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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying TNT'S Motion for Summary Judgment on TNT'S breach of contract claim.
2. The trial court erred in granting CARA'S Motion for Summary Judgment on TNT'S breach of contract claim.
3. The trial court erred in concluding that CARA did not receive a reduction in the amount owed as delineated by the JARPA credit set forth in Invoice 100158.
3. The trial court erred in concluding that the entire \$244,808.20 owed on the contract was paid in full by CARA.
4. The trial court erred in concluding that CARA did not underpay TNT for work performed under the contract.
5. The trial court erred in concluding that there is no amount currently owing to TNT for work performed under the original contract agreement.
6. The trial court erred in concluding that there was no issue of material fact.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the \$6,445.00 JARPA credit given on invoice 100158 reduce the amount CARA paid on the original contract?
[Assignment Of Error # 1, 2, 3, 4, 5, 6, 7]
2. Did the JARPA credit and subsequent rebilling have any effect on CARA'S total cost of the original Contract and ancillary agreements?
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4. Did CARA'S payment of invoice 100158 show CARA'S intent to take the benefit of the JARPA credit.
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5. Was the JARPA rebilling precluded by the language added to invoice 100158?
[Assignment of Error #1, 2, 4, 5, 6, 7]

III. STATEMENT OF CASE

(A) Overview of the Case

The Appellant, TNT Excavating, LLC (hereinafter "TNT"), and Respondents CARA LAND COMPANY, LLC, and LEADER INTERNATIONAL CORPORATION (hereinafter "CARA") entered into an "Agreement Between Owner And Sub-Contractors" dated March 15, 2006 (the "Contract"). [CP 30, CP 35-54].

TNT sought summary judgment on its claim that CARA breached the Contract and subsequent ancillary contracts for extra work by failing to pay TNT a remaining balance total of \$64,756.88 in liquidated charges that became due and owing in September and November of 2006. TNT also sought summary judgment on CARA'S counterclaims regarding hydro-seeding and ditch installation work performed by TNT under the Contract, and on

TNT'S claim for foreclosure of its Amended Claim of Lien. [CP 16-18].

(B) Statement of Facts

On March 15, 2006, Jack Johnson, Manager of TNT Excavating, LLC (hereinafter "TNT"), signed a contract, Agreement Between Owners and Subcontractors (hereinafter "the Contract"), on behalf of TNT, with Respondents CARA LAND COMPANY, LLC (hereinafter "CARA"), and LEADER INTERNATIONAL CORPORATION (hereinafter "LEADER INTERNATIONAL") [CP 30, CP 35-54].

Richard A. Flaherty, the President and CEO of LEADER INTERNATIONAL and a Managing Member of CARA, [CP 30], drafted the Contract and made all revisions thereto as the deal was negotiated. [CP 30].

Exhibit I of the Contract called for TNT to perform certain sitework for CARA and LEADER INTERNATIONAL in exchange for \$244,808.20. [CP 45].

The sitework at issue specifically included the removal of a culvert and related resloping of the land pursuant to a Hydraulic

Project Approval, Log Number ST-G3741-01 (hereinafter "the JARPA/HPA Removal" or "JARPA/HPA work"). [CP 45, CP 51-54]. JARPA/HPA Removal was specifically included in the Contract, but the cost of the JARPA/HPA Removal was not specifically broken out. [CP 45].

As work proceeded, TNT invoiced CARA for the work performed on a percentage-of-completion basis, as required by Paragraph 2 of the Contract. [CP 30-31].

On Invoice #100058, dated May 1, 2006, TNT invoiced CARA \$123,028.14, plus tax, for Contract work. [CP 31, CP 55].

On May 15, 2006, CARA paid the May 1, 2006 Invoice #100058, in full, by check #1019 in the amount of \$133,445.16 (\$123,028.14, plus tax {\$10,417.02} = \$133,445.16). [CP 31, CP 56].

On Invoice #100083, dated June 2, 2006, TNT invoiced CARA \$104,572.11, plus tax, for Contract work. [CP 31, CP 57].

