

NO. 65197-8-I

COURT OF APPEALS DIVISION I

COUNG TRANLA and KHAI TRANLA
Husband and Wife, and the marital community thereof,

Appellant(s),

v.

Mr. AMADOR ZAMORA and JANE DOE ZAMORA,
and their mutual community thereof, d.b.a.

ATOMIC CONSTRUCTION;
AMERICAN CONTRACTORS INDEMNITY CO.
BOND No. 1002004,

Appellee(s).

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
KING COUNTY

The Honorable John Erlick, Judge
Cause No. 08-2-05190-1 SEA

Justin I. Mishkin, WSBA No. 38864
Attorney for the Appellant

Integrity Law Group, PLLC
1032 South Jackson St., Ste. 205
Seattle, WA, 98104
(206) 838-8118

RECEIVED
JAN 11 2009
KING COUNTY
COURT OF APPEALS

TABLE OF CONTENTS

I. Table of Authorities.....ii-iii

II. Assignments of Error 1-2

III. Statement of Case3

IV. Argument9

1. It was improper for the Trial Court to award the Defendant money for the “extra” work commenced by the Defendant, when Defendant had been adequately compensated for his work and there was no contracts for the work alleged completed.9

 a. The Trial Court erred in awarding Defendant money for the completion of the fence.....13

 b. The Trial Court erred in awarding Defendant money for the construction of two retaining walls.....14

 c. The Trial Court erred in awarding Defendant money for relocating trees.....16

 d. The Trial Court erred in awarding the Defendant money for the installation of the smoke detectors, since the Defendant was aware the project must be up to DSHS requirements and the amount was contemplated and included in the electrician’s bill which Tranla paid.....17

 e. The Trial Court erred in awarding the Defendant money for the construction of a concrete deck and wheelchair ramp when they were included in the original contract, were never completed.18

 f. The Trial Court erred in awarding the Defendant money for updating wiring and rewiring the hot water tank, as well as installation of the electrical panel, when this work had yet to be completed due to Defendant’s faulty wiring.....19

 g. The Trial Court erred when it awarded the Defendant money for the construction of additional bedroom and bathroom as they were never completed.21

 h. The Trial Court erred when it awarded Defendant money for the relocation of two toilets in two bathrooms.22

 i. If this court finds Tranla liable for “extra work,” should Tranla be liable for the costs of incomplete or faulty work?.....23

j. In the alternative, the Trial Court erred in determining that the Defendant was entitled to the value of services rendered for the “extra work” on Tranla’s construction project on theory of Quantum Meruit.....	24
2. <u>The Trial Court improperly held Tranla responsible for paying sales tax when the contract specified that a particular party to a contract was responsible for paying sales tax.</u>	28
3. <u>The Trial Court improperly chose a commencement date for liquidated damages to accrue which was contrary to the date specified in the written contract.</u>	30
4. <u>The Trial Court improperly awarded Defendant money for an incomplete underlying basic contract.</u>	36
V. Conclusion	38
Index to Appendices	39

I. TABLE OF AUTHORITIES

STATUTE

RCW 82.08.50529

CASES

Wise v. United States, 249 U.S. 361, 63 L. Ed. 647, 39 S. Ct. 30331
(1919).

Ashley v. Lance 80 Wash.2d 274, 493 P.2d 1242 (1972)30

Bellingham Sec Syndicate Inc., Bellingham Coal Mines, Inc., 13 Wn.2d
370, 125 P.2d 668 (1942).....10,

Bignold v. King County, 65 Wn.2d 817, 399 P.2d 611 (1965).....24, 26

Boeing Airplane Co. v. Firemen’s Fund Indem Co., 44 Wn.2d 488, 268
P.2d 654, 45 A.L.R.2d 984 (1954).....10,

Brower Co. v. Garrison, 2 Wn.App. 424, 468 P.2d 469 (1970).....30

Dravo Corp. v. Municipality of Metro Seattle, 79 Wn.2d 214, 484 P.2d
399 (1971).....25

Eagle Ins Co. v. Albright, 3 Wn. App. 256, 474 P.2d 920 (1970)11

E.G., St. Yves v. Mid State Bank, 111 Wn.2d 374, 757 P.2d 1384 (1988)10, 11

In Re Estate of Garrity, 22 Wn.2d 391, 156 P.2d 217 (1945)11

Johnson v. Nasi, 50 Wash.2d 87, 309 P.2d 380 (1957)25

Jones v. Best, 134 Wn.2d 232, 950 P.2d 1 (1998)34, 35

Kaeser v. Everett, 47 Wash.2d 666, 289 P.2d 343 (1955).....28

Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, 204 P. 5
(1922).....11

Management, Inc. v. Schassberger, 39 Wn.2d 321, 235 P.2d 293 (1951).31

Nelse Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 566
P.2d 560 (1977).....24,25

Pomeroy v Anderson, 32 Wn.App 781, 649 P.2d 855 (1982).28, 29

Ross v. Raymer, 32 Wash.2d 128, 137, 201 P.2d 129 (1948).....25

<i>S.L. Rowland Constr. v. Beall Pipe & Tank Corp Co.</i> , 14 Wn.App 297, 540 P.2d 912 (1975).....	24
<i>S.S. Mullen, Inc., v. Marshland Flood Control Dist.</i> 67 Wash.2d 461, 407 P.2d 990 (1965).....	28
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wn.2d 250, 510 P.2d 221 (1973)	30
<i>Stoen v. Frech Slough Flood Control Dist.</i> , 67 Wash.2d 440, 407 P.2d 963 (1965).....	28
<i>V.C. Edwards Contracting Co. v. Port of Tacoma</i> , 83 Wn.2d 7, 514 P.2d 1381 (1973).....	24, 25
<i>Walter Implement, Inc. v. Focht</i> , 107 Wn.2d 553, 730 P.2d 1340 (1987)	30, 31

SECONDARY AUTHORITIES

American Jurisprudence (2d) 13 -Building and Construction Contracts ..	11
J. Calamari & J. Perillo, <i>Contracts</i> (3 rd Ed., 1987).....	10
Restatement (3 rd) of Contracts § 339	10, 31

II. ASSIGNMENT OF ERROR

A. Assignments

Assignment of Error 1. It was improper for the Trial Court to award the Defendant money for the “extra” work commenced by the Defendant, when Defendant had been adequately compensated for his work and there was no contracts for the work alleged completed.

