No. 39766-8-II

COURT OF APPEALS – DIVISION II
OF THE STATE OF WASHINGTON

RON COLEMAN d/b/a COLEMAN AND SON CONSTRUCTION,

Respondent,

v.

DAVID MILNE AND VIRGINIA MILNE, et al.

Appellants.

RESPONDENT'S BRIEF

David P. Horton
WSBA#27123
LAW OFFICE OF
DAVID P. HORTON, INC. P.S.
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I. STATEMENT OF THE ISSUES

A. Is a promissory note given in settlement of a disputed invoice supported by sufficient consideration?

B. When a third-party to a contract gives a promissory note to induce performance of a settlement, is the note supported by consideration?

C. Did the trial court err in granting summary judgment?

II. STATEMENT OF THE CASE

A. INTRODUCTION

The Milnes argue the promissory note is not supported by consideration because it was given for future work under a construction agreement. But that agreement unambiguously states the note was given to pay previous invoices that were disputed – not future work. The agreement recites: the work already completed; its cost; the dispute over invoices; and payment of those invoices by the note. The agreement then separately sets out the compensation for future work.

The Milnes assert that the note was "as a practical matter" a guaranty.[1] But it was not. The note was payment on a past due disputed obligation for completed, and approved, work. It is well established that a third party to a contract can supply the consideration for the contract. That

[1] Brief of Appellant at 6.

is, "consideration may be given to the promisor or to some other person. It may be given by the promise or by some other person."[2] There is no disputed material fact. The trial court did not err in granting summary judgment.

B. FACTS

David Alan Development, LLC planned to develop a plat in Port Orchard known as Horstman Heights.[3] They hired Ron Coleman's company for site work.[4] Coleman provided services and materials under the contract and periodically invoiced for the work.[5] David Alan Development disputed the July, 2008 invoice. Coleman recorded a lien on July 15, 2008 for $124,653.36.[6]

The following month Coleman and David Alan Development resolved their dispute. They amended the contract and incorporated a settlement to the dispute. In exchange for $33,176.67 in certified funds and a personal promissory note from David Milne for $63,733.00[7]

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[2] *Alexander & Alexander, Inc. v. Wohlman*, 19 Wash.App. 670, 683, 587 P.2d 530 (1978) citing to Restatement of Contracts §75 (1932).
[3] CP 37; 43-47 (Amended Agreement attached as Appendix B).
[4] Id.
[5] CP 37.
[6] Id.
[7] CP 1-9; CP 22 (The note is attached as Appendix A).

Coleman agreed to release his lien.[8] The Milnes' factual statement makes an unsupported allegation regarding these payments. They allege:

> Milne personally signed a promissory note...and delivered a certified check...in consideration for the promises set forth in the Agreement: release of the lien and the Coleman's [sic] promise to perform the work on the plat in accordance with the terms of the Agreement.[9]

But the Agreement did not say this. It only said the note was payment for the past due disputed invoices – not for the promise to perform work on the plat:

> **Payment**. Contractor acknowledges receipt of $33,176.67 in certified funds and a promissory note for $63,733.00 as payment on the invoices previously sent, and disputed as set forth above.[10]

In short, the owner and contractor settled their old claims and agreed to move forward with the work for future compensation. The Agreement itemized scope items that were complete. It also itemized how much had been paid for completed items and the cost for yet to be completed items.[11]

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[8] CP 43-47 (Appendix B).
[9] Brief of Appellants at 2. (Emphasis in original).
[10] CP 43.
[11] CP 45.

Both parties performed. Mr. Milne delivered the promissory note and cashier's check.[12] Coleman released the lien and notice to lender and returned to work.[13]

In exchange for his work under the contract David Alan Development, LLC paid Coleman $110,140.59 in August and $98,719.17 was paid on October 10, 2008 for work that was completed.[14]

C. PROCEDURE

David Alan Development, LLC did not pay for work done through November, 2008. As such, Coleman recorded liens. The note was due on December 1, 2008.[15] No payment was made.[16]

When the note became past due, Coleman commenced this suit against the Milnes. Coleman later amended his lawsuit to include the lien claims against David Alan Development, LLC to foreclose its lien.