On June 21, 2006, CARA paid the June 2, 2006 Invoice #100083, in full, by check #1031, in the amount of \$120,141.21 (\$104,572.11, plus tax {\$8,993.20} = \$113,565.31). [CP 31, CP 58]. The \$6,575.90 additional amount included in check #1031 was

payment for agreed extras in the amount of \$6,055.16, plus tax, (\$6,055.16 + 520.75 = \$6,575.90), invoiced on Invoice #100059 [CP 60, CP148].

After billing out Invoice #100083, only \$17,207.95, plus tax, remained to be billed of the \$244,808.20 plus tax total that TNT was to earn under the initial Contract. The Contract work that remained included:

- a. \$2,397.00 for Parking Area Extension for Respondents WEST SOUND TREATMENT CENTER;
- b. \$8,685.95 for Hydroseeding and Mulch of Slopes and Ponds; and
- c. \$6,125.00 for Construction and Placement of Rock at Pond.

[CP 31].

In early August 2006, CARA'S agent, Richard Flaherty (hereinafter "Flaherty"), informed TNT'S agent, Max Walker (hereinafter "Walker"), that Flaherty was delaying and perhaps even canceling the JARPA/HPA Removal. [CP 82]. The culvert was still needed for machinery to cross in order to perform other necessary work at the site. [CP 82].

After Flaherty told Walker not to complete the JARPA/HPA Removal, TNT credited the cost of the JARPA/HPA Removal back to CARA on Invoice #100158. [CP 82, CP 85-87].

On or about August 9, 2006, Walker hand-delivered Invoice #100158 to Flaherty on the job-site. [CP 82-83]. Shortly thereafter, Flaherty returned Invoice #100158 to Walker with handwritten notes and comments on the document. [CP 83, CP 85-87]. The two discussed the concerns Flaherty raised, including Flaherty's concern that the \$6,999.27 (\$6,445.00 plus tax {\$554.27}) credit back for the JARPA/HPA Removal did not have enough money in it. [CP 83, CP 85-87]. Walker then explained to Flaherty how the JARPA/HPA cost was calculated. [CP 83].

Walker and Flaherty eventually agreed that CARA would pay \$75,000.00 on invoice #100158 and that this amount would cover all additional work performed outside of the Contract up to that date, as well as certain future additional work documented in handwritten notes. [CP 83, CP 88].

At Flaherty's request, Walker agreed to include certain language on a new draft of Invoice #100158:

Credit per Verbal Agreement

\$75,000 Invoice amount covers all previously unbilled and remaining time/material additions to contract agreement excluding trucking and material costs for additional rock to be placed on the R-3 Pond Access Road.

[CP 83, CP 89-91]. At the time the new language was included, the JARPA/HPA work was still on hold and possibly cancelled. [CP 83].

Flaherty accepted the revised Invoice #100158, dated 8/9/2006, and subsequently delivered a check to CARA, in the amount of \$51,302.61, with the notation, "\$75K Extras less Contract Holdback (10%)." [CP 83, CP 91, CP 92].

In mid-August 2006, Flaherty requested that TNT proceed with the JARPA/HPA Removal work. [CP 83]. TNT completed the JARPA/HPA Removal by the end of August 2006. [CP 84].

On or about October 4, 2006, Walker hand-delivered TNT'S Invoice #100187, dated 10/4/2006, to Flaherty. [CP 84]. Invoice #100187 included TNT'S \$6,445.00 (plus tax) bill for the completed JARPA/HPA Removal and all other work remaining under the Contract, as well as the last of the additional work that had been separately agreed to by the parties. [CP 84, CP 93].

On or about October 6, 2006, Flaherty returned a TNT Statement, dated October 4, 2006, on which Flaherty had marked a change (reducing the amount shown as owing from \$64,756.87 to \$57,757.60, a difference of \$6,999.27). [CP 32, CP 59]. The \$6,999.27 reduction is the exact amount of the JARPA/HPA Removal amount, plus tax ($\$6,445.00 + \$544.25 \{\text{tax @ } 8.6\% \} = \$6,999.27$) invoiced, after the JARPA/HPA work was completed, on Invoice #100187, dated 10/4/2006. [CP 93]. Attached to the changed Invoice #100187 was a summary of payments table ("FINAL Summary Contract/Other Payments") (hereinafter "the Table") created by Flaherty. [CP 32, CP 59-60].

