

(i) The Transportation Impact Fee was discovered by Smedley on September 23, 2007. Ex. 203, RP 10/16/13, Smedley Testimony, 51:2-13.

(ii) On October 11, 2007, Smedley advised his team of consultants of the fees and that they were targeting February 1, 2008 for filing the Core & Shell permit package. Ex. 203.

(iii) On October 22, 2007, Smedley advised McLeod that the February 1, 2008 deadline was "critical to the financial success of the project." Ex. 204.

(iv) On November 27, 2007, Smedley set the Permit Submittal Schedule and established January 15, 2008 as the plan submittal date. Exs. 205 & 240.

(v) Weeks after being advised of the February 1, 2008 "critical" date and establishing the January 15, 2007 permit submittal date, on December 16, 2007, Smedley provided Alekson and McLeod with the Exhibit A Stipulated Fee and Attachment B Scope of Work. Neither document references an acceleration. Ex. 209; RP 10/16/13, B. Stock Testimony, 102:21-25.

(vi) The actual filing date for the permit set was January 18, 2008, three days later than the date Smedley originally set. Exs. 71 & 77.

(vii) The first notice of a claimed acceleration ASR 1 was September 24, 2008, a full year after Smedley discovered the traffic impact fee issue. Exs. 219 & 239; RP 10/16/13, Alekson Testimony, 26:2-6; RP 10/16/13, Smedley Testimony, 169:1-5.

ASR 2 claims $25,575 in extra fees and costs for an extra one-half floor of garage and increasing the number of parking stalls to 520. Exs. 219 & 230. The evidence at trial was:

(i) On October 11, 2007, the Lake Street Project contemplated a four-story parking structure. Ex. 203.

(ii) Smedley's November 2, 2007 draft of Attachment B (which was never submitted to Alekson or McLeod) contemplated approximately 485 parking stalls and Stock knew it would be a fluid number. Ex. 208. RP 10/16/13, B. Stock Testimony, 97:22 - 98:17.

(iii) The number of stalls could not be precisely established because it was dictated by the relative uses within the Lake Street Project (retail or office) and until the square footage of those two elements was determined, the exact Code-required number of stalls was not known. That was the reason for the term "approximately 500." RP 10/16/13, Alekson Testimony, 30:22 - 32:3.

(iv) On November 29, 2007, Smedley acknowledged that "we're doing some tweaks on ramps even as we speak, so if it doesn't affect traffic concurrency, I guess I'd like Stuart to decide which number

to use (these counts will continue to change up and down as we go along…it's just part of the process.)" Ex. 60.

(v) The final Attachment B Scope of Work delivered December 16, 2007 stated "and five levels of below grade parking with approximately 500 parking stalls." Ex. 209 & 210.

(vi) The Lake Street Project submitted to the City on appeal contained a "new five-level, 520 parking stall structured parking garage." Consistent with the "five levels of below grade parking with approximately 500 parking stalls" Stock anticipated in the Scope of Work. Ex. 166; Response to Appeal.

(vii) The first notice of a claimed additional cost and fee related to parking ASR 2 was September 24, 2008, seven months after Stock submitted plans using the 520 parking stalls. Exs. 219 & 239; RP 10/16/13, Alekson Testimony, 26:20 - 27:5; RP 10/16/13, Smedley Testimony, 169:1-5.

ASR 3 claims $265,704 in extra costs and fees because there were more than three DRB meetings and because of the appeal to the City Council. Exs. 219 & 231. The evidence at trial was:

(i) With respect to the number of DRB meetings, Smedley did extensive investigation into the DRB process and knew prior to

proceeding with the Lake Street Project and thereafter that it was highly likely that there would be more than three to five DRB meetings. Ex. 67; RP 10/16/13, B. Stock Testimony, 76:20 - 78:14; RP 10/16/13, Smedley Testimony, 118:11-24, 122:13 - 126:16, and 123:8 - 124:11.