Coleman brought a motion for summary judgment on the note. It was granted.[17] The lien claims remain for later adjudication by the trial court.

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[12] CP 37.
[13] Id.
[14] CP 37.
[15] CP 8-9; 22.
[16] CP 37.
[17] The Milnes argued in the trial court that Ms. Milne was not liable on the note because she had not signed it. Because it is well established in Washington that debts incurred during marriage are presumed to be

III. ARGUMENT

A. STANDARD ON REVIEW

The question whether a contract is supported by consideration is a question of law.[18] The Milnes correctly cite the standard on review for summary judgment. But because they rely on David Milne's declaration to create an issue of fact, several other principles are important. First, unsupported conclusory allegations are not sufficient to defeat summary judgment.[19] Additionally, unsupported argumentative assertions are not sufficient to defeat summary judgment.[20] Finally, affidavits submitted in support of, or in response to, a motion for summary judgment must set forth such facts as would be admissible in evidence.[21] An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature. Ultimate facts, conclusions of fact, or conclusory statements of

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community debts they appear to have abandoned that defense. *See Fies v. Storey*, 37 Wash.2d 105, 221 P.2d 1031 (1950); *Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710, 30 P. 1058 (1892); *National Bank of Commerce v. Green*, 1 Wash.App. 713, 463 P.2d 187 (1969). *See* also RCW 26.16.030 extending management authority to both spouses.

[18] *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash. 2d 178, 840 P.2d 851 (1992).
[19] *Stringfellow v. Stringfellow,* 53 Wash.2d 639, 641, 335 P.2d 825 (1959).
[20] *Blakely v. Housing Auth. of King Cy.,* 8 Wash.App. 204, 210, 505 P.2d 151, *review denied,* 82 Wash.2d 1003 (1973).
[21] CR 56(e).

fact are insufficient to raise a question of fact.[22] Here, David Milne's argumentative, conclusory allegations are insufficient to raise a question of fact.

B. THE MILNES ARE LIABLE ON THE NOTE.

The Milnes are liable on the note, because Mr. Milne signed as the "Maker." A maker's obligation is to pay the note in accordance with its terms. *See* RCW 62A.3-412 ("The issuer of a note... is obliged to pay the instrument (i) according to its terms ... "). "As between the maker and the payee, a promissory note is but a simple contract to pay money." [23]

Further, the note was given to satisfy a disputed claim as evidenced by the Amended Agreement. So, while defendants may theoretically complain about work done subsequent to the agreement, they are barred either by the account stated doctrine or accord and satisfaction from alleging that the note was not given for adequate consideration. The agreement provides that the note was given as payment on a disputed

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[22] *Grimwood v. University of Puget Sound, Inc.,* 110 Wash.2d 355, 359, 753 P.2d 517 (1988).

[23] *Felt v. McCarthy,* 130 Wash.2d 203, 211-12, 922 P.2d 90 (1996) (citing *Vancouver Nat'l Bank v. Katz,* 142 Wash. 306, 313, 252 P. 934 (1927)); *Reid v. Cramer,* 24 Wash. App. 742, 744-45, 603 P.2d 851 (1979).

claim.[24] And the Milnes admit there was a dispute as to the past due invoices.[25] There was an accord and satisfaction.

"[A]fter accord and satisfaction, one may not raise ... any defense on the merits to the items which were originally in dispute. That is fundamental...."[26] Coleman gave up a significant right – lien rights on the disputed invoices. The lien later recorded by Coleman does not include the amounts resolved by this claim – because those claims were settled by the note given by Mr. Milne. The note was given to pay the past due invoices.

