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No. 77288-1-I

SUPREME COURT

OF THE STATE OF WASHINGTON

KAES ENTERPRISES, LLC, Appellant,

v.

KOPPENBERG ENTERPRISES, INC., Respondent.

(King County Superior Court Cause No. 15-2-19445-3)

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Kaes Enterprises, LLC ("Kaes") petitions this Court to accept review of the Court of Appeals decision identified in Section II of this petition.

II. THE COURT OF APPEALS DECISION

Kaes requests this Court to review the Court of Appeals, Division 1 opinion in Kaes Enterprises, LLC v. Koppenberg Enterprises, LLC, Docket No. 77288-1-I, filed November 26, 2018. A copy of this decision, terminating review, is attached as Appendix A. The Court of Appeals decision affirmed the Trial Court, ruling in favor of Koppenberg Enterprises, LLC at the conclusion of trial on the merits.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ruling that Kaes' objection to the unpled defenses of Rejection and Revocation by Koppenberg was waived prior to trial?

2. Did the Court of Appeals err by failing to apply the precedent of **Cervitor Kitchens Inc. v. Chapman**, 82 Wn.2d 673, 515 P.2d 25 (1973) to the facts of this case?

3. Did the Court of Appeals err failing to recognize that Kaes demanded, per RCW 62A.2-605, that Koppenberg provide a detailed written statement explaining why each niche cover was rejected?

4. Did the Court of Appeals err by finding that the Federal Acquisition Regulations (FARS) were incorporated into the purchase orders?

5. Did the Court of Appeals err in allowing parol evidence of an alleged "trade usage" or "course of performance" that contradicts the written terms of the agreement between Kaes and Koppenberg?

6. Did the Court of Appeals err by failing to award Kaes damages for the retainage funds that Koppenberg admitted it withheld from Kaes?

7. Did the Court of Appeals err by finding that the purchase orders required Kaes to replace the nonconforming niche covers without charge, regardless of Koppenberg's installation of the niche covers?

IV. STATEMENT OF THE CASE

This case involves application of Washington's Uniform Commercial Code (UCC) and the decision in **Cervitor Kitchens Inc. v. Chapman**, 82 Wn.2d 673, 515 P.2d 25 (1973). More specifically, this case involves memorial plaques made of marble, called "niche covers" or "niche fronts," manufactured by Kaes, that were used at national cemeteries across the country to honor United States' veterans. RP Vol. 1 pg. 54-55.

A few years after his retirement from the Air Force is a former Level III federal contracting officer, Mr. Kaes formed Kaes Enterprises, LLC for, amongst other endeavors, supplying marble niches to the government. RP Vol 1, pg. 52-54. Memorial Program Services ("MPS") is the government agency that generally purchases materials like these niches directly. RP Vol 1, pg. 58-59. When niches are needed at the individual cemeteries, MPS would supply the niches from its stocked

materials. RP Vol 1, pg. 59. After several unsuccessful bids to supply marble directly to the government, Kaes focused on supplying marble niches to the contractor responsible for installing the marble niches at the national cemetery sites. RP Vol 1, pg. 64. One such contractor tasked with obtaining and installing marble niches was Koppenberg Enterprises, Inc. RP Vol 1, pg. 64-65.

Kim Koppenberg is the owner of Koppenberg Enterprises, which focuses generally on erecting columbariums at cemeteries. Koppenberg's employee, Carlton Fuqua, describes a columbarium as a precast concrete unit -- that looks like a plastic ice cube tray -- placed in cemeteries or churches as an interment for urns. RP Vol. 3 pg. 356. Granite or marble niches covers, like the ones supplied by Kaes, are placed over the open face of the units.

Mr. Koppenberg estimates that his company has worked on over a hundred columbariums projects. He further estimates that in ninety percent (90%) of those projects, the government furnished Koppenberg with the niches covers to install. RP Vol. 4 pg. 466. The other ten percent (10%), Koppenberg was contracted to obtain the niche covers from a supplier directly. RP Vol. 4 pg. 467.

In the fall of 2010, Chris Kaes and Margie Deck, met with Kim Koppenberg to discuss various upcoming opportunities. RP Vol. 1 pg. 66-

67. The meeting was fruitful and by close of November 2010, Koppenberg simultaneously submitted purchase orders to Kaes for marble niche covers for three projects. These orders were for Koppenberg's columbarium projects for the Bakersfield National Cemetery (CA), Eagle Point National Cemetery (OR), and Fort Rosecrans National Cemetery (CA) (sometimes referred to as "Miramar"). RP Vol. 1 pg. 71.

Koppenberg was a subcontractor on these projects. Kaes, in turn, was merely a supplier. Samples were supplied to Koppenberg and purchase orders were drafted and signed by Mr. Koppenberg, and addressed to Kaes' Puyallup location. After Koppenberg placed its order with Kaes, Kaes cut the marble to size, drilled the holes and honed the finish on each of the niches. This occurred at a quarry in Alabama. RP. Vol. 1 pg. 55-56. Thereafter, each niche cover was individually inserted into a polyproline (plastic) sleeve, they were packed in a padded crate, separating each niche to protect them to avoid shipping damage. RP. Vol. 1 pg. 120-121.

The crates were "drop" shipped to the individual cemetery sites as directed by Koppenberg. RP. Vol. 1 pg. 125. Upon delivery, Koppenberg was responsible to arrange for the inspection of the materials with a Resident Engineer, who is a government representative. For example,

Koppenberg, for the Bakersfield and Miramar projects,[1] was required to inspect as follows:

> "Coordinate delivery of the niche covers with the Resident Engineer. All marble shall be received and unloaded at the site with care in handling to avoid damaging or soiling. Unload, **inspect**, store, and protect niche covers **after delivery to the job site** and **prior to erection**."

(CP 20 - Ex. 19 and CP 20 - Ex. 30). [Emphasis Added].

Koppenberg testified there was no inspection by the government at the time of delivery, as was required by the prime federal contract; rather, Koppenberg merely visually inspected the crates to make sure the crates were not damaged during transit. RP. Vol. 4 pg. 451.