(ii) The Attachment B Scope of Work

a. Is silent with respect to any limitation on the number of DRB meetings;

b. Did not limit design approval only to the DRB approval process;

c. Specifically indicated that "Schematic Design includes obtaining final Design Review approval from the City of Kirkland;" and

d. Had a last page that listed Exclusions from the Scope of Work that did not limit, mention or exclude the number of DRB meetings or an appeal to the City of Kirkland. Exs. 209 & 210; RP 10/16/13, Alekson Testimony, 15:25 - 17:12; RP 10/16/13, B. Stock Testimony, 101:21 - 102:20.

(iii) The first notice of a claimed additional cost and fee related to the number of DRB meetings and the appeal, ASR 3, was September 24, 2008. Exs. 219 & 239; RP 10/16/13, Alekson Testimony, 26:7-19; RP

10/16/13, McLeod Testimony, 21:13 - 22:3; RP 10/16/13, Smedley Testimony, 169:1-5.

C. Stock Failed to Pay its Subconsultants

Although McLeod had paid all of the Stock invoices except for the ASRs, McLeod learned in December 2008 that Stock had not fully paid its subconsultants and that this could potentially harm his and the project's reputations. Ex. 239. The largest account was more than $126,000 owed to Peterson, Strehle, Martinson, Inc. ("PSM") and was related to ASRs 1-5 and 7. Indeed, PSM's bills comprised a substantial portion of ASRs 1-3 and were the only cost claimed by Stock for ASRs 4, 5, and 7. Ex. 229-233 & 235.

In order to (i) protect his business reputation, (ii) preserve his relationship with the subconsultants when he elected to proceed with the project in the future, and (iii) reduce any potential claim by Stock, McLeod elected to settle with PSM. Contrary to the single explanation advanced by Stock – that payment was made because of the relationship of one PSM principal with McLeod's sister – McLeod's reasons for settling were related to MDC's business. Ex. 256; RP 10/16/13, McLeod Testimony, 46:3 - 48:2.

The Settlement Agreement and Release not only released McLeod and the Lake Street Project, but also released Stock. Ex. 256. Regardless of the settlement and full and unconditional release of Stock, Stock maintained at trial and requested as damages the entire amount that it had included in the ASRs related to PSM fees. RP 10/16/13, McLeod Testimony, 50:5 - 51:8.

IV. ARGUMENT AND AUTHORITY

A. Introduction

Stock's two assignments of error relate to the trial court's not instructing the jury on "quantum meruit." Appellant's Br. at 6. First, Stock argues that the trial court erred in failing to instruct the jury on quantum meruit. Id. Second, Stock argues that the trial court erred by allowing the jury to hear certain evidence, which, in combination with the lack of a quantum meruit instruction, prejudiced the jury. Both of these assignments of error are incorrect.

1. Stock's First Assignment of Error

Stock's first assignment of error, that the trial court should have instructed the jury on quantum meruit, fails for two reasons. First, Stock did not take any exceptions to the trial court's proposed jury instructions. By failing to except or otherwise object to the proposed jury instructions,

Stock waived its ability to challenge the instructions on appeal. See, e.g., Barracliff v. Maritime Overseas Corp, 55 Wn.2d 695, 702-03, 349 P.2d 1080, (1960) ("[t]he claim of error . . . cannot be considered here because there was no objection or exception to that instruction at the trial level.).

Substantively, Stock's first assignment of error is incorrect because quantum meruit is a theory that allows for "recovering the reasonable value of services provided under a contract implied in fact." Young v. Young, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (emphasis added). Quantum meruit is a theory of implied contract. It is not available where the parties have an express contract because "where the rights of the parties are governed by an express and enforceable contract, the law will not imply another or different contract. . ." Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 608, 137 P.2d 97 (1943). Stock and MDC had an express fixed fee contract. That contract included provisions related to work that may have been required above and beyond the defined scope of work. Stock was therefore properly limited to recovery on the express contract.

2. Stock's Second Assignment of Error

Stock next assigns error to the trial court's failure to exclude testimony and evidence related to McLeod's payment to one of Stock's

subconsultants, PSM. Stock claims that the allowance of testimony, evidence, and argument related to this issue prejudiced the jury in favor of finding the existence of an agreement and, therefore, against Stock's quantum meruit claim.