C. CONTRARY TO MR. MILNE'S DECLARATION, IT IS INCONTROVERTABLE THAT THE NOTE PAID THE DISPUTED PAST DUE INVOICES.

David Milne's declaration asserts:

> The Agreement and the delivery of the promissory note was for Coleman to remove the Lien <u>and</u> also perform the Scope of Work set out in the Agreement.[27]

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[24] CP 43.
[25] CP 68.
[26] *Northwest Motors, Ltd. v. James,* 118 Wash.2d 294, 304, 822 P.2d 280, 285 (1992).
[27] CP 73.

He also asserts:

> The promissory note does not state that it was given in consideration for the lien release.[28]

But the note was explicitly given in payment for the disputed past-due invoices, not performing the future scope of work. Again, the Agreement provides that the note was "payment on the invoices previously sent, and disputed…."[29]

Mr. Milne's unsupported conclusory statement that the note was for Coleman to perform future work directly contradicts the Agreement. The Agreement identifies the consideration – fixed prices – for the remaining work.[30]

Note that Mr. Milne's declaration quotes this same section incompletely: "Contractor acknowledges receipt of $33,176.67 in certified funds and a promissory note for $63,733.00 as payment…"[31] Milne then asserts that the payment was something other than payment on the disputed invoices. The words deleted by Mr. Milne are dispositive. He cannot contradict them.

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[28] CP 111.
[29] CP 43.
[30] Id.
[31] CP 73.

Although extrinsic evidence is admissible as to the circumstances under which a contract was made in an attempt to interpret the parties' intent and to determine the contract terms' meaning it cannot be used to add, modify, or contradict the contract terms.[32]

Here, Mr. Milne's unsupported conclusory statements directly contradict the written Agreement between Coleman and David Alan Development that the note was payment on the disputed past due invoices.

D. A THIRD PARTY CAN SUPPLY THE CONSIDERATION FOR A CONTRACT.

Third parties to a contract can supply the consideration for a contract. The Milnes assert, and plaintiff agrees, that the Milnes had no liability for this project or on the construction contract. But Mr. Milne induced Coleman to release his lien, accept a partial payment in satisfaction on past due invoices, and return to work based on his promise to pay a sum certain. Under Washington law this is adequate consideration. This was discussed by the Court in *Alexander & Alexander, Inc. v. Wohlman.*[33]

> "Consideration need not go directly to the promisor.

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[32] *Berg v. Hudesman,* 115 Wash.2d 657, 667, 669, 801 P.2d 222 (1990).
[33] 19 Wash.App. 670, 683, 587 P.2d 530 (1978) citing to Restatement of Contracts §75 (1932).

> (2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Comment e on s 75 states:

> It matters not from whom the consideration moves or to whom it goes. If it is bargained for as the exchange for the promise, the promise is not gratuitous. Restatement, Contracts s 75 (1932).[34]

In *John Davis & Co. v. Cedar Glen, # Four*[35] the court held:

> It is not essential that the consideration move directly from the promisee. It is sufficient if it moves from a third person. Generally, if consideration is sufficient in other respects, it does not matter from whom the consideration moves. It may move from a third person as well as from the promisee.[36]

Here, consideration moved from a third person, Milne. There was consideration for the note. Indeed, consideration is simply defined as "any benefit to the promisor ***or*** detriment to the promisee."[37]

Even if Mr. Milne did not benefit personally, consideration is supported by Coleman acting to his detriment in accepting the note. He

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[34] *Id.* 19 Wash.App. 670, 683, 587 P.2d 530 (1978) citing to Restatement of Contracts §75 (1932).
[35] 75 Wash.2d 214, 222, 450 P.2d 166, 171 (1969).
[36] *Id.*
[37] *Harris v. Johnson*, 75 Wash. 291, 294-95, 134 P. 1048, 1050 (1913). (Emphasis Added).

did not further pursue collection from the LLC, he released his lien, and returned to work.

E. MILNE WAS A THIRD PARTY TO THE CONSTRUCTION CONTRACT, AND CANNOT ASSERT A DEFENSE TO THE NOTE THAT THERE WAS A BREACH OF THAT AGREEMENT.

