Supreme Court No. 91035-9
(From Court of Appeals Div 1, No. 70335-8-1)

SUPREME COURT OF THE STATE OF WASHINGTON

STOCK & ASSOCIATES, INC., a Washington corporation,

Petitioner-Appellant,

v.

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

Respondents.

PETITION FOR REVIEW UNDER RAP 13.4

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TABLE OF CONTENTS

IDENTITY OF PETITIONER.....1
COURT OF APPEALS DECISION 1
ISSUES PRESENTED FOR REVIEW 1
STATEMENT OF THE CASE.....5
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....12
CONCLUSION.....20

TABLE OF AUTHORITIES

TABLE OF CASES

Bignold v. King County, 65 Wn.2d 817, 399 P.2d 611 (1965).....13-15, 17, 20

Brutsche v. City of Kent.....*19*

Eaton v. Engelcke Mfg., Inc., Wn. App. 677, 861 P.2d 1312 (1984) 16

Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 1 P.3d 579 (2000.....3, 13

Hensel Phelps Constr. Co. v. King Cty, 57 Wn. App. 170, 787 P.2d 58 (1990)....13-18, 20

Industrial-Electric-Seattle, Inc. v. Bosko, 67 Wn.2d 783, 410 P.2d 10 (1966).....16

In Re Guardianship of Cornelius, 181 Wn. App. 513, 326 P.3d 718 (2014).....19

V. C. Edwards Contracting Co., Inc. v. Port of Tacoma, 83 Wn.2d 7, 514 P.2d 1381 (1973).....15

Young v. Young, 164 Wn.2d 477, 191 P.3d 1258 (2008).....15

RULES

CR 51(f).....2, 4-5, 13-14, 19-20

RAP 13.4.....12

A. IDENTITY OF PETITIONER

Petitioner, Stock & Associates, Inc. ("Stock"), was Appellant below and Plaintiff in the initial underlying action. Further identification is included in the Statement of the Case, section D herein.

B. COURT OF APPEALS DECISION

Stock seeks review of the Court of Appeals Division I unpublished opinion issued on October 6, 2014. *Stock & Associates, Inc. v. Stuart McLeod and McLeod Development Company*, No. 70335-8-1. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

The issues presented below pertain to the trial court's failure to (a) provide a quantum meruit jury instruction as a necessary companion to a breach of contract jury instruction and (b) the resulting deprival of Stock's right to receive a jury verdict on a legally recognized ground for relief in a case where facts presented justified the quantum meruit remedy.

Accepting an argument from the Respondent Brief, the Court of Appeals faulted Stock for not taking exception during trial to the trial court's failure to give the proposed instruction on quantum meruit. However, the discussion of record shows the trial court provided the court's instructions to counsel before rebuttal witnesses, cut off Stock's counsel after asking for objections, postponed taking exceptions, and then

rushed to finish the case without ever affording the opportunity to study the instructions and record objections.

The Court of Appeals further erred when it found any error to be harmless. The Court of Appeals reached this conclusion by relying on a jury instruction that provided a mere summary of claims alleged by parties that was submitted with the anticipation that both breach of contract instructions and quantum meruit instructions would be given as defined claims for jury resolution. However, because the trial court gave only the specifically defined breach of contract instruction and the verdict form only asked for rulings based on contract theories, Stock was deprived of the opportunity to argue or obtain a quantum meruit award. The jury had no instruction authorizing them to base a ruling on quantum meruit despite the fact that testimony at trial established that a contract was not entered and extra work was performed.

1. Violating CR 51(f), the trial court never "afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction."

(a) The trial court satisfied the first obligation under CR 51(f) by supplying "counsel with copies of its proposed instructions which shall be numbered." However, rather than afford an opportunity to study and record objections, the Court directed: "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."

(b) The court never afforded that opportunity. Instead, immediately upon conclusion of Stock's handling of its rebuttal witness, and before affording time to study and record objections to proposed instructions, the trial court directed: "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."