Assignment of Error 2. The Trial Court improperly held Tranla responsible for paying sales tax when the contract specified that a particular party to a contract was responsible for paying sales tax.

Assignment of Error 3. The Trial Court improperly chose a commencement date for liquidated damages to accrue which was contrary to the date specified in the written contract.

Assignment of Error 4. The Trial Court improperly awarded Defendant money for an incomplete underlying basic contract.

B. Issues

1. Was it proper for the Trial Court to award Defendant money for “extra work” completed when the contract specified that all “extra” would be in writing and there was agreement that the “extra” work completed was for a flat rate paid by Tranla during the construction project? (Assignment of Error 1)

a. The Trial Court erred in awarding Defendant money for the completion of the fence.

b. The Trial Court erred in awarding Defendant money for the construction of two retaining walls.

c. The Trial Court erred in awarding Defendant money for relocating trees.

d. The Trial Court erred in awarding the Defendant money for the installation of the smoke detectors, since the Defendant was aware the project must be up to DSHS requirements and the amount was

contemplated and included in the electrician's bill which Tranla paid.

e. The Trial Court erred in awarding the Defendant money for the construction of a concrete deck and wheelchair ramp when they were included in the original contract, were never completed.

f. The Trial Court erred in awarding the Defendant money for updating wiring and rewiring the hot water tank, as well as installation of the electrical panel, when this work had yet to be completed due to Defendant's faulty wiring.

g. The Trial Court erred when it awarded the Defendant money for the construction of additional bedroom and bathroom as they were never completed.

h. The Trial Court erred when it awarded Defendant money for the relocation of two toilets in two bathrooms.

i. If this court finds Tranla liable for "extra work," should Tranla be liable for the costs of incomplete or faulty work?

j. In the alternative, the Trial Court erred in determining that the Defendant was entitled to the value of services rendered for the "extra work" on Tranla's construction project on theory of Quantum Meruit.

2. Did the Trial Court improperly hold Tranla responsible for paying sales tax, when the contract specified that a particular party to a contract was responsible for paying sales tax? (Assignment of Error 2)

3. Did the Trial Court err in determining a 'reasonable date' to grant liquidated damages contrary to the date specified in the contract? (Assignment of Error 3)

4. Did the Trial Court err in ruling that the Defendant was entitled to compensation for the completion of the entire basic contract when the Defendant failed to complete the basic contract? (Assignment of Error 4)

III. STATEMENT OF CASE

Appellant Coung and Khai Tranla (“Tranla”) own and operate an elderly residential home where they also reside. The home is a duly licensed elderly facility with the Washington State Department of Social and Health Services (“DSHS”). (CP 16)

In order to better take care of their clients the Tranla’s decided to construct an addition to their business residence. (CP 16)

Tranla hired an architect, Eddie Kane (“Kane”) to prepare drawings for the construction of the project. (RP 16, lines 24-25; RP 16, lines 1-2) After the hiring of Mr. Kane, Tranla sought a contractor to complete the construction. (CP 16)

Tranla and Appellee Amador Zamora, d.b.a. Atomic Construction (“Defendant”) began negotiations on a construction project on or about January 2007. Defendant was fully aware of Tranla’s use of the home and that it must meet certain codes and requirements to retain its licenses and permits. (CP 9, 11)

Initially it was contemplated that a 2800 square foot addition, including the building a second story on an existing home, would be constructed by the Defendant. (CP 9, 11)

Defendant offered and agreed to a fixed price of \$182,000 based on an initial architect's drawing. (CP 16)

Tranla determined that she could not afford the \$182,000. So on January 15, 2007, Tranla and Defendant entered into a written construction contract, whereby Defendant would complete a remodel and a 1900 square foot addition based on another drawing by Kane for a contract price of \$115,000. (CP 15, Trial Ex. 101) The contract specified that Defendant would be responsible for paying the sales tax associated with completion of the project. (CP 15, Trial Ex. 101)

The project was to be fully completed no later than 4 months after the execution date of the contract, and Tranla informed Defendant time was of the essence. If the contract was not completed on time, Defendant was to pay Tranla liquidated damages in the amount of \$150 per day until the job was completed. The contract also specified: "If additional work was to be completed, a new work agreement will be written, or any change of specifications costs of \$45.50 per hour [sic]." (CP 15, Trial Ex. 101)

The contract specified that Tranla would hold back \$15,000 of the contract money and pay \$25,000 at the execution of the contract. Twenty-five percent of the remaining balance was to be paid once the foundation was fully completed. The remaining balance (\$15,000 hold back money)

was to be paid in 5 payments every two weeks after the final payment under the contract was made. (CP 15, Trial Ex. 102 & 103)

In order to provide funding for the project, Tranla was forced to obtain loans and pay associated interest. Defendant was also aware that Tranla was paying interest on the monies borrowed to complete the project. (CP 16)

Tranla made the first \$25,000 at the execution of the contract dated January 15, 2007, and commenced her liability pursuant to the contract. (CP 15, Trial Ex. 103) Tranla had the site ready for Defendant to conduct demolition when Defendant was ready to begin work. (RP 36, lines 1-8) Defendant was originally working off of the architect's drawings for the 2800 square foot two-story addition. In April 2007, Defendant (who agreed to the \$115,000 contract price based on communications with the architect), Kane, and Tranla, commenced using the new drawing which eliminated the second story of the addition and had other amendments contemplated by all the parties when the contract was entered into and price quoted in January 2007. (CP 16; CP 9)

From the inception of the contract, Defendant failed to timely show-up to the construction site, and when the Defendant did show-up, the Defendant failed to provide adequate employees to complete the necessary jobs for that day. (CP 9) Tranla additionally claimed that some of

Defendants employees showed up to the job site drunk and smelling of alcohol. (RP 72, Lines 16-20; CP 15, Trial Ex. 107).