After delivery and acceptance of the niches by Koppenberg, it began installing the niche covers at the projects. Koppenberg found no grounds for rejection and proceed to install all niches without reservation. Koppenberg then presented his completed subcontract construction projects as completed for to his prime contractor who accepted and paid Koppenberg. Following installation, government inspectors allegedly rejected some of the marble niches covers for chips, scratches, cracks, color and excessive veining. RP Vol. 1 pg. 143. These post-installation inspections/rejections generally form the basis of the dispute between the parties. RP Vol. 1 pg. 138, 139, 168 and 169.

[1] Eagle Point contained nearly identical language. CP 20 - Ex. 20.

When niche covers began to be returned by Koppenberg, Kaes requested from Koppenberg written documentation for "each" niche cover returned, identifying the basis for the alleged rejection; that information was never provided as promised by Koppenberg as a required condition of return. CP 20 - Ex. 187 / 241 and Ex. 32. Rather, the niches fronts were returned to the quarry had been haphazardly tossed into a general, non-specialized foam crates or any protective covers and shipped back without supporting paperwork. Lack of all original packing material (which includes the plastic sleeves and foam) was documented. Koppenberg had destroyed all of the specialized foam crates and had disposed of all protective covers since having further intent for use having accepted all materials. RP Vol. 1 pg. 148-149, Vol. 2 pg. 287, 288 and 292. With the exception of 1500 – 2000 missing niche covers.

Koppenberg had reassured Kaes that Koppenberg would file a claim with its prime contractor or the VA to preserve Koppenberg's rights and its ability to obtain compensation for the wrongfully rejected niche covers from the prime contractor. However, Kaes found out indirectly that Koppenberg never made a claim to its Prime Contractor or the VA, as the parties had discussed. RP Vol. 1 pg. 223, 224, Vol. 2 pg. 251.

A. <u>Decision Below</u>

Kaes sued Koppenberg in the King County Superior Court seeking payment for all secondary marble niche covers supplied to Koppenberg Enterprises. Following a bench trial, King County Superior Judge, the Honorable John R. Ruhl, found in favor of Defendant Koppenberg and dismissed all of Kaes' claims. Kaes appealed.

The Court of Appeals, Division 1 affirmed the trial court in its opinion filed November 26, 2018. The Court of Appeals concluded that the parties' purchase orders required Kaes to replace any nonconforming niche covers without charge, regardless of installation. The Court of Appeals held that the **Cervitor Kitchens Inc. v. Chapman**, 82 Wn.2d 673, 515 P.2d 25 (1973) did not apply, because parol evidence indicated that inspection of the covers would occur *after* installation by Koppenberg, the VA, or Koppenberg's prime contractor.

The Court of Appeals also found that Kaes waived his right to a detailed written statement explaining why each niche cover was rejected, per RCW 62A.2-605, despite demanding the same after notification that covers were being rejected.[2]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

[2] The Court of Appeals also found that Kaes waived his objection to the unpled defenses of Rejection and Revocation by Koppenberg, prior to trial. The Court of Appeals found, despite Koppenberg's admission in withholding retainage of $26,626.00, that Kaes failed to meet his burden that the retainage was owed to Kaes.

Kaes seeks review pursuant to RAP 13.4(b)(1) and (4) wherein the Supreme Court will accept a petition for review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or [...]
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A. The Court of Appeals decision is in conflict with the Supreme Court decision in Cervitor Kitchens Inc. V. Chapman, 82 Wn.2d 673, 515 P.2d 25 (1973).

The Court of Appeals erred by failing to apply the holding of **Cervitor Kitchens Inc. v. Chapman**, 82 Wn.2d 673, 515 P.2d 25 (1973) to the instant case. In **Cervitor Kitchens**, the Washington Supreme Court decided a UCC case based on facts nearly identical to the facts in Kaes v. Koppenberg.

In **Cervitor Kitchens**, Howard Chapman ("Chapman") was the prime contractor for the plumbing work in the construction of a dormitory for Pacific Lutheran University. **Cervitor**, 82 Wn.2d at 675. Chapman purchased four kitchen units from Cervitor Kitchens, Inc. which were to be installed in the university dormitory. **Id**. On May 4, 1967, Chapman received the four kitchen units from Cervitor enclosed in shipping crates or cartons. **Id**. According to the testimony, the "units themselves were **not inspected** at the time of delivery although Chapman's manager was

present when the units were delivered and noticed some minor exterior shipping damage on two of the crates." **Id**. [Emphasis Added].

Thereafter, Chapman caused the kitchen units, still enclosed in their shipping crates, to be stored in a separate room at the dormitory then under construction. **Id**. Months later, Chapman removed the kitchen units from the crates and installed them in the dormitory. **Id**.

Chapman then notified the consulting engineer that the kitchen units had been installed. The consulting engineer was an agent of the architect who in turn was an agent of Pacific Lutheran University. **Id**. "Shortly thereafter, the engineer telephoned Chapman that the units were of poor quality and did not comply with specifications. He confirmed his and the architect's disapproval to Chapman by letters dated August 18 and 25, 1967. The defects complained of were chipped and rough edges on the stove sections which did not fit properly with the adjoining surface, poorly fitted doors, a poorly installed aluminum panel along one side of the unit, and inadequate hinges on the refrigerator section." **Id**.

Chapman's manager in turn notified Cervitor that the kitchen units did not comply with the specifications and would be rejected. **Id**. Thereafter, Chapman shipped the kitchen units back to Cervitor, who refused to accept them, and they were then stored and sold for storage charges. **Id**.

Based on the above-referenced facts, the Washington Supreme Court held as follows:

> Inspection **after installation** by Mr. Bogue, the engineer, an agent of the architect who was in turn agent of the owner, Pacific Lutheran University, **has no bearing on the acceptance by Chapman**. When Chapman performed acts inconsistent with Cervitor's ownership, at that point **title passed** to Chapman. **If Chapman, as buyer of the units, was to reject them effectively, he had to do so before installation**. There is no contention the defects were not readily observable in the time interval between the uncrating of the units and their installation by Chapman. **The subsequent inspection by agents of the owner and their rejection are irrelevant to the legal dispute between Chapman and Cervitor under the facts of this case, showing installation**.