(c) The Court of Appeals cited *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000) in support of its ruling that Stock waived any objection; however, the Court of Appeals decision is in conflict with that cited case.

(i) "Goehle complains in her brief that she was prejudiced by the trial court's rush to finish the case and informs us that the trial court precluded discussion of the instructions on the record. ...But she has not pointed to any discussion in the record that indicates that the trial court rushed the parties or that the parties were surprised, or made objections to, the pace of the proceedings." In contrast to the facts in *Goehle*, here the record shows the trial court postponed taking exceptions, rushed to finish, and afforded no opportunity to make objections in the absence of the jury by directing counsel to move straight to rebuttal witnesses and then straight to jury instructions and closing arguments.

(ii) *Goehle* held: "Had the trial court here prevented Goehle's attempt to state her objections and grounds on the record, we would have a different story on appeal." This Petition is that different story. The record shows the trial court postponing and skipping exceptions. Moreover, the record also shows the trial court cutting off Stock's counsel right when counsel started to state "but if" exceptions. After distributing instructions, the trial court asked: "And are you prepared to make any exceptions at this point?" "[Counsel for Stock]

> 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—" "[THE COURT] Tell you what we'll do. Let's go ahead with the testimony."

2. The Court of Appeals erred by ruling that Stock waived error regarding the omission of a proposed quantum meruit instruction. The ruling is the logical fallacy "denying the antecedent" or "begging the question." Stock did not object because the trial never afforded the required opportunity in the absence of the jury to study and record objections to proposed instructions. Washington cases require objections be made to preserve issues for appeal which takes as a condition precedent the trial court's obligation under CR 51(f) to afford that opportunity.

3. The Court of Appeals erred by considering briefing regarding CR 51(f) improper for a reply brief. After Stock appealed the failure to provide the requested instruction on quantum meruit, Respondent then raised an argument in response alleging waiver as a defense to Stock's appeal. Stock addressed that defense in reply, specifically citing to both CR 51(f) and also directions from the court that resulted in affording no opportunity to object. While our courts have held that new grounds for reversal are not properly asserted for the first time in reply, our courts have never deprived an appellant of the opportunity to use a reply brief to refute a defense presented for the first time in a respondent's brief. The Court of Appeals should have rejected McLeod's waiver argument based on the trial court's failure to satisfy CR 51(f), and then resolved the question of whether a quantum meruit instruction was necessary based on the facts presented at trial.

4. The failure to give a proposed quantum meruit instruction, identifying it as a cause of action, was reversible error. The Court of Appeals correctly summarized the pertinent facts: "After Stock expressed concern that they had not finalized the contract, McLeod asked the parties to focus on the project, not the contract. He testified at trial, '[T]hey

> expressed some concern about not getting paid and I said that I would take care of them. And I did take care of them.'" This testimony combined with evidence of extra work performed for the benefit of McLeod but not paid for was sufficient for a properly instructed jury to award contract damages in quantum meruit. However, that specific instruction identifying quantum meruit as a cause of action with required elements was not given to the jury. Instead, the jury was left with an inaccurate summary of what the parties alleged, and a specific instruction form the court defining rights only in terms of agreed contracts.

D. STATEMENT OF THE CASE

This Petition for Review arises from a jury trial where testimony established that, during contract negotiations, the parties stopped focusing on their contract and focused on the design of a construction project due to pressing demands. As the Court of Appeals acknowledged, when it was all said and done, McLeod "did not pay the additional service requests" after assuring he "would take care of them" when he directed Stock to "focus on the project, not the contract." Despite the admitted absence of an agreed contract, and the admitted performance of additional work for the benefit of McLeod, the trial court declined to give a necessary instruction on quantum meruit recovery. The trial court compounded the error by failing to afford counsel an opportunity to study the court's instructions and record objections per CR 51(f).