In the Table, Flaherty noted CARA'S payments of \$227,600.25, plus sales tax, under the Contract, but did not account for TNT'S \$6,999.27 credit back against the Contract for the JARPA/HPA Removal. [CP 32, CP 59-60].

Because the JARPA/HPA Removal, which was part of the Contract work, was credited back to CARA while the JARPA/HPA Removal was on hold; the \$6,999.27 ($\$6,445.00$ plus tax) attributable to the JARPA/HPA Removal was not, in fact, paid. [CP 32, CP 82].

On or about November 6, 2006, CARA submitted check #1031 to TNT in the amount of \$57,757.61 with the note, "Final Payment – 100% Sitework Complete." [CP 32, CP 61]. However, the check included an endorsement stating, "When endorsed this payment constitutes full and final payment for all contract services for site work at the CARA CREEK BUSINESS PARK." [CP 32, CP 61]. Because the payment amount did not include \$6,999.27 for the JARPA/HPA Removal, TNT did not accept the check.

On or about November 14, 2006, Jack Johnson, Manager of TNT, received an email from Flaherty reaffirming that \$57,757.61 was due and owing for Contract work and extras, but refusing to pay any of the amount due because we would not release our claim to the \$6,999.27 due for the JARPA/HPA Removal. In his email, Flaherty threatened to "use the funds you do not except [sic] to pay for our legal counsel." [CP 62].

CARA has, to date, failed to pay the \$6,999.27 due under the Contract for the JARPA/HPA Removal. [CP 32].

(C) Procedural History

On October 1, 2007, Appellant TNT Excavating, LLC (TNT) filed an Amended Complaint for a breach of contract claim against

Respondents CARA LAND COMPANY, LLC and LEADER INTERNATIONAL CORPORATION (CARA) and for a foreclosure of a materialmen's lien claim. [CP 1-6]. The remaining Defendants in this matter claim an interest in the real property subject to the lien. [CP 1-6].

On October 2, 2007, CARA filed an Answer to Amended Complaint and Counter Claims alleging claims for improper ditch installation and failure to hydroseed. [CP 7-11].

On January 4, 2008, TNT filed a Motion for Summary Judgment seeking judgment on TNT'S breach of contract claim, on CARA'S counterclaims, and on TNT'S claim to foreclose lien. [CP 16-18].

On January 18, 2008, CARA filed a Memorandum in Support of Defendants Motion for Summary Judgment, which contained a motion for summary judgment on TNT'S breach of contract claim and foreclosure claim. [CP 95-103].

On February 15, 2008, Judge Leila Mills heard oral arguments on the respective cross motions for summary judgment. [RP, February 15, 2008]. Following oral arguments, Judge Mills denied TNT'S motion for summary judgment on CARA'S counter

claims, and took the matter of the breach of contract claim/JARPA under advisement for ruling at a later date. [RP, February 15, 2008, Page 28],

On February 25, 2008, an Order on Cross Motions for Summary Judgment was entered [CP 249-251], in which Judge Mills denied TNT'S motion for summary judgment on the breach of contract claim, and granted CARA's motion for summary judgment on TNT's breach of contract claim [CP 250, RP April 18, 2008, Page 17].

On March 6, 2008, TNT filed a Motion for Reconsideration [CP 257-265], which was denied on March 17, 2008 [CP 266].

On April 9, 2008, TNT filed a Motion for Entry of Final Judgment [267-268].

On April 10, 2008, CARA filed a Motion and Memorandum in Support of Attorney's Fees. [CP 269-272]. Oral arguments on the Motion were heard on April 18, 2008 [RP, April 18, 2008]. Judge Mills ruled that the issue of fees was not properly before the court because the counterclaims have not been dismissed and there remains an issue as to who will be the prevailing party. [RP, April 18, 2008, Pages 10-11, 20].