Defendant requested and was granted numerous extensions from Tranla. Each time Tranla granted an extension, Tranla informed Defendant that she would waive fees, but only if the job was completed by the date of said extension. (CP 9, 16). Tranla, two weeks prior to each extension, informed the Defendant that the job must be completed by said extension. (CP 9)

The Defendant requested the first extension to May 15, 2007 to complete the project. Defendant then requested another extension to complete the project through June 30, 2007. Tranla further agreed to waive the late fees contingent on the project being completed by June 30, 2007. The Defendant failed to complete the project by the June 30, 2007 date. (CP 1, 9, and 16)

On June 30, 2010, Tranla granted Defendant a second extension to July 15, 2007. Tranla again agreed to waive all late fees contingent on Defendant completing the job by July 15, 2010. Defendant again failed to timely complete the project. (CP 1, 9, and 16)

On July 15, 2007, Tranla reluctantly granted Defendant a third extension, agreeing to waive late fees if completed by August 1, 2010. Defendant again failed to timely complete the project. (CP 1, 9)

On or about August 1, 2007, Tranla granted Defendant a fourth extension to September 15, 2007, again agreeing to waive all prior late fees if the work was completed by September 15, 2007. (CP 1, 9)

At the time of the fourth extension, Defendant informed Tranla she was now responsible for taxes and materials. As the contract specified the contrary, Tranla refused to pay the tax. Defendant again failed to complete the work timely. (CP 1, 9)

Finally, Tranla granted Defendant a fifth and final extension to complete the work, providing Defendant until November 10, 2007 to complete the project. Tranla again agreed to waive all prior and current late fees, contingent on Defendant completing the work by November 10, 2007. (CP 9, 15, Trial Ex. 112)

On October 22, 2007, Tranla's counsel informed Defendant that if the project was "complete" by November 10, 2007, Tranla would waive her right to liquidated damages. (CP 15, Trial Ex. 112) Defendant again failed to timely complete the work.

General Builders Supply Inc, filed a lien in the amount of \$3,675.21 on Tranla's property due to the Defendants failure to pay costs of materials as stated in the contract. (CP 15, Trial Ex. 108)

During the construction of the project, Defendant offered to do additional work for Tranla and requested fixed amounts for each and every

additional task completed on the Tranla property. No written agreements were executed with reference to the additional work. These were evidenced only by oral agreements and checks paid by Tranla to Defendant. Many of the additional projects Defendant commenced work on and promised he would complete were never completed. (CP 1, 9)

Between November 10, 2007 and December 20, 2007, Tranla was forced to pay Defendant an additional payment of \$8,000 not specified in the contract in order to provide Defendant with funds to pay for appliances, etc., which were part of the set \$115,000 price of the original contract. (CP 15, Trial Ex. 107)

On January 2, 2010, Tranla terminated Defendants employment after Defendant failed to complete the construction project; even after Tranla provided Defendant with multiple opportunities to complete the project and to have additional fees waived if the project was completed timely. At termination, Tranla had already expended \$112,000 of the original contract price and paid an additional \$9,714 for additional work partially completed by Defendant. Tranla further informed Defendant that she would file a suit for the breach of contract and liquated damages fees if the Defendant failed to pay amounts due. (CP 15, Trial Ex. 113)

On February 4, 2008, Tranla filed a complaint for breach of contract, breach of implied covenant of good faith and fair dealings, Consumer

Protection Act violations, and claimed against Defendant's registration bond. (CP 1)

On July 11, 2008, Defendant counter-claimed for money due under the contract and in quantum meruit. (CP 2-3)

On March 8, 2010, Trial Court Judge John Erlick ruled that:

1. Defendant completed the "basic contract";
2. Defendant completed "additional work" not included in the contract and was entitled to the value for such work completed;
3. Time was of the essence;
4. Taxes were included in the contract, but for the additional work, Tranla was responsible for the taxes; and
5. Tranla was entitled to liquidated damages and the court determined the "reasonable" time for calculation was from November 10, 2007 through January 2, 2010.

After all such calculations were made, the court awarded Defendants \$18,497.13. (CP 16)

On April 4, 2010, Tranla appealed the Trial Court's decisions to award the Defendant money for: (1) additional work provided, (2) the remaining balance on the original contract, (3) taxes for the additional work completed, and (4) the date the Court chose to use as the off-set for the liquidated damages award. (CP 17)

IV. ARGUMENT

1. Was it proper for the Trial Court to award Defendant money for "extra" work completed when the contract specified that all "extra" work must be in writing and there was an agreement in place that the "extra" work completed was for a flat rate paid by Tranla during the construction project?

The Plain Meaning Rule states that if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. *J. Calamari & J. Perillo, Contracts* §§3-10, at 166-67. Washington State follows the plain meaning rule. Only if a contract is ambiguous on its face should a court look to evidence of the parties' intent as shown by the contract as a whole, its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations. *E.G., St. Yves v. Mid State Bank*, 111 Wn.2d 374, 378, 757 P.2d 1384 (1988); *Boeing Airplane Co. v. Firemen's Fund Indem Co.*, 44 Wn.2d 488, 496, 268 P.2d 654, 45 A.L.R.2d 984 (1954); *Bellingham Sec Syndicate Inc., Bellingham Coal Mines, Inc.*, 13 Wn.2d 370, 384, 125 P.2d 668 (1942)

Washington allows extrinsic evidence in to determine the entire circumstances under which a contract was made and to aid in ascertaining the parties' intent when there is ambiguity in the contract. *Restatement (Second) of Contracts* §§ 212, 214(c) (1981). Therefore courts may, in interpreting contract language, consider the surrounding circumstances leading to execution of the agreement, including the subject matter of the contract as well as the subsequent conduct of the parties--not for the

purpose of contradicting what is in the agreement, but for the purpose of determining the parties' intent. See, *E.G., Stender v. Twin City Foods Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973); *In Re Estate of Garrity*, 22 Wn.2d 391, 156 P.2d 217 (1945); *Leavenworth State Bank v. Cashmere Apple Co.*, 118 Wash. 356, 204 P. 5 (1922).