Petitioner-Appellant-Plaintiff Stock & Associates, Inc. ("Stock") 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 individually and though his company McLeod Development Company (collectively, "McLeod").[2]

McLeod hired Stock to provide architectural services for a Kirkland project to which the parties refer as the Lake Street Place project.[3] It 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 had previously worked with McLeod on other projects, including the restaurant Hector's and a nine unit apartment building among others.[5] In particular, McLeod had a trusting relationship with Shelly Stock of Stock & Associates.[6]

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[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.
[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.

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 had never worked with Jim Alekson on any prior projects.[9] At Alekson's request, in October 2007 Stock provided McLeod 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]

Later, Stock 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 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

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[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.
[13] See Ex. 208.

("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] McLeod expressed frustration that rather than working on the project Mark Smedley of Stock wanted to work on reaching an agreement on the form of contract.[19] During a meeting about the impasse in reaching an agreed contract, McLeod directed Stock to start working.[20] Rather than

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[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.
[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.

finalize a contract, he told Bruce and Shelly Stock of Stock & Associates that he would "take care of" them.[21]

Stock 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 continued to work on the project until McLeod directed it to cease work in December 2008.[23]

McLeod instructed Stock to first bill the portion of the project as it had been priced initially.[24] Stock 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 was requesting compensation for the 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]

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[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.
[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.

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 billed for the extra work beyond the scope of the project.[31] The billings for extra work were sent out in the form of Additional Service Requests ("ASR").[32] Relying on the contract form that was never agreed upon and executed, McLeod did not pay any amounts on the bills for its ASRs, even amounts not disputed.[33] The matter went to trial.

In submitting proposed jury instructions, Stock asked the trial court to instruct the jury about breach of contract and also to give an instruction

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[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.
[32] *Id.* See Ex. 138-143, 235.
[33] RP, Smedley at p.110 ll.15-17.

regarding quantum meruit recovery.[34] 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 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. Stock proposed both instructions.

The Court rejected Appellant's proposed instruction on quantum meruit but inadvertently left quantum meruit language within a summary of claims that anticipated the jury being given specific breach of contract and also a specific quantum meruit instruction. However, the jury was not given the quantum meruit instruction as a legal ground for recovery for services performed.[35] Instructed specifically about only a breach of an agreed contract as a recognized cause of action, the jury did not award damages on ASRs.[36]

Prior to instructing the jury, hearing closing arguments, and closing the case, the trial court failed to ever afford an opportunity to study and record exceptions or objections to the court's jury instructions. The Court of Appeals provided the following record for the discussions

[34] See generally Plaintiff's proposed jury instructions, CP 64-119, and Instruction 27 on Quantum Meruit at CP 103.
[35] CP 362-86.
[36] CP 355-57.

that transpired when the trial court provided the numbered instructions at the time counsel was ready for rebuttal witnesses:

> THE COURT: And are you prepared to make any exceptions at this point?
> [Counsel for Stock]: 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**—
> 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 if there are any.

RP (Nov. 5, 2012) at 3 (emphasis added). Immediately upon conclusion on the rebuttal witnesses, counsel having been busy with examinations and having been afforded no time to review the instructions, without dismissing the jury to create an opportunity to take exceptions, the trial court directed:

> 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 (Nov. 5, 2012) at 4. Despite the trial court's earlier comment about taking exceptions later, the court never afforded counsel an opportunity to study instructions and record objections in the absence of the jury.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court when one or more of the following criteria are met:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Review is justified under those criteria. For #1 and #2, as discussed herein, the failure to give a quantum meruit instruction is contrary to this Supreme Court's decision in *Bignold.* In addition, the Court of Appeals handling of CR 51(f) resulted in a conflict with the Court of Appeals decision in *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000), as identified in Issues Presented. Moreover, the Court of Appeals opinion about issues included in reply briefing is also in conflict with existing authorities. For #4, the right to pursue remedies under quantum meruit theories is a substantial public interest that has been severely impaired by overextension of the *Hensel Phelps* case, and this Supreme Court now has a chance to reset the correct course and enforce long established law.