On May, 9, 2008, an Agreed Final Judgment on Cross Motions for Summary Judgment was entered. [CP 297-300]. Parties agreed that TNT'S Motion to Enter Final Judgment on Cross Motions for Summary Judgment should be granted on the basis of the courts February 25, 2008 Order on Cross Motions for Summary Judgment. [CP 297-298].

On May 30, 2008, TNT timely filed a Notice of Appeal [CP 301-309].

IV. STANDARD OF REVIEW

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3rd 1124 (2000).

The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Bremerton Pub. Safety Ass'n v. City of Bremerton*, 104Wn.App, 226, 230, 15 P.3rd 688 (2001) (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201,961 P.2d 333 (1998)).

The court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue

of material fact and that the moving party is entitled to judgment as a matter of law. *Lybbert*, 141 Wn.2d at 34,1 P.3rd 1124 (2000).

V. ARGUMENT

- A. The \$6,445.00 JARPA credit given on invoice 100158 reduced the amount CARA paid on the original contract.

The JARPA credit, given on invoice 100158, ultimately reduced the amount CARA paid on the original contract by \$6,999.27 (\$6,445.00 plus sales tax), because the credit was applied to other charges on another invoice.

The original Contract called for payment of \$244,808.20 to TNT to perform certain sitework for CARA. [CP 45]. The contracted sitework specifically included the JARPA/HPA removal, [CP 45, CP 51-54]; but the JARPA cost was not specifically broken out. [CP 45].

Prior to the JARPA work being put on hold by CARA, CARA made two payments toward the original Contract price on two separate invoices. [CP 136, CP 142]. CARA was billed and paid \$123,028.14 (plus tax) on Invoice# 100058 [CP 31, CP 56, CP 138]; and was billed and paid \$104,572.11 (plus tax) on Invoice#

100083.¹ [CP 142, CP 144]. The two payments on the two original Contract invoices totaled \$227,600.25.

After billing out Invoice# 100083, only \$17,207.95, plus tax, remained to be billed of the \$244,808.20 plus tax total that TNT was to earn under the initial Contract. [CP 31, CP 60]. \$17,207.95, plus tax, was the remaining balance owed by CARA on the original contract prior to the JARPA work being put on hold [CP 31], and prior to TNT providing a credit for the JARPA work.

In early August of 2006, CARA'S agent, Flaherty, informed TNT'S agent, Walker, that the JARPA/HTC Removal was on hold. [CP 82]. At that point, TNT/Walker credited the cost of the JARPA/HTC Removal back to CARA on Invoice# 100158. [CP 82, CP 85-87]. Walker and Flaherty discussed concerns that Flaherty raised, including Flaherty's concern that the \$6,999.27 (\$6,445.00 plus tax {\$554.27}) credit back for the JARPA/HPA Removal did not have enough money in it. [CP 83, CP 85-87]. Walker then

¹ CARA'S check for payment on Invoice# 100083 included an additional \$6,575.90; which was payment on Invoice#100059 [CP 60, CP 148]. The additional amount was for agreed extras in the amount of \$6,055.16, plus tax (\$6,056.16 + \$520.75 = \$6,575.90). [CP 60, CP 148].

explained to Flaherty how the JARPA/HPA cost was calculated. [CP 83].

Walker and Flaherty eventually agreed that CARA would pay \$75,000.00 on invoice #100158 and that this amount would cover all additional work performed outside of the Contract up to that date, as well as certain future additional work documented in handwritten notes. [CP 83, CP 88].

The JARPA credit given by TNT, after the JARPA work was delayed, clearly benefited CARA because it reduced the amount CARA owed on the original contract allowing application of the credit to other work billed on a subsequent invoice, Invoice #100158.

TNT acted in a more than fair business manner by providing the credit before knowing if the JARPA Removal was permanently off the table. TNT could have held onto the money, benefiting from the use of the money until it was determined if the JARPA work would go forward.

The parties agreed to hold off on the JARPA Removal. CARA was credited for the cost of the JARPA Removal which reduced the amount paid to TNT for other work TNT provided. TNT

subsequently completed the JARPA Removal at CARA'S request. [CP 83, CP 84]. TNT is entitled to be paid for the JARPA Removal as agreed to under the original Contract. Failure to do resulted in CARA'S breach of the original Contract.