As stated in *Stender*:

“Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole the subject matter and objective of the contract, all the circumstances surrounding the making of the contract the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”

StenderR, at 254. The rule is called the “context rule.” *Eagle Ins Co. v. Albright*, 3 Wn. App. 256, 474 P.2d 920 (1970) With construction contracts, a provision that requires a written agreement for additional work/change orders will be enforced. *13 Am.Jur.2d*, Building and Construction Contracts § 22 (1964)

In the present case, Tranla and Defendant entered into a written contract, whereby they agreed that specific work was to be performed, for a specific contract price, and there was a specific date for completion of the contract. The contract also specified that if there was additional work

to be completed, any agreements must be in writing. (CP 15, Trial Ex. 101). The Trial court ruled that each party was the drafter of the contract and each party had opportunity to make amendment before they entered into the contract. (CP 16)

As noted in the facts, Tranla and Defendant originally agreed to the construction of a 2800 square foot addition. However, after Defendant provided Tranla the bid based on the 2800 square foot addition, Tranla and Defendant agreed to a smaller addition for a set price to include taxes. During the project there was “extra work” not contemplated in the contract by Tranla or Defendant when they entered into said contract. None of the “extra work” agreements were in writing as set forth in the underlying contract, and most of the “extra work” was either at the recommendation of the Defendant, or completed without notice to Tranla.

Whenever “extra work” was commenced, Defendant either informed Tranla that she would only be liable for the costs (not labor), or where labor and/or costs were contemplated/agreed to, Tranla made the appropriate payments. Each time there was costs for “extra work” and Defendant requested money for the “extra work,” Tranla provided Defendant with checks for the price of the costs for each and every project. (CP 15, Trial Ex. 106). Throughout the construction process, and not until Tranla filed a complaint for money due and breach of contract

did Defendant ever claim that he was entitled to any additional money for the “extra work” beyond that already tendered. The Trial Court ignored the plain terms of the contract, as well as the law on construction contracts, when it awarded Defendant the full value of the “extra work” commenced--some of which was never completed based on the cost estimator. The Trial Court determined that Defendant’s hourly worksheets were unreliable and untimely disclosed. The Trial Court determined that the best way to award damages was through the “estimator” spreadsheet. (CP 16; RP 7, number 5). The problem with the estimator sheet is that it did not base the price for faulty work or work never completed.

- a. The Trial Court erred in awarding Defendant money for the completion of the fence.

In January 2007, Defendant offered to build a back yard fence on Tranla’s property. The Defendant informed Tranla that the fence would make his project look better and would assist in obtaining the required permits necessary to complete the project. The Defendant informed Tranla that if she agreed to pay the costs of the project, the Defendant would not charge Tranla labor on the project. Tranla agreed to pay \$2,500 for the costs of the materials, evidenced by the Tranla Declaration (CP 15, Trial Ex. 105, pg 1; CP 15 Trial Ex. 106, Checks #3042 & 3033). There was no written contract for the “extra work” as required by the contract.

The above was only based on oral agreement. Further, the Defendant never requested the costs of labor from Tranla, whom only learned of the Defendants labor bill the day before trial.

Contrary to the original construction contract and contrary to the parties oral contract, the Trial Court determined that Tranla was responsible for the value of the labor provided Tranla for the construction of the fence. The Trial Court merely determined that since a fence was built and Tranla appreciated the benefit of it, the Defendant was entitled to the costs and labor for the construction of such fence even though there was no written contract as called for; the fence was for the benefit of the Defendant (to assist in obtaining permits); and there was an oral agreement providing Tranla was only to pay for the costs. Therefore, the Trial Court erred when it unilaterally determined the construction of the fence should be part of the \$20,455.18 amount the court awarded the Defendant, when this was contrary to the party's written and oral agreements.

- b. The Trial Court erred in awarding Defendant money for the construction of two retaining walls.

Defendant informed Tranla that it would be advisable to build two retaining walls on the property line between the neighbor's property and Tranla's property. Defendant offered to build the first retaining wall and

Tranla agreed to pay for the costs of the retaining wall. Defendant informed Tranla the costs was \$1,500 and Tranla paid the total amount.

As opposed to the first retaining wall, which was a benefit to the contractor for the purposes of code compliance, the Second retaining wall was to benefit both Tranla's neighbor and Tranla. The Defendant offered to build the retaining wall if Tranla paid the costs for the construction of the wall and the neighbor agreed to pay for half of the labor for construction of the wall. The Defendant never informed Tranla that the construction of the retaining wall would extend the time for completion of the "basic" job. (RP 49, lines 16-21)

The neighbor agreed to and did pay half of the labor cost to build the retaining wall; and Tranla agreed to pay the costs for the project. The neighbor paid Defendant \$2,000 for their half of the costs of the labor and Tranla paid Defendant \$1,000 for the costs of construction. (RP 36, lines 10-25; RP 37, lines 1-25; RP 38, lines 1-25; RP 39, lines 1-16).

There was no written contract for the construction for the retaining walls. The only agreement Tranla and the Defendant entered into was the oral agreement noted above. Once again, Defendant only made the request for the money (the full amount of the labor) for the retaining wall during litigation. The Defendants excuse during trial was that he was "a bad records keeper." All of the undisputed facts prove that the Defendant

did not have the intent to hold Tranla responsible for paying for the labor of the retaining wall.

Defendant never informed Tranla that if he built the retaining walls it would cost her over \$18,000 to build. (CP 16, Trial Ex. 116). Tranla testified that if she had known the costs for the retaining walls she would never have had the Defendant build the retaining walls, since she had already eliminated the second floor of the project as initially conceived, due to lack of money to build such an addition. (RP 326, lines 1-12)

Even if this Court somehow finds that Tranla is responsible for the labor on the retaining wall, the amount should have been reduced by the amount the neighbor paid Defendant. Therefore, the Trial Court erred when it awarded Defendant the costs for labor on the retaining walls.

c. The Trial Court erred in awarding Defendant Money for relocating trees.

In late March 2007, the Defendant asked Tranla whether she wanted the Defendant to relocate 7 fruit trees out of 10 trees removed. The Defendant informed Tranla that three of the trees would need to be removed since they were in the way of where the foundation would be poured; and that the other trees were in the way of other parts of the construction. In his trial brief, Defendant admitted that the removal of three of the trees was part of the original bid. (RP 295, lines 17-20; CP

11, Defendants Trial Brief). The Defendant informed Tranla that he would move the trees at no additional cost, since he had already rented a bobcat tractor, and it would not take much time to dig a hole and drop the trees in. (CP 15; Trial Ex. 107, pg. 2). In reliance on this offer Tranla agreed to have the Defendant move the trees. Defendant never completed a work order, and never requested money for the relocation of the trees. (RP 326, lines 13-25, RP 327 lines 8-25). In addition, eventually the trees died, nullifying any theoretical benefit.

