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## I. INTRODUCTION

Appellant TNT Excavating, LLC (“TNT”) commenced suit in Kitsap County Superior Court against Respondent Cara Creek LLC, 1997 Port Orchard Industrial Park Limited Partnership, Cara Group LLC, Leader International Corporation, West Sound Treatment Center, Wells Fargo Bank, and Kitsap Bank (“Cara”) for breach of contract. (CP 1-6). For purposes of this appeal, TNT’s suit primarily concerns TNT’s assertion that Cara breached its contract by failing to pay to TNT the disputed sum of \$6,999.27 (\$6,445.00 before tax) to TNT. Before the trial court, Cara successfully argued that it was entitled to summary judgment on TNT’s breach of contract claim. (CP 249-51). After reviewing the parties’ extensive briefing and hearing oral argument and taking the matter under advisement, Judge Mills determined that the disputed work (referred to as “JARPA” work) supporting TNT’s claimed underpayment of \$6,999.27 was part of the parties’ original contract and TNT had received full payment for all contract work. TNT’s subsequent motion for reconsideration was also denied. (CP 266). TNT’s appeal subsequently followed.

## II. ASSIGNMENTS OF ERROR

Cara assigns error to the trial court's failure to award fees pursuant to RCW 60.04.181, RCW 4.84.320, the parties' contract, and RCW 4.84.110 and reiterates its request for fees herein.

## III. STATEMENT OF CASE

TNT and Cara entered into a contract whereby TNT was to perform certain excavating and grading work for Cara. (CP 35-45). TNT agreed to perform the excavating and grading work for \$244,808.20. (CP 45). The specific work TNT would perform is outlined in the parties' contract. (CP 35-45). The contract provides, "Original JARPA/HPA Removal of Culvert and Reslope by Reed Construction and TNT Excavation (included as per original quote)." (CP 45). Where other contract work is broken out line by line, the JARPA work is "included as per original quote." (CP 45). However the JARPA work is alleged by TNT to have cost \$6,445 (before tax). (CP 87).

Certain additional work beyond the work addressed in the contract was performed by TNT for Cara. This work was also paid for. Cara tendered payment to TNT for the full amount owed on the parties' contract via check number 1051 in the amount of \$57,757.61. (CP 168). This check included additional amounts for work done outside of the parties'

original contract, retainage, and the balance owed on the parties' \$244,800.20 contract.

The invoicing and payment history between the parties includes amounts for work attributable to the parties' original contract and additional work. As such, following the invoicing history (described *supra*) throughout the parties' contractual relationship is somewhat laborious. (CP 97-101). However, after reviewing the documents the trial court ultimately granted Cara's motion for summary judgment ruling:

Cara Creek LLC did not receive a reduction in the amount owed and delineated by the JARPA credit as set forth in invoice 100158. Furthermore, the Court finds that the entire \$244,808.20 owed on the contract was paid in full by Cara Creek, LLC and that this constituted the original contract prices, and JARPA work was contemplated and included in the original contract to be reimbursed in the total contract price of \$244,808.20. Further, the court finds that there is no issue of material fact [ . . . ]

(CP 249-51).

This appeal followed. (CP 301).

A. History of Payments Made by Cara to TNT for Work Performed.

Review of the invoices and balance owed as the project progressed is assisted by beginning with the parties' contract price of \$244,808.20. (CP 132). The following table tracks the invoices, checks for payments,

and lien releases related to TNT's work and Cara's payment for contract work.

<u>Invoice Source</u>		<u>Source of Payment</u>
	<b>\$244,808.20</b>	
Invoice #100058 <sup>1</sup>	-\$123,028.14	Paid to TNT pursuant to check #1019 <sup>2</sup> (check total \$133,445.16 includes tax)
Invoice #100083 <sup>3</sup>	-\$104,572.11	Paid to TNT pursuant to check #1031 <sup>4</sup> (check total of \$120,141.21 includes tax and work billed on invoice #100059 <sup>5</sup> )
Total Contract Price Owing prior to invoice #100158 <sup>6</sup>	<b>\$17,207.95</b>	\$17,207.95 included in tender of \$57,757.61 via check #1051 <sup>7</sup> .