- B. The JARPA credit and subsequent rebilling had no effect on CARA'S total cost of the Contract and ancillary agreements.

The fact that the agreed JARPA amount was temporarily credited while the work was on hold, and then subsequently billed when the work was taken off hold and completed, had no effect on the total cost of the Contract and ancillary agreements between the parties. The total cost to CARA was not increased. The JARPA amount was agreed to in the original contract and TNT is entitled to be paid for the work.

The JARPA cost was included in the original Contract. [CP 45, CP 51-54]. However, the cost of the JARPA Removal was not specifically broken out in the Contract. [CP 45]. TNT figured the JARPA cost at \$6,999.27 (\$6,445.00 plus tax {\$554.27}), when it provided a credit to CARA. [CP 82, CP 85-87]. TNT and CARA then discussed the amount of the JARPA cost and ultimately agreed to the value of the work as \$6,445.00 plus tax, for a total of

\$6,999.27. [CP 83, CP 88]. A credit for that amount was issued on invoice 100158 [CP 91, CP 89-91], and the exact same amount was later invoiced, Invoice #100187, to CARA after the JARPA work was completed. [CP 84, CP 93].

A more simplified explanation of what occurred in this case is as follows: CARA was to be charged \$X under the original Contract. CARA received a credit for \$Y billed under the original Contract. CARA was subsequently billed for \$Y for work agreed to under the original Contract. The credit and subsequent billing would normally be a wash, and the amount owed on the original contract would remain \$X.

The fact that changes this analysis is that the credit was applied to extras and other charges not in the original Contract. Therefore, CARA actually paid less on the original Contract than agreed because CARA'S obligation on other amounts owed to TNT was reduced by the application of the credit; the credit was applied to ancillary agreements/extras and a subsequent invoice between the parties, not to the original Contract invoices. [CP 82, CP 85-87]. The dollars were put towards another invoice and CARA paid less for other contracted work and extras because of the credit.

CARA has failed to acknowledge this fact, and as a result, TNT has not been paid for the JARPA Removal.

Appendix -1 is a table showing all TNT invoice amounts and CARA payments. As shown and documented to the record on Appendix -1, the total amount invoiced by TNT was \$424,513.43. The total amount paid and by CARA to date is \$359,756.56. An additional \$57,757.61 was tendered to the registry of the court by CARA. Therefore, the total amount paid and tendered to the registry by CARA to date is \$417,514.17. As shown on Appendix -2, the difference between the amount billed by TNT and the amount paid or tendered by CARA is \$6,999.26, which is the amount TNT is owed for the JARPA Removal. TNT has not been paid for the JARPA work.

CARA unilaterally deducted \$6,999.27 (the amount of the JARPA Removal cost plus tax) from the TNT Statement dated October 4, 2006, [CP 59]; and then attached its Summary of Contract/Other Payments, which fails to provide for the re-billed JARPA costs or take into consideration the credit offset taken against Invoice# 100158 [CP 89-91].

C. The JARPA credit was specifically negotiated by TNT and CARA for inclusion in invoice# 100158.

The actions taken by TNT and CARA demonstrate that the JARPA credit was negotiated by the parties for inclusion in Invoice# 100158.

Subsequent to TNT'S being advised that the JARPA was on hold, on or about August 9, 2006, TNT/Walker hand-delivered Invoice #100158 to CARA/Flaherty on the job-site. [CP 82-83]. Shortly thereafter, Flaherty returned Invoice #100158 to Walker with handwritten notes and comments on the document. [CP 83, CP 85-87]. The two discussed the concerns Flaherty raised, including Flaherty's concern that the \$6,999.27 (\$6,445.00 plus tax {\$554.27}) credit back for the JARPA/HPA Removal did not have enough money in it. [CP 83, CP 85-87]. Walker then explained to Flaherty how the JARPA/HPA cost was calculated. [CP 83].

Walker and Flaherty eventually agreed that CARA would pay \$75,000.00 on invoice #100158 and that this amount would cover all additional work performed outside of the Contract up to that date, as well as certain future additional work documented in handwritten notes. [CP 83, CP 88].