The Trial Court determined that since the Defendant relocated trees, the Defendant was entitled to the reasonable value for the relocation of the trees. The Trial Court was wrong. There was no contract, as specified in the original contract, for relocating the trees; Tranla had not solicited the relocation; and Defendant needed to remove three trees in order to pour his foundation. Therefore, the Trial Court made an error when it granted the Defendant money for his services of relocating and removing trees some of which was necessary for the Defendant in order to commence the underlying construction contract.

- d. The Trial Court erred in awarding the Defendant money for the installation of the smoke detectors, since the Defendant was aware the project must be up to DSHS requirements and the amount was included in the electrician's bill Tranla paid.

Despite Tranla paying the electricians for the electrical work completed, including the installation of the smoke detectors, the Trial Court awarded Defendant money for the installation of new smoke detectors. Tranla did not request the new smoke detectors and they were only installed after an offer of the Defendant's workers. The installation of some smoke detectors was in the plans for construction. These costs should have been covered by the \$115,000 original contract price. Defendant also claimed he would need to install smoke detectors in the existing parts of the Tranla residence to obtain final electrical inspection approval. Tranla reluctantly paid for the additional smoke detectors in the existing part of the residence in order to pass the electrical inspection.

The Defendant, a licensed contractor, should have been aware that he would have needed to install additional smoke detectors, making that part of the bid since he was aware that Tranla was dependant on his flat bid for the funding. Further, Tranla paid the electricians directly. The Trial Court should have deducted this amount and any amounts included in the bid before making such award. Therefore, the Trial Court erred in awarding the Defendant with money for the installation of the smoke detectors.

- e. The Trial Court erred in awarding the Defendant money for the construction of a concrete deck and wheelchair ramp, when these were included in the original contract, and never completed.

The concrete deck was part of the existing plan as provided to the Defendant. Mrs. Tranla testified under oath that the concrete slab was part of the original plans and therefore part of the original bid of \$115,000. (RP 306, lines 21-25; RP 307, lines 1-3) Building codes for senior housing also required said foundation, which the Defendant was or should have been aware. The Trial Court apparently neglected to take the plans and the city codes submitted as trial exhibits, into consideration when it awarded the Defendant money for building the concrete deck and ramp.

Defendant failed to complete the wheel chair ramp and concrete deck. Defendant merely poured the foundation and left the remaining work unfinished when he vacated the job site. After the Defendants termination, Tranla was forced to have the deck and wheel chair ramp completed at her own expense. Among other things not completed was the handrail was never installed, the sides of the ramp were not completed, and there was gaps on the ramp that required filling. Given this information, the Trial Court erred in determining that the Defendant was entitled to the costs for the services for a completed concrete deck and unfinished wheel chair ramp.

- f. The Trial Court made an error in awarding the Defendant money for updating wiring and rewiring the hot water tank, as well as installation of the electrical panel, when this work needed to be completed due to Defendant's faulty wiring.

The Trial Court erred when it awarded the Defendant money for installation of lighting. All of the lighting was part of the original bid and included in the original plans. The Defendant was aware that he was required to include the lighting to the specifications in the original contract. The Defendant was further aware that any addition and/or additional work in the contract must meet DSHS codes. The Defendant complained to Tranla that the codes made it more difficult to complete the work and he was having a hard time finding electricians to complete the project. In fact, there were at least three electrical contractors who worked or neglected to work on the project.

Further, the Trial Court erred when it awarded the Defendant money for upgrading and replacing the electrical panel and rewiring a hot water tank; as the sole reason the wiring and water tank failed inspection and required updating and rewiring was due to the negligence of Defendant and its electricians. (RP 42, lines 7-15) During the installation of wiring, Defendant or his employees burned the wiring on the water heater and overloaded the existing wiring system, causing the electrical panel to malfunction. Further, during the construction, the water heater ceased working and electrical failed. (RP 43; lines 1-25). Defendant was forced to replace and upgrade the existing wiring and water heater.

Defendant admitted that he was the one responsible for hiring the electrical contractors that were not doing their job correctly or doing work negligently, some of whom were not licensed or bonded as required. Inadequate performance leads to the imposition of unnecessary fines and delays in the project. (RP 235, lines 3-25; RP 236; lines 1-5). Tranla eventually paid Defendant and the electricians directly for the additional electrical work so that the Defendant would continue working. (RP 44, lines 1-25; RP 45, lines 1-8)

The water heater was only two years old when the Defendant began the project. (RP 44, lines 21-22) To date, the water heater still does not work properly and at times the heating system for the house ceases to work. Therefore, the Trial Court should not have awarded the Defendant money for rewiring the water tank, updating wiring, or installation of lights specified in the plans.

- g. The Trial Court erred when it awarded the Defendant money for the construction of additional bedroom and bathroom, as they were never completed.

The Defendant never constructed a new bedroom or bathroom not specified in the building plans. The Trial Court awarded money for the addition of a bedroom, and determined that the bathroom was never completed; and therefore Defendant was not entitled for reimbursement for the bathroom.

The only rooms constructed were those contemplated in the Kane drawings. During construction, Defendant tore down a wall between the garage and the house for convenience of construction. Upon completion of the work necessary for access to the garage, Tranla required the Defendant to replace the wall that he had torn down. The only possible interpretation of contemplation of a new bedroom not in the Kane plans could have been the reinstallation of the wall Defendant tore down earlier in the construction process. If the Court based its award for the replacement of this wall, the Trial Court erred.

- h. The Trial Court erred when it awarded Defendant money for the relocation of two toilets in two bathrooms.