TNT does not dispute that checks #1031 and #1019 were received by TNT for amounts due on invoices #100058 and #100083. Partial lien releases were also executed by TNT for these amounts. (CP 140, 146). As a result of Cara's payment of the work reflected on invoices #100058 and #100083, \$17,207.95 remained owing on the balance of the parties' contract at the time invoice #100158 was provided to Cara. Invoice

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<sup>1</sup> CP 136

<sup>2</sup> CP 138

<sup>3</sup> CP 142

<sup>4</sup> CP 144

<sup>5</sup> CP 148

<sup>6</sup> CP 136

<sup>7</sup> CP168

#100158 contains the alleged credit for the JARPA work. The parties agreed to additional work beyond the contract and these amounts were paid as well.

TNT admits that Cara tendered check #1051 in final payment for the project in the amount of \$57,757.61. (CP 32 ¶ 12). Cara's check to TNT in the amount of \$57,757.61 included the \$17,207.95 remaining due on the original contract along with amounts for additional work agreed to by the parties outside of the original contract. The additional amounts resulting in the total \$57,757.61 are also documented by the parties' undisputed history. These amounts are outlined in the table on page 7 of this brief. TNT ultimately rejected Cara's payment of \$57,757.61 because it excluded the \$6,999.27 allegedly owed for JARPA work. (CP 32).

TNT also performed additional work for Cara beyond the original contract. Because these amounts are also included in checks paying the original \$244,808.20 of contracted work they are relevant to Cara's motion for summary judgment. These amounts for contract additions are summarized here.

<u>Invoice Source</u>		<u>Source of Payment</u>
Invoice #100059 <sup>8</sup>	\$6,055.16	Paid to TNT pursuant to check #1031 <sup>9</sup> (check total of \$120,141.21 includes tax and work billed on invoice #100083 <sup>10</sup> ).
Invoice #100102 <sup>11</sup>	\$50,522.62	Paid to TNT pursuant to check #1037 <sup>12</sup> (check total of \$54,867.58 includes tax).
Invoice #100158 <sup>13</sup>	\$75,000.00	Paid to TNT pursuant to check #1039 <sup>14</sup> (check total of \$51,302.61 includes tax and subtracts retainage of \$27,760.03 – <i>see next line</i> ).  10% of \$227,600.25 = \$27,760.03, \$227,600.25 = amount paid so far on contract “heldback” pursuant to holdback provision of contract permitting 10% holdback.
Total additional work	<b><u>\$131,577.78</u></b>	Held back funds of \$27,760.03 (excluding tax) were tendered via check #1051.

The amounts included in Cara’s final payment tendered to TNT via check #1051 from Cara Creek is summarized here:

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<sup>8</sup> CP 148.  
<sup>9</sup> CP 144.  
<sup>10</sup> CP 142.  
<sup>11</sup> CP 150.  
<sup>12</sup> CP 154.  
<sup>13</sup> CP 159-60.  
<sup>14</sup> CP 162.

<u>Invoice Source</u>		<u>Source of Payment</u>
Invoice #100187 <sup>15</sup> properly includes agreed rock placement. #100187 also includes billing of \$6,445.00 JARPA work allegedly “credited” on #100158 invoice.	\$8,125.82	\$8,922.38 (plus tax)
Retained funds held back from payment of #100158 invoice	\$27,760.03	
Funds owing on contract balance of \$244,808.20.	\$17,207.95	\$48,835.23 (plus tax)
Total of check #1051 <sup>16</sup>		<b>\$57,757.61</b>

As the invoicing summary and accompanying checks show, Cara paid the entire contractually agreed upon \$244,808.20 via checks #1019, #1031, and #1051.

#### IV. STANDARD OF REVIEW

Summary judgment is reviewed *de novo*. Lybertt v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). On its motion for summary judgment TNT argued that there was no issue of material fact. (CP 25; Report of Proceedings Feb. 15, 2008, pg. 27). TNT also repeatedly asserts that the JARPA work, which is the source of the disputed payment

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<sup>15</sup> CP 93.

<sup>16</sup> CP 168.

amounts, was included in the original contract for \$244,808.20. (CP 30, 45, 51-54). However, on appeal TNT is now asserting that an issue of material fact is presented despite its prior briefing and assertions before the trial court. The record below shows that TNT is arguing for the first time on appeal that an issue of material fact is presented. As such, this argument should not be addressed. Arguments made for the first time on appeal are not properly preserved. RAP 2.5(a).

## V. ARGUMENT

### A. Cara Paid \$244,808.20 for TNT's Originally Contracted Work.

TNT alleges that it provided Cara a credit on invoice #100158 which reduced the amount Cara paid for the work outlined in the parties' original contract. (Petitioner's Brief at pg. 13). TNT's argument is without merit or factual support and summary judgment is appropriate.