Cervitor Kitchen, 82 Wn.2d at 677. [Emphasis Added].

In the instant case, the facts developed at the trial below (like those in the **Cervitor Kitchen**) show that Koppenberg conducted no inspections of the niche covers prior to installation. At the time of delivery, however, Koppenberg would merely visually inspect the crates to make sure the crates were not damaged in transit. It was only after delivery, storage, payment[3] and acceptance of the niche covers, that Koppenberg began installing the niche covers on the projects. In fact, Koppenberg only installed covers that he felt met the specifications. RP Vol. 4 pg. 446.

[3] When the VA made its progress payment which covered amounts for the niche covers, the title passed to the VA according to FAR 52.232-5(f) "All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government[.]"

Thereafter, government inspectors, not Koppenberg, rejected various installed niche covers allegedly due to: chips, scratches, cracks, coloring of the covers and excessive veining. In this case, Mr. Koppenberg, in his own handwriting, confirmed that Koppenberg did not make the rejections of the niche covers. (CP 20 - Ex. 241).

B. The Court of Appeals decision and use of parol evidence undermines Cervitor Kitchens.

The **Cervitor Kitchens** case resolves important UCC issues regarding what it means to "accept" goods. The **Cervitor Kitchen** case recognizes two bright-line rules: (1) buyer must reject before acceptance; and (2) installation, an act inconsistent with ownership, is buyer's acceptance as a matter of law. Additionally, the **Cervitor Kitchen** decision also stands for the proposition that inspections by the buyer's customer, after acceptance, are legally irrelevant.

In this case, however, the decision of the Court of Appeals determined that: (1) Koppenberg was not required to inspect and reject the material before acceptance, (2) that Koppenberg's installation was not acceptance, and (3) rejection of covers by Koppenberg's customer, after installation, was appropriate. Stated differently, the Court of Appeals decision in this case is exactly the opposite of the Supreme Court's holding in **Cervitor Kitchen**.

To distinguish **Cervitor Kitchen**, the Court of Appeals used parol evidence of "usage of trade" and "course of performance." While the Court of Appeals was correct that the UCC allows "usage of trade" and "course of performance" to explain or supplement an agreement, such parol evidence may not contradict the agreement. RCW 62A.2-202.

Here, the Court of Appeals concluded that the alleged "usage of trade" and "course of performance," legally entitled the VA, prime contractors, and Koppenberg to inspect and reject nonconforming niche covers all the way until the final government inspection. **Appendix A, Decision Page 12.**

The alleged "usage of trade" and "course of performance," however, contradict Koppenberg's requirements, which were known to Kaes, to inspect the niche covers with the Resident Engineer after delivery and prior to installation. Specifically, on the Eagle Point project, the written specifications to Koppenberg required Koppenberg to inspect as follows:

> "Coordinate delivery of the niche covers with the Resident Engineer. All marble shall be received and unloaded at the site with care in handling to avoid damage or soiling. Unload, **inspect**, store, and protect niche covers **after delivery** to the job site and **prior to installation**." (CP 20 - Ex. 20). [Emphasis Added].[4]

[4] Mirmar and Bakersfield had nearly identical language. See CP 20 - Ex. 19 and CP 20 - Ex. 30

Clearly the Court of Appeals' "usage of trade" and "course of performance" contradict the Koppenberg's written requirement to inspect the niche covers after delivery and prior to installation. The Court of Appeals does not explain why it ignores expressed written inspection requirement from the specifications,[5] only to adopt a contradictory requirement from parol evidence.

The **Cervitor Kitchen** case creates a bright-line rule: installation of the product is acceptance as a matter of law. The Court of Appeals decision undermines the **Cervitor Kitchen** holding.

C. This petition involves an issue of substantial public interest that should be determined by the Supreme Court because of the distinction between sales under the UCC and construction contracts.

The **Cervitor Kitchens** case marks the fundamental distinction between the Uniform Commercial Code ("UCC") and general construction related services. The reason this delineation is important is because Koppenberg was responsible for both procuring the marble niche covers and then installing the covers. Kaes, on the other hand, was only involved in supplying the material to Koppenberg.

In **Arango Const. Co. v. Success Roofing**, Inc., 46 Wn. App. 314, 318, 730 P.2d 720, 722–23 (1986), the Division I of the Court of Appeals

[5] CP 20 - Ex. 19, CP 20 - Ex. 30, and CP 20 - Ex. 20.

identified the delineation between sales contracts and construction contracts. More importantly, the **Arango** set forth those cases when the UCC applied versus when general contract principals governed as follows:

> The principle that contracts for work, labor, and materials are governed by common law principles of contract, while contracts for goods are governed by the Uniform Sales Act, was again stated in **Whatcom Builders Supply Co. v. H.D. Fowler, Inc.**, 1 Wash. App. 665, 463 P.2d 232 (1969). There, Whatcom Builders had a construction contract with the City of Blaine to construct a sewage treatment plant. Whatcom also had a subcontract with Fowler to supply a pump for the plant. **Whatcom**, at 666, 463 P.2d 232. The court held that the Whatcom/Fowler contract was a contract for the sale of goods to be manufactured; therefore, that contract was within the scope of the Uniform Sales Act. The Whatcom/Blaine contract, however, was a contract for work, labor, and materials. Therefore, the general principles of contract law, not the Uniform Sales Act, applied to that contract. **Whatcom**, at 668, 463 P.2d 232.
>
> In a dispute regarding damages for delay in completion of buildings at Washington State University, our Supreme Court held that construction contracts are not governed by RCW 62A.2. **Christiansen Bros., Inc. v. State**, 90 Wash.2d 872, 586 P.2d 840 (1978). [. . .]
>
> The Lakeside and Lige Dickson contracts were governed by the Uniform Commercial Code because they were contracts for materials only; work and labor were not involved. The Success contract is not a contract for materials only; it is a construction contract for work, labor, and materials. Therefore, RCW 62A.2 does not apply[.]

Here, there is no doubt that the relationship between Kaes / Koppenberg is governed by the UCC because the purchase orders were for material only. On the other hand, Koppenberg's commitment to the prime

that Koppenberg would install the covers as part of his columbarium construction project, takes that relationship outside the UCC. Because this is a UCC matter, the **Cervitor Kitchens** case is squarely on all fours regarding the issues in this matter.