First, this assignment of error fails for the same reason as the first assignment of error – Stock did not object to the testimony and evidence it now claims was erroneously admitted. Nor did Stock take exception to the jury instruction on the MDC counterclaim. Second, the assignment of error fails because even had Stock objected, the evidence would properly have been admitted. Finally, this assignment of error fails because any alleged error was harmless.

B. Plaintiff Waived its Objections to the Trial Court's Jury Instructions

Stock assigns error to the trial court's failure to instruct the jury on its theory of quantum meruit. As a threshold matter, Stock waived any error as to the jury instructions by failing to except or otherwise object to the trial court's instructions.

It is well established that a party who fails to except to jury instructions in the trial court waives the right to assign error to those instructions at the appellate court. See, e.g., Cunningham v. Tieton, 60

Wn.2d 434, 439, 374 P.2d 375 (1962) ("[t]wo of the objections urged in the brief were not in the exceptions and cannot be considered."); and Barracliff, 55 Wn.2d at 702-03; see also State v. Smith, 174 Wn. App. 359, 364-65, 298 P.3d 785 (2013) (noting that "[g]enerally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal" unless the error is a "[m]anifest error affecting a constitutional right. . .") The rule requiring exception to preserve issues for appeal applies to both challenges to erroneously given instructions and challenges to the trial court's failure to give proposed instructions, as is the case here. See, e.g., Bronk v. Davenny, 25 Wn.2d 443, 451, 171 P.2d 237 (1946) ("appellants urge that it was error to refuse their instructions Nos. 5 and 6 . . . Requested instruction No. 6 is not before this court for review as appellants failed to take exception to its refusal."); see also Bellah v. Brown, 71 Wn.2d 603, 609, 430 P.2d 542 (1967) ("The defendant assigns error to the failure . . . to give a proposed instruction . . . The record shows the defendant in taking her exception failed to advise the trial court of the specific points involved; hence the exception will not be considered."); and Cowan v. Chicago, Milwaukee, St. Pail and Pacific Rr, 55 Wn.2d 615, 621, 349 P.2d 218 (1960) (refusing to consider a proposed jury instruction on appeal because "exceptions to instructions will not be considered on

appeal where the exception fails to advise the court of the specific points of law involved . . . this is particularly applicable to the failure to give requested instructions.").

Prior to trial, Stock proposed an instruction on quantum meruit, CP 103, but the trial court declined to give that instruction to the jury. The transcript shows that Stock, through its attorney Mr. Elison, raised no objection to the trial court's refusal to give the proposed instruction:

> THE COURT: All right. We've prepared the jury instructions and I've made two very small grammatical changes, but I've left them pretty much as-is. Have we numbered them? Do you have them?
>
> THE CLERK: Yes, there's a copy that (inaudible) next to them --
>
> ***
>
> THE COURT: And are you prepared to make any exceptions at this point?
>
> MR. ELISON: I'm not prepared to make any exceptions at this point. I don't believe I will make any exceptions at any point, Your Honor, but if I --
>
> THE COURT: Tell you what we'll do. Let's go ahead with the testimony. Hopefully that will give you a chance to look through the exhibits -- the instructions. And then we can take exceptions later on if there are any.

RP 8/6/13, Jury Instructions, 3:7-22 (emphasis added). Following the above colloquy, rebuttal testimony was taken, and the trial court returned

to the issue of jury instructions approximately 24 minutes later. RP 8/6/13, Jury Instructions, 4:1-5.

> MR. ELISON: No further witnesses, Your Honor.
>
> THE COURT: Mr. Brain, anything further?
>
> MR. BRAIN: No.
>
> THE COURT: All right, ladies and gentlemen, we're just going to move right into jury instructions, which will take about 30 minutes for me to read to you and then we'll proceed with closing arguments.

RP 8/6/13, Jury Instructions, 4:7-13. The trial court then read the jury instructions. RP 8/6/13, Jury Instructions, 5:1-21:8. The only interruption from counsel came in a brief discussion of whether the word "not" had been accidentally removed from instruction No. 6. RP 8/6/13, Jury Instructions, 12:1-13.