At Flaherty's request, Walker agreed to include certain language on a new draft of Invoice #100158:

Credit per Verbal Agreement

\$75,000 Invoice amount covers all previously unbilled and remaining time/material additions to contract agreement excluding trucking and material costs for additional rock to be placed on the R-3 Pond Access Road.

[CP 83, CP 89-91]. At the time the new language was included, the JARPA/HPA work was still on hold and possibly cancelled. [CP 83].

Flaherty accepted the revised Invoice #100158, dated 8/9/2006, and subsequently delivered a check to CARA, in the amount of \$51,302.61, with the notation, "\$75K Extras less Contract Holdback (10%)." [CP 83, CP 91, CP 92].

In mid-August 2006, Flaherty requested that TNT proceed with the JARPA/HPA Removal work. [CP 83]. TNT completed the JARPA/HPA Removal by the end of August 2006. [CP 84].

The actions taken by TNT and CARA agents, Walker and Flaherty, demonstrate that the JARPA credit was specifically negotiated for inclusion on Invoice# 100158. The parties agreed to the value of the JARPA work when they agreed to the value of the JARPA credit.

CARA had no objection to receiving and utilizing the negotiated JARPA credit to reduce the obligation on Invoice# 100158. CARA balked, and breached, when the JARPA Removal work was subsequently completed by TNT and billed out but not paid.

When presented with an invoice, Invoice #100187, for the completed JARPA Removal (\$6,445.00 plus tax) and all other work remaining under the Contract, CARA attempted to unilaterally modify the parties agreements regarding the JARPA/HPA Removal, as well as the last of the additional work that had been separately agreed to by the parties. [CP 84, CP 93].

Flaherty returned the TNT Statement, dated October 4, 2006; which billed out the completed JARPA Removal and had marked a change (reducing the amount shown as owing from \$64,756.87 to \$57,757.60, a difference of \$6,999.27 equal to the JARPA plus tax cost). [CP 32, CP 59]. The \$6,999.27 reduction is the exact amount of the JARPA/HPA Removal amount, plus tax ($\$6,445.00 + \$544.25 \{ \text{tax @ } 8.6\% \} = \$6,999.27$) invoiced, after the JARPA/HPA work was completed, on Invoice #100187, dated 10/4/2006. [CP 93]. Attached to the changed Invoice #100187 was

a summary of payments table ("FINAL Summary Contract/Other Payments") (hereinafter "the Table) created by Flaherty. [CP 32, CP 59-60], which also failed to provide for payment of the JARPA Removal. [CP 59-60].

The JARPA credit was specifically negotiated by TNT and CARA for inclusion in Invoice# 100158. CARA accepted the benefit of the JARPA credit, then refused to pay TNT the identical amount billed for the JARPA Removal after the work was completed, thereby breaching the original Contract.

D. CARA's payment of invoice 100158 shows CARA'S intent to take the benefit of the JARPA credit.

CARA/Flaherty accepted the revised Invoice #100158, dated 8/9/2006 with the JARPA credit, and subsequently delivered a check to CARA, in the amount of \$51,302.61, with the notation, "\$75K Extras less Contract Holdback (10%)." [CP 83, CP 91, CP 92]. Cara's actions demonstrate their intent to take the benefit of the JARPA credit.

E. The JARPA rebilling was not precluded by the language added to invoice 100158.

The parties added language to Invoice 100158 to reflect that the total due on the invoice covered previously unbilled work that

had been performed in addition to the original Contract requirements:

\$75,000 Invoice amount covers all previously unbilled and remaining time/material additions to contract agreement excluding trucking and material costs for additional rock to be placed on the R-3 Pond Access Road.

Walker Dec., [CP 89-92] (emphasis added). Plaintiff retained the right to bill again for the JARPA work when it was completed because the language added to Invoice 100158 only precluded further billing for additions to the contract, not work still to be performed pursuant to the original Contract. As the Court found, the JARPA work was called for under the original Contract. Order [CP 250]. Thus, billing for the JARPA work still to be done was not precluded, and after the work was performed, Plaintiff was entitled to payment for that work.