Both the Court of Appeals and Trial Court failed to recognize the important distinction between an offsite supplier of material and a construction company onsite. In this case, Washington's UCC was applicable legal framework to determine the rights and responsibilities between Kaes and Koppenberg for the supplying of marble niche fronts. The Trial Court went beyond the UCC and imposed FARs that do not relate to the supplying of material. Specifically, the Trial Court incorporated the VA's "construction" terms into the purchase orders between Kaes/Koppenberg. CP 118, ¶5.

The following is the purchase order for the Eagle Pt. project:

KAES ENTERPRISES LLC/ LEVENTINA
16707 129TH AVENUE CT E
PUYALLUP WA 983748840 USA
Attention: Margie

This is to confirm a purchase order of 3,100 marble niche fronts 11-1/4" x 15-3/4" x ¾" thick as per approved samples and specifications for this project. All materials that are supplied and rejected must be replaced unless damaged by after arrival onsite. Koppenberg Enterprises, Inc. will pay all invoices for materials onsite when Koppenberg Enterprises, Inc. are paid. Cut off dates for materials stored onsite is 25th of each month. Agreed to pricing for this project was $34.00 per piece.

Sincerely,

Kim Koppenberg, President

CP 20 - Ex. 471.

Nothing in this purchase order indicates that a third-party, rather than Koppenberg, would inspect and/or reject. Nothing in this purchase order states that after Koppenberg installs the covers, Kaes will still be liable. Nothing in this purchase order references the incorporation of construction terms. Nothing in this purchase order states when a final inspection will occur.

The Court of Appeals decision affirming the Trial Court's ruling, raises important questions about transforming a material supplier into a federal construction contractor. If Kaes was a federal construction contractor, Kaes would be required to comply with federal law, including prevailing wage rates.[6] Taken to its logical conclusion, any material that Koppenberg ordered from Home Depot or Lowe's, would also subject those companies to these federal provisions, even without any notice to these businesses. This is precisely why there must be a clear distinction between the Kaes/Koppenberg transaction, which is subject to the UCC, and Koppenberg's construction subcontractual relationship with the federal government. These are issues of substantial public interest to which the Supreme Court should address.

[6] 48 C.F.R. 22.403–1 (which is entitled "Construction Wage Rate Requirement Statute").

D. This petition involves an issue of substantial public interest that should be determined by the Supreme Court because Washington merchants need certainty in their dealings.

A Washington merchant in Kaes' position, with knowledge of the **Cervitor Kitchen** case and the requirement that Koppenberg must inspect prior to installation,[7] would be hard pressed to understand that parties unrelated to the transaction are legally allowed to inspect and reject the materials being supplied to Koppenberg and that Koppenberg has no responsibility to inspect or reject. In addition, installation of the niche covers on the job site by Koppenberg does not constitute acceptance. As such, this petition involves a matter of substantial public for Washington merchants under the UCC.

The Court of Appeals decision creates a trap for Washington merchants. Not only would a merchant need to anticipate that consumption of the product at the project site is not acceptance (despite **Cervitor Kitchen**'s holding and RCW 62A.2-606(1)(c)), but written requirements as to inspecting the product will have no meaning if the buyer ever claims, even after the fact, its customer is the ultimate decision maker.

The Court of Appeals decision states that the Trial Court provided detailed findings of the process implemented from arrival onsite through

[7] CP 20 - Ex. 19, CP 20 - Ex. 30, and CP 20 - Ex. 20.

the final inspections by the VA. However, what the Court of Appeals decision fails to recognize is the important distinction between an offsite supplier of material and a construction company onsite. Kaes is not onsite observing this process. Rather, Kaes' span of control (and observation) ends when shipped. This is why Koppenberg needs to inspect the product after delivery and prior to installation,[8] because once installed on the project both **Cervitor Kitchen** and RCW 62A.2-606(1)(c) conclude acceptance has occurred.

There is a second reason why Koppenberg's inspection after delivery important, according to the purchase orders Kaes is not responsible for any damage *after arrival onsite*. This fact has been glossed over by both the Trial Court and the Court of Appeals. The one-page purchase orders drafted and provided by Koppenberg state, "All materials that are supplied and rejected must be replaced **unless damaged by (sic) after arrival onsite**." Emphasis Added. Therefore, there is a practical reason why a baseline needs to be established to determine who is responsible for damages. If damaged prior to arrival onsite, then arguably Kaes is responsible. If damages after arrival onsite, then Kaes is not responsible.

Here, the Court of Appeals noted that the materials shipped back to

[8] CP 20 - Ex. 19, CP 20 - Ex. 30, and CP 20 - Ex. 20.

Kaes by Koppenberg of "rejected" covers were damaged by Koppenberg's handling. Specifically, the decision states, "The returned, rejected niche covers arrived at the quarry *with serious damage* because Koppenberg shipped them without their original packaging." **Appendix A, Decision page 6**. This is consistent with Mr. Kaes testimony that the returned material was trashed and most of the material was merely thrown in the crate, contrary to RCW 62A.2-602(2)(b),[9] and Kaes could not ascertain the reason for their rejection. RP Vol. 2 pg. 288, 292, and 336. It was Koppenberg's burden to prove how each niche cover allegedly did not meet the specification, not Kaes. In fact, beginning in September of 2011, Kaes sent correspondence to Koppenberg demanding written documentation, on a per piece basis, identifying the basis for each rejection, in accordance with RCW 62A.2-605(1)(b).

The Court of Appeals decision holds that Kaes was not entitled to any explanation, because he somehow waived the requirement. As such, the Court of Appeals decision makes Kaes liable until final inspection of the niche covers by some unknown third-party. This essentially relieves Koppenberg from any responsibility for how the niche covers are handled

[9] "(b) If the buyer has before rejection taken physical possession of goods in which he or she does not have a security interest under the provisions of this Article (RCW 62A.2-711(3)), **he or she is under a duty after rejection to hold them with reasonable care** at the seller's disposition for a time sufficient to permit the seller to remove them[.]" [Emphasis Added].

following their delivery to the site.