The record contains the actual checks paid by Cara to TNT for the work and the lien releases for the amounts received. (CP 140, 146). The source of the disputed \$6,445 is the JARPA work which appears as a credit on invoice #100158 and is then re-billed on invoice #100187. (CP 45, 93, 159-60). Both parties concede that the JARPA work is part of the parties' original contract. (CP 45).

Washington law holds that, “Interpreting a contract provision is a question of law when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence.” Spectrum Glass Co., Inc. v. Public Utility District No. 1 of Snohomish County, 129 Wn.App. 303, 311, 119 P.3d 854 (emphasis supplied). Consequently, resolution of this case as a matter of law is appropriate.

The amount charged for all work outlined in the contract, including JARPA work must total \$244,808.20. This is the agreed upon amount in the parties’ contract. (CP 45). TNT fails to demonstrate how it is entitled to more than \$244,808.20 for the work outlined in the contract when the work at issue (JARPA work) is specifically admitted by TNT to be within the parties’ original contract. (CP 30, 45, 51-54). TNT further concedes that all but \$17,207.95 remained to be paid on the parties’ contract. (Petitioner’s Brief at pg. 5). This amount was tendered via check #1051. (Appendix I, Table 4).

While TNT variously argues the mechanics of how Cara underpaid TNT by \$6,999.27 (\$6,455.00 before tax), ultimately TNT’s argument can be distilled to their assertion that they were not paid \$6,999.27 for the JARPA work. Yet, as the checks, lien releases, and contract demonstrate,

TNT was entitled to \$244,808.20 and received \$244,808.20. TNT articulates no reason they should be permitted to charge an additional \$6,999.27 for the JARPA work when such work was included in the parties' contract and the entire \$244,808.20 was tendered to TNT. Summary judgment is appropriate on these uncontested facts.

B. TNT Was Compensated for All Work Performed in Addition to the Work Addressed in the Parties Contract.

TNT also argues that it was under-compensated for work it performed outside of the parties' contract because of the inclusion of the JARPA credit on invoice #100158. Essentially, the JARPA credit is now argued by TNT to have reduced other amounts owed for work performed outside of the contract but included on invoice #100158. This argument does not circumvent the irrefutable facts that the full original contract price of \$244,808.20 was paid by Cara to TNT and the JARPA work was part of the original contract. However, this argument also fails on its own merits.

First, the invoicing outlined in the statement of facts reflects that TNT invoiced Cara and was paid \$131,577.78 for additional work performed outside of the original contract. Second, TNT's briefing and invoicing repeatedly argues that TNT was not paid what it was owed on the parties' *original* contract. (Petitioner's Brief at 1, Assignments of

Error 3, 4, 5). In its briefing, Petitioner specifically asks, “did the \$6,445 JARPA credit reduce the amount Cara paid on the original contract?” (Petitioner’s Brief at 1). However, now TNT argues that the credit reduced the amounts paid for other work. Such argument merely attempts to shift contractually agreed upon work beyond the scope of the original contract to obtain un-bargained for compensation. Regardless, TNT was also paid \$131,577.78 for *all* work performed outside of the contract. TNT is attempting to characterize the JARPA work as a change order or contract addition, which, as TNT concedes, it is not.

As the trial court properly concluded, TNT’s argument is contradictory and without merit.

C. The “Credit per Verbal Agreement” on Invoice #100158 Does Not Entitle TNT to Any Further Compensation Than Provided for in the Parties’ Contract.

The record illustrates that TNT agreed to accept \$75,000 as payment for invoice #100158. TNT included a statement on this invoice asserting that it would not subsequently bill for any previously unbilled and remaining additions to the contract except the R-3 work. (CP 160). With the exception of the \$6,520.00 appearing at the top of the invoice, invoice #100158 contains all change order work (CP 111). Change order,

or contractual additions, are designated “CE” by TNT.<sup>17</sup> (CP 111). The statement on invoice #100158 reiterates that the compensation TNT is entitled to subsequent to invoice #100158 is the contract balance on the original \$244,808.20 and the R-3 work. The R-3 work, the contract balance, and the retainage were all paid via check #1051.