This Supreme Court has not yet ruled on CR 51(f). This Petition for Review affords this Supreme Court the opportunity to correct confusion that now exists between the decision below and that issued in

Goehle, enforce the rule as written, and require that trial courts meet their burdens. The rule plainly imposes a burden on the trial court:

> Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of he jury to make objections to the giving of any instruction and to the refusal to give a requested instruction....

CR 51(f) (Emphasis added). The trial court failed to satisfy that requirement and there should be issue about whether Stock waived an objection by virtue of not making an objection in a trial where no opportunity to make objections in the absence of the jury was afforded. Before counsel can waive an objection, counsel must be afforded the precedent opportunity to study proposed instructions and make exceptions in the absence of the jury.

This petition presents an opportunity for the Supreme Court to bring clarity to Washington law about the continued existence of quantum meruit. Such clarity is desperately needed. A court of appeals decision, *Hensel Phelps Constr. Co. v. King Cty.*, 57 Wn. App. 170, 787 P.2d 58 (1990), is too often assumed to have sounded the death-knell for quantum meruit. It is not surprising the trial court declined to even give a quantum meruit instruction. Though not surprising, it was error nonetheless. This Supreme Court's earlier decision in *Bignold v. King County,* 65 Wn.2d 817, 826, 399 P.2d 611 (1965) remains controlling law. The construction

industry in particular is in dire need of this Court's ruling regarding the limitations of *Hensel Phelps Constr. Co. v. King Cty.* and the continued viability of the quantum meruit remedy.

In *Bignold*, King County appealed a trial court decision awarding a road construction contractor 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).

When there are failures in contract formation, as was the case in this action, 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"). Contracts implied in fact 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.

By refusing to give a quantum meruit instruction, the trial court implicitly accepted McLeod's argument that the only rights to recover compensation must arise from the contract negotiations. This tendency is pervasive in the post-*Hensel Phelps* construction environment. Indeed, 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, quantum meruit as a ground for entitlement to compensation would be governed and foreclosed by *Hensel*

Phelps Constr. Co. v. King Cty., 57 Wn. App. 170, 787 P.2d 58 (1990). However, because the facts in this case are starkly and squarely different than in *Hensel Phelps*, this Petition for Review presents the Supreme Court with a much needed opportunity to correct the course Washington law has taken and restore the long established rights held by individuals under theories of quantum meruit.

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). Here, the parties admit that rather than focus on the contract, due to project demands they chose to focus on the project and did not complete their contract negotiations or reach a final agreement on all terms. Stock was entitled to request quantum meruit recovery. The Court of Appeals found the omission harmless based on a summary instruction that identified allegations made by the parties where quantum meruit language remained, but the omission of the actual quantum meruit instruction as a recognized legal theory was not harmless. It was error that made it impossible for Petitioner to argue and for the jury to award damages in quantum meruit using the verdict form provided where he only definitions from the court of legal rights pertained to rights established by contract agreements.

The Court of Appeals never directly addressed the question of whether the submitted quantum meruit instruction should have been given. This Petition for Review affords this Supreme Court the opportunity to reverse the Court of Appeals, affirm that *Bignold* remains the law of Washington, guide trial courts to limit their applications of the court of appeals decision in *Hensel Phelps*, and confirm that quantum meruit instructions are appropriate in cases such as this one.

The Court of Appeals went too far in its inclination to affirm the trial court, even faulting Stock for arguing the CR 51(f) issue in its reply rather than opening brief. That ignored the fact that the basis for reversal ultimately must be the failure to give a necessary jury instruction. Respondent presented the waiver argument in his brief. Petitioner addressed it in reply. It is a startling notion for the Court of Appeals to have said that Petitioner's reply to the respondent's brief should have been made in the opening brief. Our caselaw acknowledges that briefing will naturally lead to developments in the arguments and have allowed a new case to be cited in a reply, *see Brutsche v. City of Kent* at 671, n3., and new issues that are an "elaboration of the argument" to be included in replies, *see In Re Guardianship of Cornelius*, 181 Wn. App. 513, 530, 326 P.3d 718 (2014). Here, the appeal assigned error to the trial court's failure to give a necessary instruction. Respondent's argument about whether that error was preserved is not a separate issue, but is subsumed in the issue appealed. It was contrary to other appellate rulings for the Court of Appeals to hold that the CR 51(f) issue was not proper in reply. While there is case authority requiring that grounds for reversal of a trial court be presented in the opening Appellant' brief, those cases do not stand for the proposition that a party may not cite authority in reply to refute new arguments raised in a respondent's brief.