The Court of Appeals decision creates nearly unlimited liability for the material supplier. The decision states, "the purchase orders legally entitled the VA, prime contractors, and Koppenberg to inspect and reject or revoke acceptance of nonconforming niche covers until final inspection." **Appendix A, Decision page 12.** This is particularly concerning because the three simultaneous orders each had an allotment, in the hundreds, of spare niche covers. These spare niche covers are held for future use in the even a cover needs replacing. What if a spare niche cover is installed five years from now and the VA disapproves of it? The Court of Appeals decision would seemingly hold that Koppenberg had still *not* accepted the niche cover and Kaes would be responsible to replace it. This would create significant liability exposure and uncertainty for Washington merchants; contrary to the UCC policy to simplify, clarify, and modernize the law governing commercial transactions. See RCW 62A.1-103(a)(1).

VI. CONCLUSION

If the Court of Appeals decision is upheld, then Washington's UCC and the decision in **Cervitor Kitchens Inc. v. Chapman**, 82 Wn.2d 673, 515 P.2d 25 (1973) will be severely impacted. **Cervitor Kitchens** establishes a clear distinction between the buyer and seller's transaction,

and subsequent inspections by the buyer's end user. **Cervitor Kitchens** is the law in Washington, yet the both the Trial Court and Court of Appeals failed to follow this precedent. Washington merchants supplying materials could unwittingly be subject to government clauses which transform them into construction contractors, subject to federal contracting requirements. This creates a substantial public interest that should be determined by the Supreme Court, and therefore, this petition should be accepted for review.

RESPECTFULLY SUBMITTED this 20th day of December 2018.

DICKSON FROHLICH, P.S.

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Attorney for Appellant Kaes

VII. CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the foregoing to counsel of record as follows:

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DATED this 20th day of December ~~2018 in Tacoma~~, Washington.

Kimberly J. Lampman

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KAES ENTERPRISES, LLC, Appellant, v. KOPPENBERG ENTEPRISES, INC, a Washington corporation, Respondent.	No. 77288-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 26, 2018

CHUN, J. — Koppenberg Enterprises, Inc. (Koppenberg) held several subcontracts to erect columbaria[1] at national cemeteries for interment of United States veterans. Kaes Enterprises, LLC (Kaes) contracted to supply and ship thousands of marble memorial plaques (niche covers) to various cemeteries for Koppenberg employees to install on the columbaria. Government inspectors visited the sites and rejected many of the installed niche covers as flawed. The contracts obligated Kaes to replace rejected niche covers. As a result, Kaes replaced thousands of niche covers at significant cost. Kaes eventually brought suit against Koppenberg for breach of contract, arguing the replacement niche covers were secondary sales requiring payment from Koppenberg. After a bench trial, the trial court entered judgment in favor of Koppenberg and we affirm.

[1] Columbaria are precast concrete units erected in cemeteries and churches to inter urns. Each columbarium has multiple small compartments for urns. Each compartment has a marble plaque or niche cover.

I.
BACKGROUND

Christopher (Chris)[2] Kaes served as a federal contracting officer with the Air Force. After retiring from the Air Force, Chris worked in federal contracting and procurement for other organizations. Chris subsequently formed his own venture, Kaes Enterprises, LLC.

In December 2010, Kaes entered a teaming agreement with Levantina USA, Inc. (Levantina), a large supplier of natural stone, to bid on federal solicitations for niche covers from the Veterans Administration (VA). Kaes contracted with an Alabama marble supplier to cut the niche covers. Levantina prepared the pricing and coordinated shipping from the quarry in Alabama to the project sites.

Koppenberg held VA subcontracts to erect columbaria at veteran memorials in national cemeteries. Owner Kim Koppenberg (Kim) had identified Levantina as a potential supplier of marble niche fronts. Austin Lowrie, the commercial division manager at Levantina, informed Koppenberg all VA projects were bid under the teaming agreement and connected Chris and Kim.

For federal contracts like these veteran memorial projects, the government contracts with a prime contractor. The prime contractor then enters into subcontracts for different aspects of the projects, such as Koppenberg's installation of columbaria. Usually, Memorial Program Services (MPS)[3] supplied

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[2] This opinion refers to the individuals by their first names to distinguish them from their corporations. We intend no disrespect.

[3] MPS is a government agency that purchases materials directly from suppliers.

Koppenberg with niche covers for its columbaria projects.[4] At the time Kim and Chris met, however, Koppenberg had bid on three contracts for the National Cemetery Administration (NCA),[5] requiring subcontractor-supplied niche covers. Kim and Chris considered this an opportunity for Kaes to begin supplying niche covers for government projects.

In November 2010, Koppenberg received the subcontracts to install columbaria for veteran memorials at Bakersfield National Cemetery, Eagle Point National Cemetery, and Fort Rosecrans National Cemetery. The subcontracts required Koppenberg to provide marble niche covers. The project requirements specified size and color and directed the subcontractor to "[u]nload, inspect, store, and protect niche covers after delivery to the job site and prior to erection."

Koppenberg subsequently submitted purchase orders for Kaes to provide marble niche covers for the three projects. The purchase orders specified, "marble niche fronts 11-1/4" x 15-3/4" x ¾" thick as per approved samples and specifications for this project. All materials that are supplied and rejected must be replaced unless damaged by [sic] after arrival onsite."

Kaes first supplied Eagle Point. Kaes received the Eagle Point purchase order in November 2010. Through Levantina, Kaes obtained the niche covers from a quarry in Alabama and drop shipped them to the cemetery site for installation. Kaes used specially designed foam-lined crates for shipping, with the covers protected by thick polyplastic individual sleeves. The shipment in

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[4] Kaes had wanted to become involved as a direct supplier to the government through MPS.

[5] NCA is a department of the VA.

fulfillment of the purchase order arrived at Eagle Point in January 2011 and Koppenberg paid in full by March 3, 2011. Kaes delivered niche covers to Bakersfield on March 24, 2011, with payment by Koppenberg on June 13, 2011. Fort Rosecrans received deliveries in satisfaction of the purchase order in April, May, and August, 2011. Koppenberg paid Kaes for these shipments in August and December 2011.