The trial court asked for objections to the jury instructions, gave counsel time to review the instructions, and read the instructions to the jury. The trial court did not instruct the jury on quantum meruit and Stock did not object. Stock waived its ability to challenge the jury instructions and Defendants respectfully request that this Court uphold the trial court's decision.

C. The Trial Court was Correct to Refuse to Give an Instruction on Quantum Meruit

1. Standard of Review

Because Stock did not object to the jury instructions, it is impossible to determine the grounds on which the trial court refused the proposed instruction. Without knowing the legal grounds on which the trial court relied, it is naturally difficult to respond to Stock's argument that the refusal.[3] Indeed, it is not even possible to state the correct standard of review to be applied by this Court, because "[a] trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact." Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).[4]

If, despite these difficulties, this Court reviews the correctness of the trial court's decision, it should review it only for abuse of discretion. Stock's primary argument to this Court is that the facts presented

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[3] For example, the trial court may have refused the instruction because Stock failed to plead quantum meruit in its complaint, because it believed the requested instruction was legally deficient, or because it believed the facts did not support the instruction.

[4] Stock's brief bears out the difficulty in determining the proper standard of review, stating that "[a] court's decision regarding whether to give a particular instruction is reviewed for abuse of discretion" followed immediately by "[a] trial court's decision to give or not give an instruction based on a ruling of law is reviewed de novo." Appellant's Br. at 16 (internal citations omitted) (emphasis added). A review for abuse of discretion is, by definition, not de novo review.

supported both a contract claim and a quantum meruit claim. See, e.g., Appellant's Br. at 20 (arguing that the facts presented at trial supported a theory of implied contract). Because the facts presented supported the existence of an express contract between Stock and MDC and because, as a matter of law, a party may not substitute quantum meruit for an express contract, the trial court did not abuse its discretion in refusing to give an instruction on quantum meruit.

2. Quantum Meruit is Not Available Between Parties to an Express Contract

In the absence of an express contract between parties, Washington law recognizes certain situations in which a party may recover damages based on a contract implied either in law or in fact. Young, 164 Wn.2d at 483-84. A contract implied in fact "is an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from circumstances which, according to common understanding, show a mutual intention of the parties to contract with each other." Id. at 485 (quoting Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)). An action for the recovery of "the reasonable value of services provided under a contract implied in fact" is termed "quantum meruit." Id.

Critically for purposes of this case, a party may only claim quantum meruit in the absence of an express contract. Otherwise:

> A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.

Chandler, 17 Wn.2d at 604 (emphasis added) (citing 71 C.J. 81, § 42; 17 C.J.S., Contracts, § 5 p. 231; Schneider v. Allis-Chalmers Mfg. Co., 196 Wis. 56, 219 N.W. 370; and Federal Royalty Co. v. Knox, 5 Cir., 114 F.2d 78).

3. Stock and MDC had an Express Fixed Sum Contract

Here, the evidence supported the conclusion that the parties had an express fixed fee contract, that contract included the claimed ASRs within its scope, and that the fixed fee contract included provisions that addressed procedures for allowing additional work that was outside the scope of work. Therefore, the trial court did not abuse its discretion in determining that a claim for quantum meruit for additional work was barred by the existence of the express contract.

The facts related to the formation of a contract between MDC and Stock are laid out extensively above. In sum, McLeod engaged Stock in May 2007 to work first on the Hotel Project and then the Lake Street Project after the Hotel Project was deemed unfeasible in September 2007. Stock engaged Smedley as the project manager on the Lake Street Project. RP 10/16/13, Smedley Testimony, 9:14-25. From the beginning, Stock understood that the agreement for architectural services would be a fixed fee/stipulated sum contract. RP 10/16/13, Smedley Testimony, 133:16-22, 157:24 - 158:15; Ex. 58; and RP 10/16/13, Alekson Testimony, 22:21 - 23:13.

After numerous discussions between the various individuals, in October 2007, Smedley submitted a memorandum to McLeod regarding the contract set. In that memorandum, Smedley stated:

> I would like to offer a narrative with the invoices so that we can be clear about our time, the progress made, and any concern about fees, contract, schedule, and changes to the process keeping you up to date with what our consultant team is doing.