The Trial Court determined that Defendant should be awarded money for the relocation of two bathrooms. The Defendant claims in his trial brief that due to Tranla's unilateral amendments to the plans, he was forced to do extensive work on the placement of the bathroom facilities. Yet the work completed on the bathrooms in question was in the Kane plans and contemplated by both parties before the completion of the project. Defendant was required to move two toilets for the project, but Tranla testified under oath that the relocation within the existing bathroom was contemplated by both parties before Defendant commenced work, that the work was minor, and Defendant never requested money for his labor.

If there had been extensive work to be completed, the Defendant likely would have requested money like he had for other work which he was paid evidenced by the checks drafted by Tranla during the construction process. Therefore, the Trial Court made an error when it awarded costs for relocating the bathrooms.

- i. If this court finds Tranla liable for “extra work,” should Tranla be liable for the costs of incomplete or faulty work?

If this court determines that Tranla is liable for the “extra work”, this Court should remand the issue of how much work was completed, and what work was completed faulty for the determination of how much to award to the Defendant. Much of what the Trial Court found as “extra work,” was either never completed, or was completed faulty before Defendants termination from the job. Defendant also failed to complete numerous other projects either called for in the original plan or part of the oral contracts between the parties during the completion of the main project.

The Trial Court conclusively determined that since Defendant alleged that work was completed and since the Defendants hours alleged were not reliable, the Defendant was entitled to the costs of completion based on a cost estimator. (CP 15, Trial Ex. 105 - Cost Estimator) The determination of the value of unfinished services or services improperly completed can

only be determined by the finder of fact, that being the Trial Court. Therefore, this Court should remand the issues of what Defendant should be compensated if at all for what work was actually completed.

- j. In the alternative, the Trial Court erred in determining that the Defendant was entitled to the value of services rendered for the “extra work” on Tranla’s construction project on theory of Quantum Meruit.

The Trial Court determined that even if Defendant was not entitled to contract damages, the Defendant was entitled to quantum meruit damages. Quantum meruit is measured by the costs incurred by the performing party to complete the job and a reasonable allowance for profit. *V.C. Edwards Contracting Co. v. Port of Tacoma*, 83 Wn.2d 7, 514 P.2d 1381 (1973)

However, quantum meruit may substitute for the contract price and form the basis of total recovery only when substantial changes occur as work progresses which are not covered by the original contract and which were not within the contemplation of the parties when the contract was formed. *V.C. Edwards Constructing Co. v. Port of Tacoma*, Supra at 13-14; *Bignold v. King County*, 65 Wn.2d 817, 827, 399 P.2d 611 (1965); *S.L. Rowland Constr. v. Beall Pipe & Tank Corp Co.*, 14 Wn. App. 297, 304, 540 P.2d 912 (1975); See also *Nelse Mortensen & Co. v. Group Health Coop.*, 17 Wn. App. 703, 566 P.2d 560 (1977) In order to prevent unjust enrichment, quantum meruit becomes the basis for the damage award

rather than the price fixed by the express contract. *V.C. Edwards Constructing Co.v. Port of Tacoma, Supra.*

Further, the services must be rendered under circumstances as to indicate that the person rendering them expected to be paid therefore, and that the recipient expected, or should have expected, to pay for them. *Johnson v. Nasi* 50 Wash.2d 87, 91, 309 P.2d 380 (1957) (citing *Ross v. Raymer*, 32 Wash.2d 128, 137, 201 P.2d 129 (1948))

In the present case, the Trial Court determined that if Tranla was not liable for contract damages, in the alternative she was liable pursuant to the theory of Quantum Meruit. Once again the Court based the value for services on the estimator, which as stated above, does not take into consideration work negligently performed and never completed. (CP 16, Courts Findings of Fact and Conclusion of Law, Pg. 8, Item 9).

Tranla should not be liable for much of the “extra work” due to Defendants representation to Tranla; and since much of the work the Trial Court based its award on was contemplated in the original bid price and based on the plans, quantum meruit award was improper. *Dravo Corp.v. Municipality of Metro Seattle*, 79 Wn.2d 214, 221, 484 P.2d 399 (1971) (Quantum meruit compensation may not be awarded for such “additional work” necessary to carry out the contract when the additional work should

have been foreseen by the parties prior to contract formation.); See also *Bignold v. King County*, Supra at 826.

In the present case, much of the “extra work” commenced should not have been compensated pursuant to the quantum meruit theory since they were foreseen as a result of the underlying contract. These are including but not limited to, relocating trees, misc electrical work, and installation of a concrete deck and wheel chair ramp.

Defendant should not have been compensated for relocating trees. Defendant was aware or should have been aware that the three of the fruit trees needed to be removed and relocated when the contract was entered into. Defendant being a duly licensed contractor, experienced in construction, should have been aware that the fruit trees were in the way of where he needed to pour the foundation and completed other construction related work. Given this, the Defendant is not entitled to compensation for the removing of the fruit trees.

Further, Tranla did not expect to compensate Defendant for the relocation of the fruit trees since Defendant informed Tranla that the trees would need to be removed in order for him to complete the bided project. The removal in Tranla’s opinion should have been part of the original \$115,000 bid provided by the Defendant. Tranla also based her opinion that the relocation of the trees should not have been at her expense due to

Defendants declarations that he would relocated the trees, and 7 additional trees at no costs. Defendant informed Tranla that he already had the equipment rented to do the work and it would be relatively easy to relocate the trees. Since it was not foreseeable based on all the evidence presented, it was improper to award quantum meruit damages for relocation of the trees.

Defendant should also not be compensated for the additional electrical work completed. By Defendants own admission, he hired electrical contractors that were not licensed or bonded and some of who did not know how to do the electrical. (RP pg 235, lines 3-25, pg 236 lines 1-5). The electricians negligently completed wiring which lead to shorts in the existing electrical, damage to Tranla's two year old water heater, which does not work to this day, and damages to her stove and other appliances. Defendant cannot have contemplated being compensated for his employee's faulty work, nor would it have been foreseeable that Tranla would be liable for costs due to faulty work by the electricians hired by the Defendant.

The installation of the concrete deck and ramp was in the plans and there should not be any award for this amount. Further, Tranla made payments for the materials. (CP 15, Trial Exhibit 106). Finally, the Defendant did not complete the work; therefore he should not have been

compensated as if he had completed the work. Therefore, any quantum meruit award must be remanded to the trial court for a proper determination as to whether any benefit was provided to Tranla if there was any to her and if any payments would have been foreseeable.