F. CONCLUSION

This Petition for Review should be granted so this Supreme Court can provide controlling guidance on CR 51(f), correct contrary rulings by the Court of Appeals about CR 51(f), correct a now contrary ruling by Court of Appeals regarding issues briefed in reply, reset Washington law with regard to quantum meruit by reinforcing *Bignold* and limiting *Hensel Phelps* and thereby cure a pervasive malady in the state's construction industry, and allow justice to a party who deserved a day in court. A jury should determine Stock's rights under the long recognized quantum meruit remedy for contracts implied-in-fact. Stock performed a project admirably trusting McLeod to honor his word without an agreement. This issue is of substantial public importance because this petitioner is one of many who suffer the same injustice when our courts do not recognize the remedy of quantum meruit. Until this Court reinforces *Bignold* and establishes the limits of *Hensel Phelps*, that injustice will continue to be pervasive.

DATED this 5th day of November, 2014.

THE COLLINS LAW GROUP, PLLC

By _____
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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STOCK & ASSOCIATES, INC., a Washington corporation, Appellant, v. STUART McLEOD, an individual, and McLEOD DEVELOPMENT COMPANY, a Washington company, Respondent.	NO. 70335-8-I DIVISION ONE UNPUBLISHED OPINION FILED: October 6, 2014

Lau, J. – Stock & Associates sued Stuart McLeod (McLeod) and McLeod Development Company (MDC) for sums allegedly owed under a professional services contract. The jury awarded Stock damages on only one out of the seven of its additional service request claims. For the first time on appeal, Stock challenges the trial court's failure to instruct the jury on its alternative quantum meruit theory. Because Stock failed to take exception to that instruction, the error is waived. And because the error, if any, of allowing the jury to consider evidence of MDC's counterclaim is harmless, we affirm the judgment entered on the jury's verdict.

FACTS

In May 2007, McLeod hired Stock on behalf of MDC to provide architectural services in connection with a proposed mixed-use development in Kirkland, Washington. Stock agreed to provide design services and assigned architect Mark Smedley to manage the project. McLeod hired Jim Alekson to manage the project on behalf of MDC.

In late November, Smedley gave Alekson an unmodified version of a standardized contract entitled "AIA Document B151 – 1997" (Form B151). He subsequently gave Alekson an "Exhibit A" and an "Attachment B." Exhibit A contained Stock's "Lake Street Mixed-Use Fee Proposal Breakdown." The proposed fee was $1,414,948. Attachment B contained a narrative "intended to clarify the scope of the Architectural Services." On January 2, 2008, Smedley sent McLeod an invoice for services performed during October 2007. Along with the invoice, Smedley included a narrative stating, "We have now begun billing towards the Main Contract that we proposed to you and Jim Alekson." The main contract had not been finalized. Smedley anticipated that Alekson would provide feedback on the Form B151, Exhibit A, and Attachment B.

On January 12, 2008, Alekson proposed several modifications to the Form B151. Alekson wrote in an e-mail, "If you have any questions or require clarification of any of the suggested amendments to the document, please call or email."

After Stock expressed concern that they had not finalized the contract, McLeod asked the parties to focus on the project, not the contract. He testified at trial, "[T]hey expressed some concern about not getting paid and I said that I would take care of

them. And I did take care of them." Report of Proceedings (RP) (Nov. 1, 2012) at 5. Bruce Stock, a principal at Stock, testified that McLeod told him at a January 15, 2008 meeting that the parties "had a business relationship," that they "didn't need a contract," and that MDC would "take care" of Stock. RP (Oct. 30, 2012) at 65.