At the time of delivery, Koppenberg employees visually inspected the crates for shipping damage and stored them unopened until installation. At installation, Koppenberg employees unpacked the crates, set the covers in the niches, and screwed each one into place.

After installation, government employees inspected the niche covers for compliance with the specifications. On May 11, 2011, Koppenberg forwarded an email from the VA to Kaes explaining this process: "Typically we have the contractor install the covers they feel meet spec, then MPS comes out to inspect." A follow-up email warned, "[D]on't be surprised if they reject 25% or more."

On May 10 and 11, 2011, an MPS employee visited Bakersfield to inspect the installed niche covers. Inspection occurred at Eagle Point on May 12, 2011. Eagle Point and Bakersfield both had rejection rates of 25 to 30 percent. At Eagle Point, the inspector rejected 777 of the 3,100 installed niche covers.

After the Eagle Point inspection, Lowrie from Levantina met with the MPS inspector to discuss the high rate of rejections. The inspector agreed to select units to serve as examples for the quarry to use in quality control. Lowrie wrote

an email for Koppenberg to forward to the Eagle Point and Bakersfield prime contractors.[6] The email promised changes to production process, quality control inspections, and shipping. The email also assured the prime contractors the supplier and quarry would replace defective units at no cost.

Koppenberg began requesting replacement niche covers, which Kaes supplied in large quantities. In June 2011, Koppenberg requested 750 to 850 replacement niche covers for Bakersfield, reflecting a 25 to 35 percent rejection rate. MPS conducted several rounds of inspections of the various sites, continuing to reject installed niche covers. This resulted in multiple shipments of replacements. Bakersfield received replacements in July and early September 2011. Eagle Point received 800 replacements on June 15, 2011, and 600 more replacements in September 2011. Fort Rosecrans received replacements in August 2011.

In late September 2011, Kaes became extremely concerned about repeated inspections and seemingly arbitrary standards for evaluation of the niche covers. Kaes demanded written explanations for each individual rejected niche cover and contemplated filing a protest or claim against the VA. Kaes sent formal letters to Koppenberg with its demands, stating, "KAES finds the large number of undocumented, unspecified, niches being rejected for this project, with oral notification only, unacceptable." Kaes further demanded, "For the end user to examine and then consider any niche as rejected, they must provide, and we

[6] Lowrie sent this email to Kim without including Chris on the message. The trial court found Lowrie to be Kaes's agent with respect to these projects. Kaes does not assign error to this finding, which results in a verity on appeal. See In re Marriage of Akon, 160 Wn. App. 48, 57, 248 P.3d 94 (2011).

require, specific, written documentation for each and every individual niche rejected for purportedly failing to meet specifications." Kaes alerted Koppenberg it would back-charge for returned niche covers meeting specifications and without documentation of the reasons for rejection.

Koppenberg passed this message to the prime contractors for the projects. But by November 4, 2011, Kaes had not received any specific documentation for individual rejected niche covers. The returned, rejected niche covers arrived at the quarry with serious damage because Koppenberg shipped them without their original packaging.

Despite lack of compliance with the demand for detailed documentation of individual rejections, Kaes continued supplying replacement niche covers. Eagle Point received replacements in November and December 2011. In total, Kaes supplied approximately 8,800 replacement niche covers.

In September 2011, Kaes attempted to solicit help from Koppenberg and the prime contractors to protest the repeated inspections and rejections by MPS. Koppenberg appeared sympathetic with Kaes's complaints, but never pursued a grievance or claim. Instead, Koppenberg signed unconditional releases to close the projects.

On August 11, 2015, Kaes brought a breach of contract claim against Koppenberg. Kaes argued Koppenberg accepted and used the goods, requiring payment for all replacement niche covers. After a bench trial, the trial court entered judgment for Koppenberg.

Kaes appeals.

II.
DISCUSSION

A. Affirmative Defenses

Kaes argues the trial court erred by allowing Koppenberg to argue the unpled affirmative defenses of rejection and revocation. The trial court determined Koppenberg's answer to the complaint put "the issues of acceptance, rejection and revocation of acceptance before the court." Additionally, the trial court concluded Kaes did not allege surprise or prejudice due to Koppenberg's failure to formally assert the affirmative defenses. While we disagree in part with the trial court's reasoning, we conclude Kaes effectively waived any objection to Koppenberg's failure to affirmatively plead defense.

Affirmative defenses must be specifically pleaded. CR 8(c). This applies to any "matter constituting an avoidance or affirmative defense." CR 8(c). Courts consider revocation of acceptance as an affirmative defense that must be set forth in the pleadings. Allis-Chalmers Corp. v. Sygitowicz, 18 Wn. App. 658, 660, 571 P.2d 224 (1977).

Generally, affirmative defenses are waived unless they are affirmatively pleaded, asserted under CR 12(b), or tried by the express or implied consent of the parties. Bickford v. City of Seattle, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001). However, "the rule's policy is to avoid surprise and affirmative pleading is not always required." Bickford, 104 Wn. App. at 813. Thus, a court considers noncompliance harmless when the failure to plead an affirmative defense does not affect the substantial rights of the parties. Hogan v. Sacred Heart Medical Center, 101 Wn. App. 43, 54-55, 2 P.3d 968 (2000). Additionally, "objection to a

failure to comply with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense." Mahoney v. Tingley, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975).

An appellate court reviews trial court decisions on the application of the civil rules for abuse of discretion. Sprague v. Sysco Corp., 97 Wn. App. 169, 171, 982 P.2d 1202 (1999).

Kaes's complaint alleged, "Koppenberg has accepted and/or used all products from Plaintiff Kaes." The trial court concluded Koppenberg's denial of this allegation effectively raised the issue of rejection. But denial of an allegation does not amount to affirmative pleading. Koppenberg specifically enumerated several affirmative defenses in its answer to the complaint, but omitted any mention of revocation of acceptance.

Despite Koppenberg's failure to plead the issue, rejection of the niche covers occupied a significant portion of the trial testimony and evidence. Both parties introduced evidence of Koppenberg's receipt of the product, installation, rejection, and requests for replacement niche covers. Therefore, the parties argued the issue of Koppenberg's rejection of the niche covers without objection. This constitutes waiver of objection to the failure to comply with CR 8(c). See Mahoney, 85 Wn.2d at 100. Furthermore, given the significant evidence from both parties on the issue of rejection, Kaes cannot demonstrate surprise.