2. The Trial Court improperly held Tranla responsible for paying sales tax when the contract specified that obligation to a particular.

The Trial Court determined that any of the “extra work” performed or change orders, did not include sales tax. The construction contract was a one page document that clearly specified that the Defendant was responsible for paying sales tax on the project. If a contract specifies that sales tax is included in a construction bid, then the tax paid by the bidding party will be upheld. *Pomeroy v Anderson*, 32 Wn.App 781, 649 P.2d 855 (1982); *Stoen v. Frech Slough Flood Control Dist.*, 67 Wash.2d 440, 407 P.2d 963 (1965); *S.S. Mullen, Inc., v. Marshland Flood Control Dist.* 67 Wash.2d 461, 407 P.2d 990 (1965); *Kaeser v. Everett*, 47 Wash.2d 666, 289 P.2d 343 (1955)

In *Pomeroy*, the court determined that since sales tax was not specified in the contract or throughout the bidding process, and the parties disagreed as to whose liability sales tax was, the buyer was responsible for sales tax. In the present case, unlike *Pomeroy*, the construction contract specified that Tranla would pay Defendant “for services in the total amount of

\$115,000 (which includes sale(s) tax” sic. (CP 15, Trial Ex. 101). During the entire negotiations, a key term to Tranla was making sales tax the responsibility of the Defendant. Tranla wanted the peace of mind of knowing exactly what she was paying for before construction was commenced. Further, the contract specified that the contract was the entire agreement; and that any additional work was required to be in writing or change order at a rate of \$45.50 per hour. Tranla understood this to mean that any “extra work” or change orders would include the sales tax if any was due.

It is Tranla’s contention that the Trial Court failed to differentiate whether the “extra work” and or “change orders” would include sales tax. This contention is based on the Trial Court’s ruling that “the parties did not expressly state whether the additional work performed by Zamora whether calculated on a contract hourly basis, or otherwise, would include sales tax.” (CP 16 - Trial Courts Findings of Fact and Conclusions of Law pg. 9, Item 12).

The Trial Court erred in basing its determination here on presumption of RCW 82.08.505, which states that sales tax is the responsibility of the purchaser. A presumption only becomes presumption if there is no evidence to the contrary in the contract. Here the parties contemplated the

sales tax issue and specified in the contract that sales tax would be the responsibility of the Defendant.

A contract is to be read together in its entirety and all the terms of the contract should be read together to determine the intent of the parties to the contract. *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973) Silence in a contract as to who is responsible for sales tax for additional work can only be determined by looking at the intent of the parties from reading the contract itself. Since the contract specified that sales taxes would be included in the price by the Defendant, and additional work would be based on the original contract, the sales tax for the work orders or “extra work” should be the responsibility of the Defendant. Therefore, the Trial Court erred when it determined that Tranla was responsible for sales tax.

3. The Trial Court erred in determining that the reasonable date to grant liquidated damages contrary to the date specified in the contract.

Liquidated Damages Clauses are favored in Washington State and courts will uphold them if the amount involved neither amounts to a penalty, nor is otherwise unlawful. *Ashley v. Lance* 80 Wash.2d 274, 280, 493 P.2d 1242 (1972); *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 558, 730 P.2d 1340 (1987); *Brower Co. v. Garrison*, 2 Wn. App. 424, 432, 468 P.2d 469 (1970)

Washington courts follow the United States Supreme Court's view that liquidated damages agreements fairly and understandingly entered into by experienced, equal parties with a view to just compensation for the anticipated loss should be enforced. *Walter Implement*, at 558 (citing *Wise v. United States*, 249 U.S. 361, 63 L. Ed. 647, 39 S. Ct. 303 (1919)) Washington uses the 2-part Restatement test for evaluating validity/enforceability of liquidated damages provisions. *Management, Inc. v. Schassberger*, 39 Wn.2d 321, 328, 235 P.2d 293 (1951) The court in *Management Inc.*, held that a liquidated damages provision is enforceable if (1) the amount so fixed is a reasonable forecast of just compensation for the harm caused by the breach, and (2) the harm caused by the breach is incapable or very difficult of accurate estimation. *Management, Inc.*, at 328 (citing Restatement of Contracts § 339, at 552 (1932))

In the present case, Tranla and Defendant included a liquidated damages clause in the construction contract. The contract specified that "the scope of work beginning on January 15, 2001, shall be completed in 4 months from the starting date. If the project cannot be completed within these 4 months, then Atomic-Construction shall pay Khia (Tranla) \$150.00 per day. (CP 15, Trial Ex. 101-Construction Contract). The Trial Court determined that this was an enforceable liquidated damages clause, and was

not a penalty. (CP 16 - Trial Courts Findings of Fact and Conclusions of law, Pg. 10, Item 13)

The Defendant claims that the delay in the new floor plans being submitted caused his delay on the project. According to Tranla's sworn testimony, the submission of the plans was not the cause of the delay. Tranla testified that Defendant informed her that he was having trouble finding electrician and that had been causing the most problems. (RP 328, lines 15-25). On cross-examination at trial, Defendant's counsel asked Tranla whether the delay was due to the plans not being submitted. Tranla responded that the Defendant had not even completed demolition in April, one month before the contract should have been completed. (RP 94, lines 11-25; RP 95, lines 1-4) Further, at trial, Defendant responded to questions as to why he did not complain of the alleged delays caused by Tranla. Defendant responded that understood the project was to be completed timely and that he never informed Tranla that "the delays" were going to prevent the project from being timely completed. (RP 227, lines 21-25; RP 228, lines 1-2) Defendant believed that "everything was going to end happy and nice." (RP 227, lines 15-20)

Defendant again testified in response to a question whether he even informed Tranla that he would not complete the project on time, that he "don't tell her I want to finished late. No, I don't tell her." (RP 230, line

6-18). The Defendant also testified that he was responsible for the hiring of bad electrical contractors and the delays as they pertain to the electrical were his fault. (RP 234, lines 21-25, RP 235 lines 1-23).