VI. CONCLUSION

Among other errors identified in this brief, the trial court erred in denying TNT'S Motion for Summary Judgment and erred in granting CARA's Motion for Summary Judgment.

TNT and CARA bargained for the JARPA work to be performed and to be paid. TNT has performed, CARA has failed to pay resulting in a breach of the Contract.

The Contract provides for payment of attorney's fees, but appears to have a scrivener's error in stating that : "Attorney's fees and court costs shall be paid by the prevailing party in the event that judgment must be, and is, obtained to enforce this Agreement or any breach thereof." [CP 37, Emphasis added].

VII. RELIEF REQUESTED

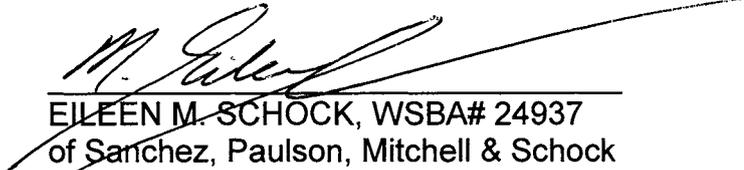
TNT seeks entry of an Order by this Court granting Summary Judgment, pursuant to CR 56, in favor of TNT on TNT'S breach of contract claim against CARA for the \$57,757.61 that Defendants have held back and \$6,997.27 for the JARPA work that was completed as a part of the Contract, for a total of \$64,756.88; pre-judgment interest of 12% from November 6, 2006; post-judgment interest of 12%; attorneys fees and costs as provided for in the Contract; and

Reversing the trial court's award of Summary Judgment to CARA on TNT'S breach of contract claim; or

Alternatively, TNT seeks entry of an Order by this Court denying Defendants' motion for summary judgment for the reason that TNT has at least raised an issue of material fact with regard to the effect of the JARPA credit on invoice 100158.

Finally, TNT request an award of attorney's fees, pursuant to the contract, and pursuant to RCW 4.84.330, on appeal if found to be the prevailing party.

DATED: October 7, 2008



EILEEN M. SCHOCK, WSBA# 24937
of Sanchez, Paulson, Mitchell & Schock
Attorneys for Appellant TNT

APPENDIX

<u>Billed by TNT</u>					<u>Payment on Invoices by CARA</u>			
<u>CP</u>	<u>Invoice Date</u> <u>Invoice #</u>	<u>Invoice</u> <u>Subtotal</u>	<u>Invoice Tax</u>	<u>Invoice</u> <u>Total</u>	<u>CP</u>	<u>Date of</u> <u>Check</u>	<u>Check</u> <u>No.</u>	<u>Amount</u> <u>Paid</u>
CP136	05/01/2006 #100058	\$123,028.14	\$10,417.02	\$133,445.16	CP138	05/15/2006	#1019	\$133,445.16
CP148	06/02/2006 #100059	\$ 6,055.16	\$ 520.74	\$ 6,575.90	¹			
CP142	06/02/2006 #100083	\$104,572.11	\$ 8,993.20	\$113,565.31	CP144	06/21/2006	#1031	\$120,141.21
CP150 -152	07/06/2006 #100102	\$ 50,522.63	\$ 4,344.95	\$ 54,867.58	CP154	07/31/2006	#1037	\$ 54,867.58
CP158 - 160	08/09/2006 #100158	\$ 75,000.00	\$ 6,450.00	\$ 81,450.00	CP162	09/08/2006	#1039	\$ 51,302.61
CP93	10/04/2006 #100187	\$ 31,868.77	\$ 2,740.71	\$ 34,609.48				

Total Billed \$424,513.43

Total Paid \$359,756.56

¹ See CP 58, Check #1031 (\$120,141.21) paid Invoice #100083 (\$113,565.31) and Invoice #100059 (\$6,575.90)

APPENDIX

Total billed by TNT		\$424,513.43
Total paid by CARA	-	<u>\$359,756.56</u>
Subtotal Balance Due		\$ 64,756.87
Tendered by CARA, as payment in full (Check No. 1051) (In Court Registry) (CP168)	-	<u>\$ 57,757.61</u>
Additional Balance Due TNT by CARA		\$ 6,999.26 ²

² \$6,999.27 is the JARPA/HPA Removal Fee (CP93) (JARPA Removal \$6,445.00 + \$554.27 {Sales Tax @ 8.60%} - \$6,999.27)

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COURT OF APPEALS
DIVISION II

08 OCT -7 PM 4: 25

STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II -TACOMA

TNT EXCAVATING,LLC, a Washington
Limited Liability Company,

NO. 37784-5

Appellant,

vs.