(emphasis added). The "narrative" was intended to keep McLeod apprised as to any issues in the listed areas. Based on this, Alekson understood they would be advised of any changes in fees or contracts. RP 10/16/13, Smedley Testimony, 133:5-11; RP 10/16/13, Alekson Testimony, 24:21 –

25:10. Smedley is therefore the one that initially stated that notice would be provided before any changes to fees or concerns about the contract, the schedule, or other changes to the process.

In November, 2007 Smedley submitted to Alekson the Exhibit A Stipulated Fee breakdown describing the stipulated fee. RP 10/16/13, Smedley Testimony, 134:8 - 135:8. He also delivered an incomplete "form B-151" to Alekson and McLeod in late November, 2007. RP 10/16/13, Smedley Testimony, 133. Section 3.1.1 of the Form B-151 confirmed the previously discussed notice provisions. It described procedures for the architect to receive additional compensation for services provided beyond the scope of work, provided the additional work was authorized or confirmed in writing by the owner. On December 16, 2007, Smedley submitted a "married" Exhibit A Stipulated Fee breakdown and Attachment B Scope of Work for the Lake Street Project. Ex. 209.

During this time, Stock had been working on the project, and on December 16, 2007, Stock submitted an invoice dated December 12, 2007 for work performed in October and November. The invoice was based on the percentage of work complete under the Exhibit A Stipulated Fee and Attachment B Scope of Work. On January 2, 2008, Stock submitted an invoice and narrative description for work in October 2007. This invoice

also followed the Exhibit A Stipulated Fee and Attachment B Scope of Work.

On January 12, 2008, Alekson delivered proposed modifications to the Form B-151. Alekson's proposed changes did not modify Section 3.1.1 addressing procedures for the architect to receive additional compensation based on written confirmation by the Owner. Exs. 206 & 213. Smedley proposed in his memorandum that notice would be provided. That understanding was confirmed by Smedley when he submitted the Form B-151, and further confirmed by MDC when Alekson returned the Form B-151, leaving the relevant provision intact.

Through September 2008, every invoice Stock submitted was billed based on a percentage of work complete as provided under the Exhibit A Stipulated Fee and Attachment B Scope of Work. Exs. 214-217 & 218. No invoices referenced any additional work or extra costs incurred for any reason, including those later raised in the ASRs. Id. Stock did not advise MDC of any issues related to "concerns" as it had agreed to do in October, 2007 (Ex. 204) nor did Stock request permission for any additional work beyond the Attachment B Scope of Work and did not receive authorization for any such work as required by Section 3.1.1 of the Form B-151. Indeed, Stock billed based on a contract and the ASRs

themselves were alleged by Stock to be outside the contractually agreed Scope of Work.

Based on the above evidence, the trial court reasonably could have concluded that the evidence established a contract between Stock and MDC under which Stock would provide services subject to a fixed fee agreement, and that the agreement included a provision governing prior notice of any request for additional fees for work outside of the defined scope of work. Because the parties had an express contract and because that contract included provisions addressing additional work, the court did not abuse its discretion by refusing an instruction on quantum meruit. Any other result would have impermissibly allowed Stock to substitute an implied contract for the provisions of the express contract.

4. Stock's Citations to Cases Involving Changed Circumstances Are Not Applicable to This Case

Stock cites to V.C. Edwards Contracting Co., Inc. v. Port of Tacoma, 83 Wn.2d 7, 13, 514 P.2d 1381 (1973), for the proposition that the express contract between the parties does not bar recovery in quantum meruit for additional work necessitated by changed conditions. Appellant's Br. at 18-19. First of all, V.C. Edwards Contracting Co. is a construction contract case, not a professional services case. Even so, this

rule only applies to "substantial changes which are not covered by the contract and are not within the contemplation of the parties." Hensel Phelps Constr. Co. v. King County, 57 Wn. App. 170, 177, 787 P.2d 58 (1990) ("Hensel Phelps").[5] Where parties agree on a contract and the contract provides a procedure to address changes in the scope of work, the parties are limited to suing on the contract and barred from quantum meruit.