The Trial Court then determined that since Tranla granted extensions on the project and due to “extra work”, liquidated damages would commence either on September 16, 2007 or November 10, 2007 and would be calculated through January 2, 2008. It seems, by looking at the Trial Courts findings of fact and conclusions of law, that it completely ignored the May 15, 2007 date as expressed in the contract as the date for calculating the commencement of the liquidated damages award. (CP 16). The Trial Court ultimately ruled that that commencement date should be November 10, 2007, and granted a liquidated damages award in the amount of \$7,950.

Tranla’s counsel informed Defendant by letter that if the work was not completed, it would calculate liquidated damages from November 10, 2007. (CP 15, Trial Ex. 113). This letter was an attempt to have the Defendant complete the project.

Later on January 2, 2008, Tranla’s counsel informed Defendant in a letter that Tranla was terminating her contract with the Defendant and that they intended to seek 106 days worth of liquidated damages. The letter further indicated that if the payments were not made, Tranla would seek

liquidated damages outstanding at the time of the filing of a law suit in an amount to be determined.

The contract entered into by both Tranla and Defendant, a sophisticated and licensed builder, specified that the contract would commence on January 15, 2007 and would be completed within 4 months from commencement. If the project was not completed for whatever reason, Tranla would be entitled to liquidated damages of \$150 per day until completed.

Defendant was aware that Tranla received a loan for the construction and that Defendant relied on the home Defendant was working on to run her business. During construction Tranla was not able to rent rooms for her clients and was forced to make payments on the construction loan. By Defendant failing to complete the project timely or timelier, the liquidated damage provision was reasonable and necessary for Tranla to protect her business and allow her to continue to pay on a loan despite lost rental revenue, due to Defendants continued failure to complete the construction timely.

A waiver of a contract right can either be expressed or implied, but a waiver must be an intentional and voluntary relinquishment of a known right. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998) If implied, the waiver must be unequivocal and any doubt or ambiguity will not

suffice as a waiver. *Jones, Supra.* Further, a party's failure to demand proof of performance does not waive the right to performance. *Jones, Supra.*

Tranla never waived her right to the liquated damages provided for in the underlying contract. In fact Tranla continuously insisted that the liquated damages should be awarded from May 15, 2007, 4 months from the contract date of January 15, 2007 to January 2, 2008. Tranla only informed Defendant that she "would" waive prior liquidated damages before September 16, 2007, in an effort to settle before a suite would be commenced. Since Defendant never completed the project, this contemplated waiver should not be considered in determining the date for liquated damages.

As indicated above, Defendant was the one who offered to commence additional work on the project, regardless of whether the Defendant was to be compensated for the "additional" or "extra work." As the Trial Court determined, Defendant was aware that time was of the essence and that Defendant failed to complete the project by the date specified in the contract. Defendant knew that a specific date was contracted for and material, as Tranla needed the construction completed in order to run her business. Thus Defendant should have also been aware, unless Tranla indicated otherwise, that liquated damages in the amount of \$150.00 per

day from the original contract date would be assessed if he continued to miss the specified extension dates.

All of alleged “additional work” and “extra work” was within the control of the Defendant. Neither impracticability, superseding event and/or force majeure were asserted. The latest date the Trial Court should have awarded the commencement of liquated damages would be from September 16, 2007 through January 2, 2008, since this was the date provided to Defendants upon termination of his services and made in an effort to settle amicably.

It seemed through the courts decision, it sympathized with Defendant and awarded him everything possible, but went out of the Courts way to rule against Tranla and her entitlement to the offset of liquidated damages. Therefore, the Trial Court erred in determining the calculation for the liquated damages award was from November 10, 2007 through January 2, 2008.

4. The Trial Court erred when in ruling that the Defendant was entitled to compensation for the completion of the entire basic contract, when the Defendant failed to complete it.

The original contract entered into on January 15, 2007, was based on plans submitted by Mr. Kane. Tranla was to pay \$115,000 for specified work to be performed. Both Tranla and Defendant were aware of what

work was specified in the original contract, and what services were to be provided based on communications and Mr. Kane's plans. Tranla made all the required payment for the completion of the work, and only withheld the remaining funds to be paid on the contract until work was completed as called for in the contract by the Defendant. As indicated above, Defendant was terminated before he completed the "basic" contract, due to his failure to timely complete the job.

Defendant was paid \$112,000 of the basic contract price before his termination. In addition to the basic contract price, Tranla expended payments covering additional work and money paid directly to the electricians. When Defendant failed to complete the "basic" project, Tranla withheld the remaining \$3,000 and sued Defendant for breach of contract. Tranla was forced to hire additional labor to complete the project at a cost of \$2,000. (RP 65, lines 4-24; CP 15, Trial Ex. 109) Tranla and her family also completed the remaining portions of the project using their own labor. Yet, the Trial Court determined that Tranla still owed the Defendant the \$3,000 on the "basic" contract, since Defendant completed the "basic" contract. (CP 16 - Trial Courts Findings of Fact and Conclusions of Law, Pg. 4, Item 21)

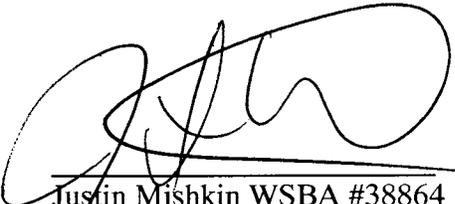
The Trial Court based its award on a false conclusion, since Defendant failed to complete the "basic" contract. It is agreed that the total contract

price was not paid, but the final amount due on the contract was not due until completion. Therefore, the Trial Court erred when it awarded Defendant the remaining \$3,000 balance due under the contract upon completion without deducting the money expended by Tranla to hire additional labor to complete the project \$2,000, and the value of her and her families own labor.

V. Conclusion.

Based on the forgoing argument, facts, and evidence, we pray that this court overturns the Trial Court's decision to grant the Defendant money for a job never completed or completed faulty, money for additional "work completed," money for taxes when the parties contemplated this in the original contract. We ask that this Court overturn the Trial Court's decision regarding liquidated damages; and remand to set the liquated damages at the date as provided for in the underlying original construction contract.

Respectfully submitted this 3rd day of August, 2010.



Justin Mishkin WSBA #38864
Attorney for the Appellant