Noncompliance with CR 8(c) was of no consequence.[7] The trial court did not abuse its discretion by considering the unpled affirmative defense.

B. Contract Interpretation

Kaes assigns errors to many of the trial court's conclusions of law pertaining to interpretation of the contracts. Where the trial court has weighed the evidence, the reviewing court's role is limited to determining whether substantial evidence supports the findings of fact, and whether those findings in turn support the trial court's conclusions of law. Ford Motor Co. v. City of Seattle, Exec. Serv. Dep't., 160 Wn.2d 32, 56, 156 P.3d 185 (2007). "Substantial evidence to support a finding of fact exists where there is sufficient evidence in the record 'to persuade a rational, fair-minded person of the truth of the finding.'" Hegwine v. Longview Fibre Co., Inc., 162 Wn.2d 340, 353, 172 P.3d 688 (2007) (quoting In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004)). An appellate court will not substitute its judgment for that of the trial court, reweigh the evidence, or adjudge witness credibility. In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). Questions of law are reviewed de novo. Hegwine, 162 Wn.2d at 353.

1. Incomplete Record

As a threshold issue, we address the incomplete record before us on review. Kaes assigns error to the trial court's conclusions of law but only

[7] Additionally, "[w]hen issues that are not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings." Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). On appeal, an appellate court can deem the pleadings to have been amended to conform to the proof. See Maziarski v. Blair, 83 Wn. App. 835, 839, 924 P.2d 409 (1996).

designated a partial record, omitting the verbatim reports of proceedings of the direct testimony of Kim and Carlton Fuqua, a Koppenberg employee. This impedes our review of Kaes's assignments of error.

"The party presenting an issue for review has the burden of providing an adequate record to establish such error." State v. Sisouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); see RAP 9.2(b). An incomplete record compromises the ability of the appellate court to review the trial court's findings of fact for substantial evidence. In re Parentage and Custody of A.F.J., 161 Wn. App. 803, 806 n.2, 260 P.3d 889 (2011). Therefore, in such instances, we treat the findings as verities on appeal. A.F.J., 161 Wn. App. 806 n.2.

Kaes challenges the trial court's findings of fact and conclusions of law, but failed to provide complete verbatim reports of proceedings. We cannot fairly evaluate the findings based on the record before the trial court. Therefore, we consider the court's findings of fact as verities.

2. Uniform Commercial Code (UCC) and Parol Evidence

Kaes contends the trial court erred by employing usage of trade, course of performance, and the prime and subcontractor contracts to interpret the purchase orders. Kaes asserts the purchase orders constituted contracts to provide goods governed by the UCC. It contends the installation of the niche covers constituted acceptance, and that Koppenberg improperly rejected those goods thereafter. Accordingly, Kaes claims Koppenberg must pay for all the niche covers in keeping with the terms of the contract. Koppenberg argues parol

evidence demonstrates the intention to inspect after installation and for Kaes to supply replacement niche covers without additional charge.

Under the UCC, the terms of a contract intended by the parties as a final expression of their agreement may not be contradicted by evidence of prior agreement or of a contemporaneous oral agreement. RCW 62A.2-202(a). However, the contract may be "explained or supplemented" by course of performance,[8] usage of trade, and evidence of consistent additional terms.[9] RCW 62A.2-202(a), (b). Course of performance and usage of trade are relevant "in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." RCW 62A.1-303(d). The terms of an agreement and course of performance or usage of trade must be construed consistently whenever reasonable. RCW 62A.2-103(e).

Kaes contends the trial court should have followed Cervitor Kitchens, Inc. v. Chapman, 82 Wn.2d 673, 513 P.2d 25 (1973), and found Koppenberg's installation of the niche covers constituted acceptance of the products under the UCC. In that case, Cervitor Kitchens sued to recover the sale price of four kitchen units. Cervitor, 82 Wn.2d at 674. The company shipped the units, which

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[8] A course of performance "is a sequence of conduct between the parties to a particular transaction that exists if: (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection." RCW 62A.1-303(a).

[9] Usage of trade "is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." RCW 62A.1-303(c). Evidence of relevant usage of trade offered by one party is not admissible unless the party has given sufficient notice to prevent unfair surprise. RCW 62A.1-303(g).

the contractor did not inspect upon delivery. Cervitor, 82 Wn.2d at 675. After installation of the kitchen units, the contractor attempted to reject the units, citing poor quality and failure to comply with specifications. Cervitor, 82 Wn.2d at 675. The Washington Supreme Court determined installation of the kitchen units was inconsistent with continuing ownership of the seller and amounted to acceptance of the products despite any defects. 82 Wn.2d at 676-77. Like Cervitor, Kaes claims Koppenberg's installation of the niche covers was inconsistent with Kaes's continuing ownership of the product and reflected acceptance of the goods under the contract.

The trial court determined Cervitor did not apply because of the additional requirements established by the terms of the prime and subcontracts, usage of trade, and course of performance between the parties. The trial court properly considered this evidence under RCW 62A.1-202. As a result of the parol evidence, the trial court determined the purchase orders legally entitled the VA, prime contractors, and Koppenberg to inspect and reject or revoke acceptance of nonconforming niche covers until final inspection. The purchase orders required Kaes to replace the nonconforming niche covers without charge, regardless of installation.

The trial court's findings of fact, which are verities in this appeal, illustrate incorporation of the VA contract terms, usage of trade within the industry, and a clear course of performance between Kaes and Koppenberg to support this interpretation of the contracts. The parol evidence demonstrates Kaes was aware of the typical process of installation followed by inspection and possible

rejection of the niche covers. In addition, Kaes repeatedly provided replacement covers long after delivery of the original shipments.

