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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PENNEBAKER CONSTRUCTION SERVICES, INC., a Washington corporation,

Appellant,

v.

PHIL NOTHSTEIN, an individual,

Respondent.

APPELLANT'S REPLY BRIEF

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I. REPLY SUMMARY

There are three issues before this Court of Appeals.

1. The first issue is whether the payment of funds and/or obtaining the release of lien constituted an accord and satisfaction. The written record is clear, unambiguous and undisputed, creating a purely legal question and precluding Respondent's argument based entirely on parol evidence. The parties entered a settlement agreement that allowed Respondent the prerogative of deciding whether to pay the settlement money "provided punch list terms complete." CP at 21. Appellant reiterated in writing that payment would not be accepted unless the matter was considered fully resolved. CP at Trial Ex. 2, #9. In the alternative, if Respondent elected to not make payment, the parties would have then had a lawsuit over compliance with the settlement agreement in which each side would have affirmative claims and Appellant would retain his lien rights. In response, Respondent sent another check with no written reservations or conditions. CP at Trial Ex. 2, #10 and Trial Ex. 9. Acting out of caution, Appellant sent an email to confirm in writing that the matter was resolved and Appellant was authorized to cash the checks. Respondent confirmed those facts in writing, again with no reservation or condition. CP at Trial Ex. 2., #11.

Respondent's argument—that his claims survived while Appellant's were released—is based entirely on parole evidence arising from communications primarily between Respondent and Respondent's own counsel. Respondent argues that this parol evidence should be used to contradict and alter the written record and agreement here. While Washington law receives parol evidence for limited purposes, Washington law prohibits the use of parol evidence as advanced by Respondent.

Moreover, if there was ever any doubt about whether payment resolved the dispute, they terminated when Respondent later requested, again with no purported rescission or modification of the agreement, a release of Appellant's lien subject to their agreement. By obtaining the lien release, Respondent unequivocally acknowledged the resolution of the disputes and thereby waived any remaining conditions or reservations that Respondent hopes to create after-the-fact from his parol evidence. As a matter of law, these parties settled their disputes through a written settlement agreement and accord and satisfaction. The first issue before this Court of Appeals is Respondent's attempt to undo a binding settlement solely to his benefit and to the prejudice of Appellant.

2. This Court of Appeals does not need to reach the second issue if the court rules that the law of accord and satisfaction must be enforced. The second issue is whether the trial judge rewrote the agreement with

regard to the Hardy Plank siding product. In settlement, Respondent insisted over Appellant's advice that caulking be added to the exterior. Respondent was later unhappy with his own decision to apply caulking and the trial court awarded money to repaint the entire exterior of the house. However, the settlement agreement provided that Appellant's obligations with regard to the siding were limited to recommendations made by a manufacturer's representative: "Address Hardy Plank per manufacturer rep's recommendations & make repairs if necessary." Respondent never called a manufacturer's representative as a witness. Absent any recommendation from the manufacturer, the Court had no authority to rewrite the agreement and determine on his own that Appellant must pay to repaint the exterior.

3. The third issue is the trial court's failure to apply the appropriate attorney fee rule for disputes such as this where there are multiple and separate claim items. Respondent pursued 8 pages of separate claims. CP at 22-29. The trial court ruled that Appellant had prevailed in defeating the majority of those claims. Under Washington law, the trial court erred by not using the rule referred to as the Proportionality Approach.

II. REPLY

A. It was legal error to contradict and alter the written settlement agreement based on parol evidence, especially in the context of Respondent's unequivocal acceptance of the benefits of settlement (namely, avoided a lawsuit on Appellant's claims and obtained a lien release).