Indeed, the situation in Hensel Phelps is similar to the situation in this case (with the caveat that Hensel Phelps is a construction case). In Hensel Phelps, a subcontractor sued the general contractor in quantum meruit to recover for additional costs beyond the scope of work. The contract provided that a subcontractor could claim equitable adjustments in the contract price for changes ordered by the owner, and required that the subcontractor give written notice of any condition on which it would make a claim. Id. at 177-79. The court held that because the contract provided procedures for addressing work beyond the scope of the contract, the trial court "did not err in dismissing the quantum meruit claim as a matter of law." Id. at 183.

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[5] Stock describes Hensel Phelps as not applying because the parties did not have an "executed a written contract"; Appellant's Br. at 22, but nothing in the case limits its

The same rule applies here. The parties agreed that Stock would provide notice of "concerns" and exchanged forms of B-151 which had an unaltered Section 3.1.1 that provided a procedure for claiming costs beyond those described in the fixed fee contract. Therefore, Stock is limited to contractual remedies for any such costs and may not substitute a quantum meruit claim for the contract.

Additionally, as described extensively above, the claimed ASRs were not additional work, but were within the scope of the fixed fee agreement. Supra at 15-19. For example: Stock knew about the February 1, 2008 deadline and established a scheduled filing date of January 15, 2008 before Smedley submitted the Exhibit A Stipulated Fee proposal and the Attachment B Scope of Work, it was not additional unexpected work as described in ASR 1; Stock planned for five stories of parking with approximately 500 parking spaces, so developing five stories of parking with 520 parking spaces was not additional work as described in ASR 2; and Stock knew that DRB approval could take five or more meetings and expressly agreed that the scope of work included "obtaining final Design

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application to written contracts. It refers to express contracts generally.

Review approval from the City of Kirkland," so requiring multiple DRB meetings and an appeal was no additional work as described in ASR 3.

The evidence supported finding the existence of a contract that provided procedures for addressing additional work beyond the scope of work. Therefore, Stock's ASRs are contingencies provided for in the contract, and Stock was properly limited to presenting a case for breach of contract. Further, the claimed ASRs were within the scope of the express contract. For these reasons, Respondents respectfully request that the Court affirm the trial court's refusal to give an instruction on quantum meruit.

D. Stock Waived its Objection to Evidence Presented on Defendants' Payment to a Subconsultant Because it Failed to Object to the Evidence at Trial

Stock's second assignment of error is that "[t]he trial court erred in allowing testimony and evidence regarding [McLeod] and [MDC's] voluntary payment to [Stock's] subcontractor . . . because that only confused the jury . . ." Appellant's Br. at 28.[6] Any alleged error in

[6] Stock also suggests that it was reversible error for the trial court to allow argument on this issue, rather than simply to admit testimony and evidence on the issue. Appellant's Br. at 6. However, Stock acknowledges that the trial court corrected the issue of allowing an impermissible argument by vacating the jury's award in favor of McLeod and MDC on this issue. Appellant's Br. at 29. The only issue for review then is whether the trial court erred in permitting the evidence and testimony in the first place.

admitting this testimony is not subject to appellate review, because Stock failed to object to the evidence and testimony at trial.

Under ER 103, "error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike is made, stating the specific ground of the objection, if the specific ground was not apparent from the context. . ." ER 103(a)(1); see also, Boyd v. Kulczyk, 115 Wn. App. 411, 416-17, 115 Wn. App. 411 (2003) (holding that the court had "no basis for review" because the defendant failed to object to the challenged testimony at trial.).

Although Stock does not specifically call out the testimony and exhibits it thinks should have been excluded, Stock directs the Court's attention to RP 8/6/13, McLeod Testimony, 46:3 - 51:8 and Ex. 256. Stock raised a single objection to that portion of McLeod's testimony, and the trial court sustained that objection:

> Q. And that $84,000 is spread throughout the ASRs?
>
> A. I believe so.
>
> MR. ELISON: Objection. Leading.
>
> THE COURT: Sustained.