The trial court found the language in the purchase orders bound Kaes to the specification of the VA contracts. The VA contracts with prime contractors and subcontractors provided terms and specifications for marble used in the projects. The purchase orders' reference to "approved samples and specifications for this project" referred to the specification established by the VA contracts. These verities on appeal support the trial court's conclusion of law that the purchase orders required Kaes to replace all non-conforming niche covers after installation and inspection.[10]

The trial court also included extensive findings of fact about usage of trade for military cemetery construction projects. These findings detailed the niche cover process from arrival and crate inspection, through installation, VA inspection, rejection, and replacement, until final inspection at the end of the project. The findings conclude Koppenberg and Kaes knew of and followed the usage of trade in delivery, handling, installation, and inspection of the marble niche covers.[11] This usage of trade then properly informed the trial court's interpretation of the purchase orders.

As for course of performance, the trial court described the working relationship between Kaes and Koppenberg throughout fulfillment of the

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[10] The trial court provided few findings on the incorporation of the federal prime and subcontract terms in the purchase orders. Nonetheless, the extensive findings about usage of trade and course of performance provide ample support for the trial court's ultimate conclusion that the purchase orders required Kaes to replace all rejected niche covers at no additional cost.

[11] The trial court further determined the usage of trade caused Kaes no unfair surprise or prejudice. Like the other findings of fact, this is a verity on appeal.

purchase orders.[12] The court found Kaes knew Koppenberg employees inspected just the crates on arrival, leaving the niche covers securely packaged inside. At the time of installation, Koppenberg employees uncrated and screwed the niche covers in place. After installation, VA inspectors evaluated and rejected large numbers of niche covers as non-conforming. Kaes then replaced the rejected niche covers. Kaes and Lowrie worked to improve quality and coordinate delivery of the replacement niche covers. Between the three projects, Kaes replaced over 8,000 niche covers.

In light of these findings, the trial court determined the purchase orders entitled the VA, prime contractors, and Koppenberg to inspect and reject all non-conforming niche covers until final inspection by the VA. The purchase orders also required Kaes to replace rejected niche covers without charge, regardless of installation or payment. The course of performance between the parties shows

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[12] Although Kaes provided incomplete verbatim reports of proceedings, Kaes submitted hundreds of pages of exhibits. These exhibits support the course of performance described by the trial court. As early as May 2, 2011, Koppenberg informed Kaes that inspection did not occur upon arrival of the shipment, but waited until setting of the niche covers. "As far as the quality, we really cant [sic] tell until we break it open and start setting them." Soon after, Kaes received the email describing the process in which the contractor installs the covers and then MPS inspects. An MPS inspector confirmed this process by inspecting and reporting only on the installed niche covers.

Given the timing of delivery, inspection, and rejection, Kaes knew rejection did not occur immediately upon arrival, yet agreed to replace the rejected niche covers when MPS rejected them after installation. The original delivery of niche covers arrived in Bakersfield in March 2011. The first inspection and associated rejections occurred in May 2011. Kaes shipped replacement niche covers in July and September 2011. Similarly, in Eagle Point, the original delivery of niche covers occurred in January 2011 with the first inspection and rejection occurring in May 2011. Kaes shipped replacement covers in June, August, November, and December 2011. Finally, Fort Rosecrans received its original shipments of niche covers in April and August 2011. Inspection occurred thereafter with replacements coming in August and October 2011.

Thus, beginning in May 2011, Kaes was aware government inspectors rejected marble niche covers after installation. From May to September 2011, Kaes supplied replacements for those rejected covers and worked to improve the quality of the product to reduce the number of rejections. Thus, the record demonstrates Kaes's commitment to fulfilling the requests for quality replacements of rejected niche covers under the terms of the contracts.

Kaes's intention to work with Koppenberg to provide suitable niche covers to replace those rejected by MPS after installation. This course of performance properly served as parol evidence for the parties' contractual relationship. Based on this evidence, Kaes provided the niche covers, expecting installation and subsequent inspection. Kaes also agreed to replace the rejections free of charge. These findings support the trial court's legal conclusion that Koppenberg complied with the rejection process established by course of performance and usage of trade, resulting in no legal obligation to pay Kaes the replacement niche covers.

C. Documentation of Rejections

Kaes contends the trial court failed to consider its demand for detailed written rejection of each niche cover under RCW 62A.2-605. Koppenberg argues Kaes waived this requirement. We agree.

Under the UCC, "[t]he buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him or her from relying on the unstated defect to justify rejection or to establish breach." RCW 62A.2-605(1). In addition, "a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance." RCW 62A.1-303(f).

The trial court concluded Kaes had waived the written notification of non-conformity because it did not raise the issue until several months after a significant portion of the niche covers had been inspected and rejected. The trial court's findings on the parties' course of performance supports this conclusion.

Kaes received notification of the first rejections and need to replace niche covers in May 2011 but did not begin requesting detailed written documentation until late September 2011. By the time of the request, Kaes had already shipped approximately 6,300 replacement niche covers, representing the majority of the 8,200 replacements provided.

Given this history, the trial court properly considered Kaes's failure to request written rejection until after shipping thousands of replacement niche covers as evidence of the parties' course of performance. The course of performance supports the trial court's legal conclusion that Kaes waived written rejection.

D. Retainage

Kaes claims Koppenberg improperly withheld retainage and the trial court failed to award the retained $26,626.00. Kaes cites Kim's admission of withholding retainage and an entry in an exhibit detailing Koppenberg, "[u]nder paid by $26,626.00 for expenses for replacing rejected niche fronts on all projects due to rejected materials." Koppenberg claims all funds were paid.

The trial court made no findings of fact or conclusions of law on this issue. In the absence of a finding of fact, an appellate court "must indulge in the presumption that the party with the burden of proof failed to sustain their burden on this issue." In re Welfare of A.B., 168 Wn.2d 908, 927 n.42, 232 P.3d 1104 (2010). Because Kaes had the burden of proving breach of contract, the trial court's failure to enter a finding of fact is construed as Kaes's failure to meet this burden of proof.

Other than described above, Kaes failed to produce evidence Koppenberg withheld funds as retainage. Koppenberg provided evidence all funds were paid. Therefore, substantial evidence supports the trial court's conclusion.

We affirm.

Chun, J.

WE CONCUR:

Andrus, J.

Becker, J.

DICKSON FROHLICH

December 20, 2018 - 12:06 PM

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