The Milnes' "failure of consideration" defense is based on the holding in *Burton v. Dunn.*[38] In *Emmerson v. Beckett*[39] the defendant on a promissory note brought the same defense. Just as here, the defendant (Beckett) had given the disputed note as consideration for a third party – Sherwood Properties, a company controlled by Beckett. The court held that because the defense asserted by Beckett could only be claimed by Sherwood Properties, it was not available to defend on the promissory note.

Here, David Alan Development, LLC may seek an offset to its lien or claim damages against Coleman.[40] But the Milnes cannot. And because it is undisputed that Mr. Milne induced Coleman to release his earlier, disputed, lien in exchange for the note, the note was supported by consideration.

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[38] 55 Wash.2d 368, 347 P.2d 1065 (1960).
[39] 30 Wash.App. 456, 635 P.2d 747 (1981).

F. THE PROMISSORY NOTE WAS NOT A GUARANTY, IT WAS SIMPLY A PAYMENT.

The Milnes analogize the note to a guaranty. But the promissory note was not a guaranty. A guaranty is "a collateral engagement for the performance of an undertaking of another."[41] Mr. Milne was not guaranteeing the contract's future performance. He was simply paying the past due invoices in an accord and satisfaction.

The Milnes assert that the note must be a guaranty, or else there was not consideration. But that a third-party can supply consideration is well established as set out above. Owners often pay their business entity's debts to keep their businesses going. The note was not a guaranty.

G. COLEMAN IS ENTITLED TO HIS FEES AND COSTS

A prevailing party is entitled to fees on appeal if permitted by contract.[42] RCW 4.84.330 permits a prevailing party in a lawsuit to recover its reasonable attorney's fees and costs, where the contract so

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[41] *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.* 134 Wash.2d 692, 707, 952 P.2d 590, 598 (1998).

[42] RAP 18.1; *Bayo v Davis*, 127 Wash.2d 256, 264, 897 P.2d 1239 (1995); RCW 4.84.330, *Tacoma Northpark, LLC v. NW, LLC,* 123 Wash.App. 73, 96 P.3d 454 (2004).

provides. The note provides for an award of fees and costs to the prevailing party. Coleman is entitled to his fees on appeal.

IV. CONCLUSION

David Milne (in his capacity as managing member of the LLC) induced Coleman to release his lien and return to work in exchange for payment. That payment was a promissory note. As noted by the Milnes, a promissory note is simply a contract to pay money. While Mr. Milne had no obligation to pay Coleman to release his lien, he certainly had the right to do so. For him to now claim that the note is unenforceable against him is not supported by Washington law. As such, summary judgment was appropriate.

The trial court should be affirmed, and Coleman awarded his attorney's fees on appeal.

Respectfully submitted this 21st day of December, 2009.

LAW OFFICE OF
DAVID P. HORTON, INC. P.S.

DAVID P. HORTON WSBA No. 27123
Attorney for Respondent

APPENDIX A

PROMISSORY NOTE

$63,733.00

Silverdale, Washington
August 6, 2008

1. PROMISE TO PAY: FOR VALUE RECEIVED, David Milne, (hereinafter "Maker") promises to pay, or order, at 13617 – 48th Drive SE, Snohomish, Washington 98296, or such other place as may be designated by the Holder hereof, from time to time, the principal sum of Sixty Three Thousand, Seven Hundred Thirty-Three Dollars and No/100 ($63,733.00) on the terms and conditions set forth herein.

2. INTEREST RATE: The rate of interest on the unpaid balance of this Note shall be six percent (6%) per annum.

3. PAYMENT: Maker shall pay a lump sum of Sixty Three Thousand, Seven Hundred Thirty-Three Dollars and 00/100 ($63,733.00), plus interest, on or before the 1st day of December, 2008. Interest shall commence August 6, 2008. There shall be no pre-payment penalty.

4. DEFAULT INTEREST: This Note shall bear interest at the rate of twelve percent (12%) per annum after maturity or after default until such default is cured.