TNT also argues that Cara’s payment of invoice #100158 operates as a waiver of Cara’s right to obtain the contracted for work at the contracted for price. However, in view of the language on the invoice, the JARPA work must be a new contract addition to appear on a subsequent billing. Yet all agree that the JARPA work is not an unbilled addition to the contract. (CP 45).

TNT’s argument cannot overcome the irrefutable evidence that the entire \$244,808.20 was tendered to TNT. Moreover, no legal support is offered for the contention that the notation on invoice #100158 operates as a waiver or acceptance of a benefit. Also, such argument appears to be a quantum meruit and estoppel argument, neither of which were argued on summary judgment. (RAP 2.5)

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<sup>17</sup> While the \$6,520.00 is not change order, the \$6,520.00 was paid by Cara without objection and was *not* subtracted from the \$244,808.20 contract price. (CP 110-111)

Further, for a benefit to actually have been conferred upon Cara the \$244,808.20 tendered on the contract would have to have been reduced by \$6,455. However, the payments of \$123,028.14, \$104,572.11, and tender of \$17,207.95 via check #1051, totaling \$244,808.20 is undisputable.

TNT's position is also inconsistent with TNT's repeated admission that the JARPA work was part of the original contract as argued *supra*. Consequently, no matter how TNT manipulates the invoicing, TNT was actually paid (or tendered) \$244,808.20. TNT also makes much of the fact that the JARPA work was allegedly canceled. This assertion is contested, but taking the facts in favor of TNT, it is clear that this assertion is of no consequence as the work was part of the \$244,808.20 of agreed upon work, which was paid. (CP 45).

TNT repeatedly concedes that the JARPA work was part of the original contract and the checks and lien releases unequivocally demonstrate that all amounts owed under the contract were paid and tendered. (CP 32, 138, 144).

D. Cara Did Not Receive the Benefit of a Credit for the JARPA Work; TNT is Entitled to \$244,808.20 for all Work Included in the Parties' Contract.

TNT's analysis with regard to its own invoicing is misleading. For example, the appendix offered in support of TNT's contention is based on

its invoicing, which includes the re-billing of the JARPA work included in the original contract for \$244,808.20. TNT fails to provide support for its position beyond its own self-serving invoicing. As the trial court properly determined, there is no basis to support the contention that TNT received less than \$244,808.20 for its work. (CP 249-251). TNT attempts to circumvent the facts irrefutably demonstrated by the payments to TNT by attributing the benefit of the JARPA credit to reduced amounts received for additional work TNT performed for Cara. (Petitioner's Brief at 17).

Again, this argument is inconsistent with TNT's repeated assertion that it was paid less than \$244,808.20 for its originally contracted for work. Second, the lien releases and checks demonstrate that payment was made to TNT and received by TNT. (CP 32 ¶ 11, 140, 146). However, taking the facts in the light most favorable to TNT, TNT agreed to accept \$75,000 for invoice #100158. (CP 160). TNT also agreed to perform certain work for \$244,808.20, which work included JARPA work. (CP 45). Consequently, the subsequent rebilling of \$6,445 by TNT is barred by TNT's acceptance of \$75,000 for payment on invoice #100158 *and* by the fact that the re-billed JARPA work was included in the original contract price of \$244,808.20, which was paid by Cara. (CP 140, 146, 168).

TNT's invoicing of the originally contracted JARPA work does not entitle TNT to anymore than the \$244,808.20 agreed upon in the parties' original contract. (CP 45).

E. Respondent is Entitled to Attorneys' Fees pursuant to the Parties' Contract, RCW 60.04; and RCW 4.84.110.

As pleaded in Cara's Answer, Cara tendered full payment to TNT, which was rejected prior to commencement of the suit. (CP 14). These sums were later deposited with the Kitsap County Superior Court. (CP 252). Consequently, Cara is entitled to costs, including attorneys' fees, as permitted by RCW 4.84.110. Cara is also entitled to attorneys' fees pursuant to RCW 60.04.181 for successfully defending TNT's lien. In addition Cara is entitled to fees pursuant to the parties' contract and RCW 4.84.330 as the prevailing party.

## VI. CONCLUSION

The contract price agreed upon between the parties was paid by Cara. By the final invoice, only \$17,207.95 remained owing on the contract price. Cara tendered the \$17,207.95 owing on the contract as part of its final payment (check #1051). TNT's position that it is owed an additional \$6,455.00 for JARPA work is not mathematically plausible in light of the irrefutable facts. Taking these un-controvertible facts in the light most favorable to TNT there can be no dispute that there was no

underpayment to TNT. Consequently, Cara did not receive the benefit of any JARPA credit and the entire \$244,808.20 owed on the contract was tendered to TNT. Based on these facts affirmation of the trial court's grant of summary judgment in favor of Cara is appropriate as is an award of attorneys' fees to Cara as the prevailing party.