Stock continued to work on the project until December 2008, when McLeod directed it to cease work. During this period, Stock continued to bill MDC based on the $1,414,948 base fee originally proposed in Exhibit A. On September 24, 2008, however, Stock's invoice for April 2008 included five additional service requests, representing "$193.241.44 in additional services billings" not included in the originally proposed contract. After the project terminated, Stock's invoice included seven additional service requests totaling $357,825.50. MDC ultimately paid Stock $1,098,043, representing 82.10 percent of the base fee originally proposed in Exhibit A. MDC did not pay the additional service requests.

On December 17, 2008, Alekson wrote in an e-mail to Smedley, "It has come to our attention that Stock & Associates is not paying the sub consultants to this project. This potentially harms Stuart [McLeod's] unblemished reputation for timely payment of costs incurred in all of his business operations. This is not acceptable." In June 2011, MDC entered into a settlement agreement with Peterson Strehle Martinson, Inc. (Peterson). The agreement described Peterson as a company engaged by Stock "to perform structural engineering services on behalf of McLeod." Under the agreement, MDC agreed to pay Peterson $25,000.

In September 2010, Stock sued McLeod and MDC for breach of contract. Stock sought money damages premised on the defendants' alleged "failure to pay for

services." McLeod and MDC counterclaimed, alleging breach of contract arising from Stock's failure to pay Peterson. Prior to trial, Stock proposed an instruction that would allow the jury to award it damages under a quantum meruit theory. The trial court declined to give the instruction. The jury found that Stock failed to prove a breach of contract. It awarded Stock damages for MDC's nonpayment of additional service request 6, worth $9,462.50. It declined to award damages for the other additional service requests. On the counterclaim, the jury awarded McLeod and MDC $25,000. Posttrial, on Stock's motion, the court vacated the $25,000 award.[1]

In April 2012, the trial court entered a final judgment awarding Stock $9,462.50, representing the value of the sixth additional service request. Stock appeals.

ANALYSIS

Stock argues that the trial court erred when it declined to give its proposed jury instruction on quantum meruit[2] as a quasi-contract remedy. Before trial, Stock proposed the following instruction:

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[1] The trial court ruled, "While the jury could legitimately find that plaintiffs violated the Fixed Fee Agreement by submitting [Peterson's] invoice(s) as an ASR, there was no basis for finding that plaintiff's failure to pay PSM violated any agreement between plaintiff and defendants."

[2] Quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact.

> 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 on the part of the parties to contract with each other. The services must be rendered under such circumstances as to indicate that the person rendering them expected to be paid therefor, and that the recipient expected, or should have expected, to pay for them.

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.

Stock claims the failure to give this instruction prevented the jury from deciding whether to award Stock the value of services provided to MDC regardless of whether there was a contractual agreement. But Stock waived this claim of error by failing to take exception to the trial court's failure to give this instruction.

The principle is well settled. If the trial court fails to give a proposed instruction, the instruction's proponent must take exception to that failure using the procedure in CR 51(f).[3] Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 614, 1 P.3d 579 (2000). CR 51(f). This procedure ensures that the court "is sufficiently apprised of any alleged error in the instructions so that the court is afforded an

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In other words the elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, (3) the defendant knows or should know the plaintiff expects payment for the work.

Young v. Young, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (internal citations omitted) (quoting Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)).

[3] CR 51(f) provides: "Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made."

opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial." Goehle, 100 Wn. App. at 615.

"'The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.'" Goehle, 100 Wn. App. at 615 (quoting Walker v. State, 121 Wn.2d 214, 217, 848 P.2d 721 (1993)). "The objection must apprise the trial judge of the points of law involved and where it does not so advise the court on any particular point of law, those points will not be considered on appeal." Haslund v. City of Seattle, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976).