5. ATTORNEY'S FEES: In the event this Promissory Note is placed in the hands of an attorney for collection, or if suit or other proceeding shall be brought or initiated to collect any of the principal or interest of this Note, Maker shall pay a reasonable attorney's fee, in addition to all costs of collection and expenses of suit or other proceeding.

6. WAIVER OF PRESENTMENT: Presentation for payment, notice of dishonor, protest and notice of protest are hereby waived.

7. NON-WAIVER: Failure to exercise any right or option of Holder shall not constitute a waiver of the right to exercise such right or option if Maker is in default hereunder.

8. EXECUTION AS PRINCIPAL: The Maker of this Note executes the same as a principal and not as surety.

9. APPLICABLE LAW: This Promissory Note shall be governed by and construed and enforced in accordance with the laws of the State of Washington. Venue for any action brought hereunder shall lie in Kitsap County, Washington.

10. NOTICES: All notices, demands, requests, consents, approvals and other instruments required or permitted to be given pursuant to the terms of this Note shall be in writing and shall be deemed to have been properly given if sent by registered or certified mail, postage prepaid, return receipt requested, to the addresses set forth below:

EXHIBIT B

(a) To Maker: David Milne
13617 – 48th Drive SE
Snohomish, WA 98296

(b) To Holder: Ron Coleman and d/b/a Coleman and Son Construction
4079 Essex Court SW
Port Orchard, WA 98367

Provided, however, that such address may be changed upon five (5) days written notice thereof similarly given to the other party. Such notice, demand, request, consent, approval and other instrument shall have been deemed to have been served on the third (3rd) day following the date of mailing.

David Milne

8-6-08
DATED

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

ON THIS DAY personally appeared before me David Milne, to me known to be the individual described in and who executed the within and foregoing instrument and acknowledged that David Milne signed the same PROMISSORY NOTE and acknowledged it to be the free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 6 day of August, 2008.

Cathy A. Kiernan
NOTARY PUBLIC in and for the
State of Washington
Residing at Kitsap Washington
My commission expires: 9-9-2011
Print Name: Cathy A. Kiernan

CATHY A. KIERNAN
COMMISSION EXPIRES
NOTARY
PUBLIC
STATE OF WASHINGTON

APPENDIX B

AMENDED AGREEMENT BETWEEN OWNER AND COLEMAN AND SON CONSTRUCTION FOR CONSTRUCTION SERVICES AND MATERIALS

Date: 8/15/08

Address: HORSTMAN HEIGHTS PLAT

Owner(s): DAVID ALAN DEVELOPMENT, LLC

AGREEMENT made and entered into this 8 day of August, 2008 by and between Ron Coleman d/b/a Coleman and Son Construction. ("Contractor") and David Alan Development, (hereinafter "Owner").

Background

A. Owner is developing a plat known as Horstman Heights. On or about July 9, 2007 Owner contracted with Contractor for construction work on the plat as set forth in a written contract of that same date. ("Contract").

B. Contractor has provided services and materials pursuant to the contract and invoiced for services and materials. Owner has made payments on those invoices.

C. Contractor's last invoices were not paid in full. Owner disputed the amounts invoiced.

D. On July 15, 2008 Contractor recorded a lien under Kitsap County Auditor's No. 200807150193 and provided a statutory Notice to Lender to the bank providing construction financing to Owner.

E. Owner and Contractor both desire to resolve the payment dispute, and for Contractor to continue the work under the original contract and additional work as set forth below.

F. As such the parties agree that the terms of this Amended Contract shall control their relationship for all work done from August 11, 2008 until contract completion.

As such, it is agreed as follows:

1. **Payment**. Contractor acknowledges receipt of $33,176.67 in certified funds and a promissory note for $63,733.00 as payment on the invoices previously sent, and disputed as set forth above.

2. **Lien Release**. Upon execution of this Amended Contract, Contractor shall cause a lien release in the form previously provided to Owner as well as a Release of Notice to Lender in a form previously provided.