It is undisputed that, months after issuing payment, Respondent required and obtained a release of lien from Appellant. CP at Trial Ex. 2, #7; RP at November 16, Nothstein Testimony, pp. 95-96, ll. 17-25 and 1-15 (see quotation below). Because this fact is undisputed, the question of accord and satisfaction is purely a legal question. *See Kibler v. Frank L. Garrett & Sons*, 73 Wn.2d 523, 525, 439 P.2d 416 (1968). By requiring, receiving and recording a release of lien from Appellant, Respondent consummated the final act of the settlement agreement. Respondent took full advantage of all benefits available to Respondent from the settlement agreement. He knowingly elected to avoid litigation with Appellant regarding Appellant's claims. He knowingly obtained a release of the lien. RP at November 16, Nothstein Testimony, pp. 95-96, ll. 17-25 and 1-15 (see quotation below). Respondent may have silently wished for additional services, but under Washington law by taking the benefits of the agreement Respondent ratified the settlement agreement. *Hoglund v. Meeks*, 139 Wn. App. 854, 870 n.7, 170 P.3d 37 (2007) (citing *Barnes v. Treece*, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976).

The parties contest whether issuance of payment was conditioned upon performance of further work.[1] The written record confirms that Appellant rejected any such restrictions and that no such modification agreement was ever entered. As will be discussed below, Respondent contends that such conditions were communicated orally. In any event, after issuing final payments Respondent did not say to Appellant that additional work must be performed; in fact, his final communication with Appellant was prior to the cashing of the checks. RP at November 16, Nothstein Testimony, pp. 95-96, ll. 17-25 and 1-15 (see quotation below). Rather, months later, and with no communications of reservations or conditions, Respondent required that the lien be released.

> Q Mr. Nothstein, after the checks had been delivered to our office, after the checks had been deposited, do you recall that a

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[1] Respondent's briefing on the issue is not supported by the record because the RP shows that neither Respondent Mr. Nothstein nor Respondent's counsel Ms. McMahon conditioned cashing the checks on any further work, RP at November 15, McMahon Testimony, p.19 ll.10-21 ("Q. I didn't tell you to come back to the site, did I? A. You told me you were going to talk to your client to try to get him to come back to the site and get this resolved because we also at that time were dealing with the HardiePlank issue, and the representative from the HardiePlank was supposed to come out and try to make the HardiePlank siding right. Q. Okay. You're recalling a couple things here. One, you're recalling that I told you I was going to talk to my client, and you think you recall that I was going to try to get him to come back to the site? A. That is correct.").

Respondent Mr. Nothstein does not know if he even authorized his counsel directly or whether the communications on their side went through Mr. Nothstein to his counsel's secretary and then to his counsel. RP at November 16, Nothstein Testimony, pp. 72-73, ll. 19-25 and 1-6. Respondent Mr. Nothstein's expressed belief elsewhere is that his counsel was not authorized to authorize Appellant to cash the checks. RP at November 16, Nothstein Testimony, pp. 81-82, ll.18-20 ("Q. Did you, in fact, tell the bar association that your attorney has no authority over your checking account? A. Well, in the sense that, yeah, she's not a cosigner.").

couple months later, there was a back and forth about releasing the lien?
A Yeah, the lien was still on my house.
Q Do you recall that the release-of-lien form had been sent to the mediator, but it had never been recorded with the auditor? Do you recall that that's what had happened?
A That's correct.

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Q In fact, a release-of-lien form in Defendant's Exhibit 2, Tab 7, was signed dated October 8th, so eight days after the mediation. Is that consistent with your recollection, that it was sent in, the mediator held it, but then it didn't get recorded?
A That's correct. It just sat there, and I had to release the lien myself in four or five months later. It's unfortunate that everything didn't go to the mediator. We wouldn't be here today.
Q When the back and forth occurred several months later about the release of the lien, you didn't say anything at that time about the punch list, did you?
A Who was I talking to?
Q Did you say anything to Bill about the punch list then?
A November 8th was the last conversation.

RP at November 16, Nothstein Testimony, pp. 95-96, ll. 17-25 and 1-15.