RP 8/6/13, McLeod Testimony, 50:19-22. Stock's assignment of error is not that the trial court admitted leading testimony, and this objection was

sustained besides, so it cannot for the basis for Stock's appeal. Stock also initially questioned the admissibility of Ex. 256 on grounds of hearsay and authentication, RP 8/6/13, McLeod Testimony, 48:14 - 49:3, but ultimately did not object:

> MR. BRAIN: Move for admission.
>
> THE COURT: Any objection?
>
> MR. ELISON: Not to that document, Your Honor.
>
> THE COURT: 256 is admitted.

RP 8/6/13, McLeod Testimony, 49:20-23 (emphasis added).

Stock did not object to the evidence and testimony offered on McLeod's payment to the subconsultant. Stock did object to Defendants' arguments regarding recovery of those funds, and the trial court resolved any error by vacating the jury's judgment, effectively removing consideration of the argument from the jury's hands. Stock should not be allowed to now attempt to exclude the evidence and testimony for the first time on appeal.

Stock seeks to remedy its failure to object by claiming that vacating the judgment was not sufficient because the evidence and testimony related to the subconsultant payments prejudiced on the remaining issues. If Stock was concerned that the jury would consider

evidence and testimony beyond the issue for which it was offered, Stock could have requested a limiting instruction. Stock did not. Because Stock did not request a limiting instruction, the jury was entitled to consider the evidence and testimony for any issue, and Stock cannot now complain about specific issues that the evidence and testimony may have influenced.[7]

Further, even had Stock objected to the admission of the evidence in question, the trial court would have been correct to overrule Stock's objection. Stock claims that the evidence should not have been allowed because it was relevant only to the issue of whether McLeod was entitled to damages for breach of contract, but Stock is incorrect. In exchange for the payment to PSM, McLeod obtained a full release of PSM's claims against Stock. As some of the ASRs included money Stock would otherwise have owed to PSM, the fact that PSM had released its claims against Stock was relevant to the issue of Stock's damages. Indeed, failing to allow the evidence would have created substantial risk that Stock

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[7] Stock's reliance on State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012), is misplaced. Fuller was a criminal case in which the state impermissibly commented on the defendant's post arrest silence. Because commenting on post arrest silence violates a defendant's constitutional rights, it is subject to a stringent "constitutional harmless error standard" that applies regardless of whether the defendant objects at trial. See, e.g., Id. at 812-13. The constitutional harmless error standard does not apply in this case.

would be double compensated for its claimed damages – once when PSM released its claims, and again when it collected money from McLeod to pay the no longer existing claims. The trial court would have been correct to admit this evidence over Stock's objection.[8]

Finally, any erroneous admission of testimony and evidence related to payment of subconsultants was harmless. "Error in the admission of evidence is without prejudice when the same facts are established by other evidence." Feldmiller v. Olson, 75 Wn.2d 322, 325, 450 P.2d 816 (1969). Stock claims that the evidence as to McLeod's payment to subconsultants improperly influenced the jury on the question of whether a contract existed between the parties. Even without the evidence of McLeod's payment to subconsultants, significant evidence existed on which the jury could have found such a contract. See supra at 4-19. Indeed, on this issue, McLeod's payment to subconsultants was a relatively insignificant piece of evidence.

Because Stock failed to object to the evidence and testimony on which it bases its assignment of error, and because any error in admitting

[8] Again, had Stock been concerned that the jury would consider the evidence on issues beyond damages, it could have asked for a limiting instruction. It did not.

such evidence was harmless, Respondents respectfully request that the Court affirm the decision of the trial court.

V. CONCLUSION

For the reasons mentioned above, Respondents respectfully request that the Court affirm the trial court.

DATED this 3rd day of February, 2014.

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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 3rd day of February, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Jami K. Elison, WSBA #31007 Sheri Lyons Collins, WSBA #21969 Adam C. Collins, WSBA #34960 THE COLLINS LAW GROUP PLLC 2806 NE Sunset Blvd., Suite A Renton, WA 98056	☒ U.S. Mail, postage prepaid ☐ Hand Delivered ☐ Overnight Courier ☐ Facsimile ☒ Electronic Mail

Attorneys for Plaintiff/Appellant

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 3rd day of February, 2014, at Seattle, Washington.

Betty Lou Taylor