Here, the record shows Stock took no exception when the trial court declined to include its proposed quantum meruit instruction in the court's instructions to the jury:

> 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 they have them?
> THE CLERK: Yes, there's a copy that (inaudible) next to them—
> [Counsel for McLeod]: Oh, thank you.
> THE COURT: And are you prepared to make any exceptions at this point?
> [Counsel for Stock]: 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.
> [Counsel for McLeod]: I don't have any that I'm aware of.
> THE COURT: Okay. Then I think we can bring in the jury, and we'll go ahead and make copies of the instructions now.

RP (Nov. 5, 2012) at 3. After Stock's rebuttal witnesses testified, the trial court proceeded to read the instructions to the jury.

> [Counsel for Stock]: No further witnesses, Your Honor.
> THE COURT: . . . Mr. Brain, anything further?
> [Counsel for McLeod]: 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 (Nov. 5, 2012) at 4. By failing to take exception below, Stock waived its present assignment of error. Haslund, 86 Wn.2d at 614.

For the first time in its reply brief, Stock faults the trial court. He claims the court deprived it of an opportunity to object or to take exception to the court's jury instructions. According to Stock, this violated the procedure outlined in CR 51(f) and requires reversal. We decline to consider this argument; Stock may not challenge the trial court's compliance with CR 51(f) for the first time on appeal—and not for the first time in its reply brief. RAP 2.5(a); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Nevertheless, the record fails to support Stock's assertion. Stock's counsel had several opportunities to take exception to the court's failure to give the instruction. For example, as quoted above, Stock's counsel said that he did not believe he would take exception at any point. He later remained silent as the trial court read the instructions to the jury and then excused them to begin deliberations. Nothing prevented Stock from asking the court to hear its exception to the instruction. In Goehle, we found that counsel waived any error under similar circumstances:

> Goehle complains in her brief that she was prejudiced by the trial court's rush to finish the case and informs us that the trial court precluded discussion of the instructions on the record. She claims the trial court prevented her from pointing out instructional error. But she has not pointed to any discussion in the record that indicates that the trial court rushed the parties or that the parties were surprised by, or made objections to, the pace of the proceedings. More significantly, she fails to point us to anything in the record that suggests that she

> attempted to place her instructional objections and grounds on the record but was cut short by the trial court. Had the trial court here prevented Goehle's attempt to state her objections and grounds on the record, we would have a different story on appeal.

Goehle, 100 Wn. App. at 616. As in Goehle, Stock points to nothing in the record to show it attempted to take exception to the court's failure to give the instruction—however vague—at any point below. We find Stock's attempt to assign fault to the trial judge for its own failure to preserve the quantum meruit instruction claim unpersuasive.[4]

Even if we assume trial court error, the failure to give the quantum meruit instruction constitutes harmless error. "An erroneous jury instruction is harmless if it is 'not prejudicial . . . and in no way affected the final outcome of the case.'" Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, Dist. 160, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). The record shows that the trial court did instruct the jury based on an instruction proposed by Stock, which allowed it to argue its quantum meruit theory. Instruction 12 provided:

> If you find that extra work was requested or authorized by the owner, and if you find that there was an agreement between the parties as to the price to be paid for such extras, then the contractor is entitled to receive the agreed price. If the extra work was requested or authorized by the owner and there was no

[4] The closing remarks are not in our record. We assume that Stock's counsel used instruction 12 to argue its quantum meruit theory of recovery. In addition, it is likely the trial court declined to give the quantum meruit instruction because it duplicated instruction 12's quantum meruit language underscored above.

> agreement about price, then the contractor is entitled to be paid the reasonable value of the extra work.
>
> If you find that extra work not requested or authorized by the owner, then the contractor is not entitled to be paid for the extra work.

RP (Nov. 5, 2012) at 16 (emphasis added). This instruction permitted Stock to argue that it was entitled to recover the reasonable value of all the additional service request work it performed for MDC beyond the scope of the base contract. Under these circumstances, the error here, if any, had no effect on the jury's verdict.