If Respondent had any claim rights after issuing payment, the unequivocal act of requiring the lien release subject to settlement constituted a waiver. "[D]id he by unequivocal acts so clearly waive his right to rescind that it could be decided that he had done so as a matter of law?" *Fines v. West Side Implement Co.*, 56 Wn.2d 304, 304-05, 352 P.2d 1018 (1960). This court should reject Respondent's argument that the written settlement agreement should be rescinded or modified to allow for

payment of funds followed by further demands regarding performance of work. Under no circumstances should Respondent be allowed to prevail on that argument after unequivocally obtaining the benefit of the lien release and waiver of claims from Appellant subject to the written settlement. The trial court ignored the later lien release, but this court should reverse that decision ruling in accord with the Washington Supreme Court, that, by virtue of this act: "[T]he circumstances here were such that the court could hold, as a matter of law, that a waiver of the right to rescind had been established." *Fines v. West Side Implement Co.*, 56 Wn.2d 304, 309, 352 P.2d 1018 (1960) (citing *Brown v. Van Tuyl*, 40 Wn.2d 364, 242 P.2d 1021 (1952).

The parties agree as to the elements of accord and satisfaction: (1) a dispute; (2) an agreement to settle that dispute, and (3) performance of that agreement. There was a dispute between the parties about whether the settlement agreement had been completed. The written record confirms that Appellant agreed to either litigate their mutual claims or else settle the dispute including dismissal of Appellant's lien and claims.

Whatever Respondent may have told his counsel and whatever discussions phone conversations may have included, the record is unambiguous that Respondent issued final payment with no written reservations (CP at Trial Ex. 9), confirmed in writing with no reservations

that Appellant was authorized to cash the payment, and months later required the final release of lien. This undisputed record unequivocally confirms an accord and satisfaction.

In the face of the unambiguous written record, Respondent relies instead on parol evidence taking the form of (1) testimony about a phone conversation between the principals, (2) a phone call between Respondent and his own counsel, and (3) telephone communications between Respondent's counsel, or at least counsel's secretary, and Appellant's counsel. This evidence is disputed but not properly presented because Respondent's purpose for this parol evidence is to contradict and modify the written agreement. *See In the Matter of Murillo*, 134 Wn. App. 521, 535, 142 P.3d 615 (2006) (reiterating that parol evidence may not "add to, subtract from, vary or contradict the terms").

The written agreement confirmed that payment would be made "provided punch list items complete." Appellant's counsel's letter rejected a conditional, partial payment in reliance on the written agreement. Before cashing the checks, Appellant's counsel received written confirmation by email that the matter was resolved. Respondent's parol evidence cannot be the basis for contradicting and modifying the agreement here. That is true whether the settlement agreement is an integrated contract or a partially integrated contract, because in either case

parol evidence may be used only when it is "not inconsistent with the written terms." *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 32-33, 959 P.2d 1104 (citing *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). Here, Respondent's claims about parol evidence are inconsistent with the written record under which payment confirmed resolution. Respondent's claims and the trial court's ruling are based on an improper treatment of parol evidence; also, an even more improper diminishment of the significance of the written record. This error should be corrected on appeal.

B. The Parties agreed that Appellant would "[a]ddress Hardy Plank per manufacturer rep's recommendation & make repair if necessary." There is no evidence of any recommendation from a manufacturer representative. The trial court exceeded his authority by rewriting the agreement of the parties.

Respondent suggests that Appellant waived this issue allegedly by not including it in Appellant's brief. The following quotations are from Appellant's brief:

> **Assignment of Error #3:** The trial court erred by relying on his own non-expert judicial opinion about whether siding work was defective in contrast to the settlement agreement which required that any such determination about the siding must be made by the product manufacturer.
>
> ***Issues pertaining to Assignment of Error #3:***
>
> - Courts enforce the agreement of the parties.
> - Courts do not re-write the parties agreement.

- Whether or not caulking reacted with siding required and constituted defective workmanship is an issue for an expert.
- The Court improperly asserted itself as an expert without regard to the differences between an installation defect, a manufacturing defect, or a cosmetic issue.
- The Court improperly held the contractor liable for a decision made by the homeowner to install caulking.

Appellant's Brief, p. 2.

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4.) Address Hardy Plank per manufacturer rep's recommendation & make repair if necessary. Parties to be present at site when manufacturing rep looks at house.

Appellant's Brief, p. 5.