DECLARATION OF SERVICE

CARA CREEK, LLC, a Washington
Limited Liability Company; CARA
GROUP, LLC, a Washington Limited
Liability Company; CARA LAND
COMPANY, LLC, a Washington Limited
Company; LEADER INTERNATIONAL
CORPORATION, a Washington
Corporation; WEST SOUND
TREATMENT CENTER, a Washington
Non-Profit Corporation; WELLS FARGO
BANK, a National Banking Association;
1997 PORT ORCHARD INDUSTRIAL
PARK LIMITED PARTNERSHIP, a
Washington Limited Partnership; and
KITSAP BANK, a Washington State
Chartered Bank.

Respondents.

1 I declare that on **October 7, 2008**, I personally served a copy of *Brief of Appellant*, on
2 the following:

3 HENRY HAAS, ESQ.
4 LORI BEMIS, ESQ.
5 MCGAVICK GRAVES, P.S.
6 1102 Broadway, Suite 500
7 Tacoma, WA 98402

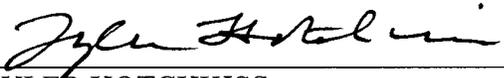
8 Attorneys for Defendants Cara Creek, LLC; Cara Group, LLC; Cara Land Company, LLC;
9 Leader International Corp.; West Sound Treatment Center; and Wells Fargo Bank

10 I also declare that on the **October 7, 2008**, I personally served the original and one copy
11 of the *Brief of Appellant* on:

12 Clerk of the Court
13 Washington State Court of Appeals, Division II
14 950 Broadway, Suite 300
15 Tacoma, WA 98402-4454.

16 I declare under penalty of perjury under the laws of the State of Washington that the
17 foregoing is true and correct.

18 DATED this 7th day of October, 2008, at Bremerton, Washington.

19 
20 _____
21 TYLER HOTCHKISS
22 Rule 9 Intern
23 Sanchez, Paulson, Mitchell & Schock
24

FILED
COURT OF APPEALS
DIVISION II

08 OCT -7 PM 4:25

STATE OF WASHINGTON
BY
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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BANK, a National Banking Association;
1997 PORT ORCHARD INDUSTRIAL
PARK LIMITED PARTNERSHIP, a
Washington Limited Partnership; and
KITSAP BANK, a Washington State
Chartered Bank.

Respondents.

1 I declare that on **October 7, 2008**, I personally served a copy of *Brief of Appellant*, on
2 the following:

3 WILLIAM BROUGHTON, ESQ.
4 BROUGHTON & SINGLETON, INC. P.S.
5 9057 Washington Avenue NW
6 Silverdale, WA 98383

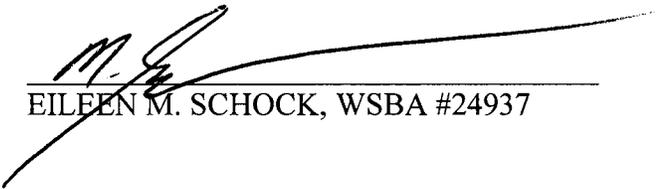
7 Attorneys for Defendant 1997 Port Orchard Industrial Park Limited Partnership

8 TRACY E. DIGIOVANNI
9 SHIERS, CHREY, COX, DIGIOVANNI, ZAK & KAMBICH, LLP
10 600 Kitsap Street, Suite 202
11 Port Orchard, WA 98366

12 Attorneys for Defendant Kitsap Bank

13 I declare under penalty of perjury under the laws of the State of Washington that the
14 foregoing is true and correct.

15 DATED this 7th day of October, 2008, at Bremerton, Washington.

16 
17 _____
18 EILEEN M. SCHOCK, WSBA #24937