Evidentiary Challenge

Stock's second assignment of error states, "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." Br. of Appellant at 6. This challenge relates to McLeod's counterclaim, which sought reimbursement for the $25,000 payment MDC made to one of Stock's subcontractors. The jury awarded McLeod $25,000, but the trial court later vacated the award on Stock's motion. Stock now argues that the trial court's admission of evidence relating to the subcontractor payment "confused the jury about the parties having a contractual relationship and thereby constituted a statement on the evidence."[5] Br. of Appellant at 28 (boldface omitted). This challenge fails for several reasons.

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[5] This assertion is unclear as to whether Stock means the constitutional prohibition against comment by the court on the evidence. That prohibition "'is to prevent the jury from being influenced by the knowledge conveyed to it by the court or to the court's opinion of the evidence submitted.'" City of Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971) (quoting Heitfeld v. Benevolent & Protective Order of Keglers, 36 Wn.2d 685, 699, 220 P.2d 655 (1950)). Nowhere in Stock's briefs does it explain its "statement on the evidence" claim. "Passing treatment of an issue or lack of

First, Stock fails to specify what evidence it believes the trial court improperly admitted. The same is true regarding its allegation that the trial court allowed the jury to hear improper statements about "contract obligations and alleged breaches." Br. of Appellant at 29. Stock never identifies what "statements" it believes were "improper." We typically do not consider inadequately briefed arguments. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

Second, Stock cites nothing in the record supporting its assertion that "allowing this argument and submitting this claim to the jury caused a substantial likelihood of prejudice and confusion." Br. of Appellant at 29. Its speculative allegation of jury confusion lacks any factual basis. And as McLeod correctly points out, "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." Resp't's Br. at 40. It is undisputed that Stock requested no such instruction at trial.

Finally, Stock relies on inapposite authority. It relies solely on State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012), which it cites for the proposition that "[b]ecause 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.'"[6] Br. of Appellant at 29 (quoting

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reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996).

[6] Stock quotes only a portion of the sentence. The full quotation, read in context, states:

> If a defendant establishes that the State made improper statements, then we review whether those improper statements prejudiced the defendant under one of two different standards of review.

Fuller, 169 Wn. App. at 812). Fuller involved a claim of prosecutorial misconduct. The court explained that because prosecuting attorneys are quasi-judicial officers, they have a duty to ensure that defendants receive a fair trial. Fuller, 169 Wn. App. at 812. It went on to discuss the standards of review applicable to a claims of prosecutorial misconduct. Stock fails to explain how Fuller applies to the present case. It does not.

For the first time in its reply brief, Stock argues that the trial court erred "both in denying Stock & Associates' Motion in Limine to exclude evidence and argument of the [subcontractor] settlement and in denying Stock & Associates' motion for directed verdict on the same issue . . . ." Reply Br. of Appellant at 21. It also argues for the first time that the counterclaim "unduly goes to credibility issues." Reply Br. of Appellant at 25. These untimely claims merit no consideration. Cowiche Canyon, 118 Wn.2d at 809.

CONCLUSION

We conclude Stock waived its quantum meruit instruction by failing to take exception when the trial court declined to give it. In any event, the trial court gave instruction 12 to the jury, thereby allowing Stock to argue its quantum meruit theory.

> First, where the defendant preserved the issue by objecting at trial, we evaluate whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury. But if the defendant failed to object to the improper argument at trial, we employ a different standard of review. Under this second, heightened standard, the defendant must show that the State's misconduct "was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."

Fuller, 169 Wn. App. at 812-13 (citations omitted) (quoting State v. Emery, 174 Wn.2d 742, 761-62, 278 P.3d 653 (2012)).

And the error, if any, in allowing MDC to present evidence of its counterclaim constitutes harmless error. Stock makes no showing that the evidence affected the jury's verdict.

Affirmed.

WE CONCUR:

PROOF OF SERVICE

I certify under penalty of perjury that on the 5th day of November, 2014, I caused to be served a copy Petition for Review via email per agreement of the parties on the following:

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Dated at Renton Washington this 5th day of November, 2014.

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