DATED this 6<sup>th</sup> day of November, 2008

MCGAVICK GRAVES, P.S.

By:



Lori M. Bemis, WSBA #32921  
Attorney for Cara Creek, LLC

**APPENDIX I**

**Table 1**

<u>Invoice Source</u>		<u>Source of Payment</u>
	<b>\$244,808.20</b>	
Invoice #100058 <sup>18</sup>	-\$123,028.14	Paid to TNT pursuant to check #1019 <sup>19</sup> (check total \$133,445.16 includes tax)
Invoice #100083 <sup>20</sup>	<u>-\$104,572.11</u>	Paid to TNT pursuant to check #1031 <sup>21</sup> (check total of \$120,141.21 includes tax and work billed on invoice #100059 <sup>22</sup> )
Total Contract Price Owing prior to invoice #100158 <sup>23</sup>	<b>\$17,207.95</b>	\$17,207.95 included in tender of \$57,757.61 via check #1051 <sup>24</sup> .

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<sup>18</sup> CP 136

<sup>19</sup> CP 138

<sup>20</sup> CP 142

<sup>21</sup> CP 144

<sup>22</sup> CP 148

<sup>23</sup> CP 136

**Table 2**

<u>Invoice Source</u>		<u>Source of Payment</u>
Invoice #100059 <sup>25</sup>	\$6,055.16	Paid to TNT pursuant to check #1031 <sup>26</sup> (check total of \$120,141.21 includes tax and work billed on invoice #100083 <sup>27</sup> ).
Invoice #100102 <sup>28</sup>	\$50,522.62	Paid to TNT pursuant to check #1037 <sup>29</sup> (check total of \$54,867.58 includes tax).
Invoice #100158 <sup>30</sup>	\$75,000.00	Paid to TNT pursuant to check #1039 <sup>31</sup> (check total of \$51,302.61 includes tax and subtracts retainage of \$27,760.03 – see next line).  10% of \$227,600.25 = \$27,760.03, \$227,600.25 = amount paid so far on contract “heldback” pursuant to holdback provision of contract permitting 10% holdback.
Total additional work	<b><u>\$131,577.78</u></b>	Held back funds of \$27,760.03 were tendered via check #1051.

<sup>24</sup> CP168

<sup>25</sup> CP 148.

<sup>26</sup> CP 144.

<sup>27</sup> CP 142.

<sup>28</sup> CP 150.

<sup>29</sup> CP 154.

<sup>30</sup> CP 159-60.

<sup>31</sup> CP 162.

**Table 3**

<u>Invoice Source</u>		<u>Source of Payment</u>
Invoice #100058		\$123,028.14
Invoice #100083		\$104,572.11
Invoice #100102		\$50,000.00
Total		<b><u>\$277,600.25</u></b>
Ten Percent		\$27,760.03
Sales Tax		\$2,387.36
Held back amount from #100158 paid via check #1051		\$30,147.39

**Table 4**

<u>Invoice Source</u>		<u>Source of Payment</u>
Invoice #100187 <sup>32</sup> properly includes agreed rock placement. #100187 also includes billing of \$6,445.00 JARPA work allegedly “credited” on #100158 invoice.	\$8,125.82	\$8,922.38 (plus tax)
“Retained” funds held back from payment of #100158 invoice	\$27,760.03	
Funds owing on contract balance of \$244,808.20.	\$17,207.95	\$48,835.23 (plus tax)
Total of check #1051 <sup>33</sup>		<b><u>\$57,757.61</u></b>

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<sup>32</sup> CP 93.

<sup>33</sup> CP 168.

CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of November, 2008, a true and correct copy of the foregoing document was served upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Appellant TNT Excavating, Inc.

Eileen Schock   X   Hand Delivered  
Sanchez Paulson Mitchell & Schock        U.S. Mail (first class, postage  
4110 Kitsay Way, Ste. 200 prepaid)  
Bremerton, WA 98312        Overnight Mail  
       Facsimile

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

DATED this 6<sup>th</sup> day of November, 2008.

  
Kristen M. Dayet

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