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Although the settlement agreement required that a Hardy Plank representative must determine whether any repairs to the siding were necessary, Judge Peterson substituted his own judicial opinion, rewrote the agreement, and required that Pennebaker pay enough money to Nothstein to paint the exterior of the house.

Appellant's Brief, p.7-8.

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"In construing the contract, this court must first look to the language of the agreement..." *Hadley v. Cowen*, 60 Wash. App. 433, 438, 804 P.2d 1271 (1991). "The court must enforce the contract as written if the language is clear and unambiguous." *WPUDUS v. PUD No. 1 of Clallam County*, 112 Wash.2d 1, 10, 771 P.2d 701 (1989).

Appellant's Brief, p. 8-9.

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The trial court erred by allowing a partial judgment for the cost of painting the house when there is no evidence that a Hardy Plank representative ever determined that the siding was installed defectively.

Appellant's Brief, p.13.

Contrary to Respondent's suggestion to this Court, the issue was plainly presented in Appellant's brief. Ignoring the quotations recited above, Respondent failed to provide any justification for the trial court's failure to follow the written settlement agreement executed by the parties.

For Respondent to pursue any claim for repairs related to the Hardy Plank siding, the burden was on Respondent to obtain and present evidence regarding a manufacturer's recommendation. "The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue." *Jacobs v. Office of Unemployment Compensation and Placement*, 27 Wn.2d 641, 651, 179 P.2d 707 (1947). The absence of any proof of a manufacturer's recommendation precludes any claim related to the Hardy Plank.

Further, the appearance of the siding is of Respondent's own making. Appellant installed the siding without applying the unnecessary caulking. In settlement, Respondent demanded that caulking be required believing he knew best whether it should be there. The caulking was applied during the punch-list work. The record is bare of any evidence that it was the wrong material or that it was defectively installed.

18 The first item, "HardiePlank not caulked at any
19 seams." Is there anything in that item about the fit
20 or the installation of the HardiePlank?
21 A No, sir.
22 Q What did you agree to do with respect to HardiePlank
23 not caulked at any seams?
24 A I reluctantly agreed to caulk the seams and the nail
25 holes.

1 Q Why do you say "reluctantly"?
2 A That wasn't the industry standard at the time, and I
3 felt like it wasn't going to be the -- give us the
4 appearance that we was after.
5 Q Did you hear Mr. Rennie asked about the industry
6 standard for caulking HardiePlank back in 2004?
7 A Yes.
8 Q And he wasn't sure what it was, right?
9 A That's correct.
10 Q Do you know what it was?
11 A Yes.
12 Q What was the industry standard regarding caulking in
13 2004 for the HardiePlank product?
14 A The industry standard in 2004 did not require caulking
15 on the HardiePlanks at that time. They did require
16 a -- a house wrap of some sort behind it, and which we
17 did. They -- they also preferred to have butt joints,
18 factory butt joints together.
19 Q Is that as opposed to sawed ends?
20 A As opposed to saw ends.
21 Q Whose idea was it to caulk the seams then?
22 A Again, I was reluctant to agree to caulk the seams,
23 but that was one way we could get that item off of our
24 punch list. So that was an item that Mr. Nothstein
25 wanted us to caulk the seams and fill the holes, so we

1 caulked the seams and filled the holes.
2 Q And do you know what caulking product was used?
3 A Yes. We used a cedar-color Quad caulking.
4 Q And Quad is the brand?
5 A Quad is brand name, yes.
6 Q And did you hear Mr. Cobun testify that the

7 appropriate brand would be Quad?
8 A Quad would be one of the two brands that he talked
9 about, and we did use Quad.

RP at November 16, Pennebaker Testimony, pp. 19-21.

Nonetheless, the trial court concluded that the resulting appearance, one required by Respondent, justified a paint job and without authorization in the settlement agreement then required that Appellant pay for it. Nothing in the settlement agreement that creates a basis for that award. In contrast, Appellant's responsibility with regard to the Hardy Plank siding product was dependent upon a recommendation from a manufacturer's representative. The question of whether a chemical reaction occurred following an elective caulking job is one only for a manufacturer's representative, not a trial judge. CP at 21. To enforce the settlement agreement the parties entered into, that award must be reversed.

C. Because Respondent pursued 8 pages of separate claim items, the trial court erred by deeming the dispute "essentially" a "single issue" dispute. Because Appellant successfully defeated the majority of the claims, the trial court should have used the Proportionality Approach for the fee question.

Appellant's opening brief challenged and cited to the trial court's award of fees (Applt Brief, p.8, fn. 21). The relevant quotation follows:

> The settlement agreement provided that in the event of litigation to enforce the agreement occurred, the prevailing party would be entitled to recover reasonable attorney's fees. Most of the Hardi-Plank defects requiring $1,900 for

> painting or staining arise under the settlement agreement. Similarly, much of the trim defects arise under the settlement agreement. The septic tank recovery is not covered by the settlement agreement. Because this action essentially concerned the single issue of whether the defendant had performed its obligations under the punchlist that was part of the settlement agreement, and since the defendant manifestly did not do so in two important regards (widespread instances of unacceptable interior trim installation, and inadequate caulking of the exterior trim resulting in a job so far below minimum standards of workmanship that the entire house must repainted or re-stained), it would be inappropriate in the Court's view to apply a proportionality approach concerning which party prevailed on each component of the punchlist to determine which party was the prevailing party. The Court finds that under these circumstances the plaintiff was the prevailing party.

CP at 56-57. That re-characterization and oversimplification of the dispute was legal error. The dispute was about 8 pages of separate claim items, not simply whether in the abstract Appellant complied with the settlement agreement. Under the trial court's ruling, Appellant complied with almost all of the settlement agreement but Respondent caused litigation over 8 pages worth of separate claim items. CP at 22-29.

Respondent sued Appellant for separate money damages related to 8 different pages of separate claim items. CP at 22-29. With the limited exception of the claims referred to in the above quotation, Appellant successfully defeated all those claims. "All of plaintiff's other claims for failure to complete punchlist items are either *de minimis*, have been

performed by defendant, or are too detailed." CP at 57, ll. 12-14. Although Respondent forced Appellant to litigate those dismissed claims, and although the settlement agreement contained an attorney fee clause, the trial court applied the attorney fee clause only to the two claim items granted in Appellant's favor. The Hardy-Plank siding claim was never authorized by the settlement agreement as discussed above. As to the remaining interior trim, the trial court stated that "much of the trim defects arising under the settlement agreement." CP at 56, ll. 25-26.

If the trial court was to award Respondent attorney fees for whatever portion of the interior trim defects arose under the settlement agreement, such an award could only be in the context of an offset with the regard to all the other claim items on which Appellant was the prevailing party. "A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon." *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605 (1993).

III. CONCLUSION

Appellant has appealed on 3 distinct issues, one of which need not be addressed depending on the court of appeals decision on the first issue. Because after learning Appellant's position Respondent (1) issued payment when payment was only due "provided punch list items

complete" and (2) later consummated the settlement by obtaining the lien release, an accord and satisfaction occurred here. Even if there had not been an accord and satisfaction, the trial court exceeded its authority by rewriting the contract to require that Appellant pay to repaint the house absent any recommendation from the manufacturer's representative regarding the siding. And, under the attorney fee rule applicable to disputes such as this one, the trial court erred by basing attorney fees only on the one or two claims upon which Respondent prevailed while ignoring the fact that Appellant prevailed in obtaining a dismissal of the remainder of 8 pages worth of separate work item claims. For these reasons and in these regards, the trial court should be reversed in order for the parties to obtain a resolution that adheres to Washington law. Failing to reverse these errors allows a party to obtain the benefits of a settlement without the consequences and encourages parties to litigate numerous separate claims with out without merit believing that prevailing on any single item creates an entitlement to a fee award, even when losing on all the other claims.

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DATED this 12th day of June, 2009.

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PROOF OF SERVICE

I certify under penalty of perjury that on the 12th day of June, 2009, I served a copy of Appellant's Reply Brief via facsimile and U.S. Mail on the following:

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Dated at Redmond, Washington this 12th day of June, 2009.

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