3. **Scope of Work – Contract Price**. Contractor shall complete the work as provided in the Preliminary Plan dated March 22, 2007 as amended and the approved Sewer and Water Plan dated July 9, 2008 by West Sound Utilities. The scope of work and contract prices set forth are based on the information available at the time of the execution of this Amended Contract. Contractor agrees to complete the below scope items for the fixed prices as set forth below. Note that some of the work noted below is the original scope of work that portions are complete and have already been invoiced and paid:

Item	Description	Fixed Price
Logging	Of Approx. 10 Acres, Logging to be performed on a split as follows. Trucking split 50/50. Owners 55% Logger 45%. Estimated value of timber at $45,000.00	(complete/paid) need slips for taxes RC
Clear/Grind	Onsite. Estimated 10 Acres	$49,610.00 (complete/paid)
Erosion	2 – Each Constr. Entrances, 2 – Ea. Sediment ponds 2,280' LF silt fence. 1,262' LF diversion ditches. 29' LF 12" CPEP. Includes disbursal of wood chips from clearing as ground cover for lots.	$47,900.00 (complete/paid)
Rock Walls	Estimated at 3,290 square feet	$78,000.00
Excavation	Move and place onsite, from cuts and fills. Estimated 89,860 CY. Assumes site to balance. No import or export. If additional soils are to be moved and placed onsite, over estimated bid quantity of 89,860 CY it will be performed at the rate of $3.50 per CY	$314,510.00 (complete/paid)
	Finish/grade roads to sub grade for gravel base. Sidewalks graded to dirt sub grade	$27,200.00
Sanitary Sewer	Per 7/9/08 plan	$139,210.00
Water	Per 7/9/08 plan	$178,249.00
Storm System	Includes infiltration pit, down spout drains & secondary storm systems. Note: downspout drains figured to terminate at property lines.	$296,594.00
	Excavate pond	$30,000.00
Subtotal		$1,161,273.00
WSST		$ 99,869.48
Total		$ 1,261,142.48

ITEMS NOT INCLUDED IN SCOPE OF WORK

a. To the extent that a survey is required, Owner shall commission and furnish any necessary surveys. Owner agrees and shall defend, hold harmless, and indemnify Contractor from any liability whatsoever that may result from any dispute, suit, or action arising over the location of the boundary lines for the Property.

b. Owner shall obtain any and all necessary or reasonably required easements, construction or environmental permits, special use permits, or variances for the construction of the work to be done if not obtained prior to execution of this Agreement

c. Contractor not responsible for any landscaping, hydro seeding or strawing of site.

d. Contractor not responsible for any engineering, staking or dewatering.

e. Contractor not responsible for any soil or compaction testing, bonds or assessments, or inspections.

f. All change orders or additional work shall be invoiced by contractor on a time and materials basis at the rate normally charged by Contractor, plus WSST, All change orders must be signed by James & Mike

g. Maintenance of previously installed erosion controls.

4. **Project Management**

a. Owner shall issue all instructions to the Contractor through the Project Manager, Jim James. The Project Manager will be the Owner's representative during the construction period. The Project Manager shall be responsible to Owner for inspecting the quality of work and the progress being made by Contractor in completing the project and reporting this information to Owner. The Project Manager will not be responsible for construction means, methods, techniques, sequences, procedures or Contractor's failure to carry out work in accordance with the Construction Documents.

b. The Project Manager shall be authorized to negotiate and execute change orders on behalf of Owner, see f. above.

c. The Project Manager shall be authorized to interpret the requirements of the Construction Documents and to make decisions of interpretation, as requested by Contractor, on behalf of Owner.

5. **Contractor**.

a. Contractor shall be responsible for construction of the work to be done as set forth in the documents making up the contract between the parties. The Contractor shall supervise and direct all construction activities associated with the project. The Contractor shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work to be done.

b. Unless otherwise specified, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, and to provide all necessary utilities, and other services for proper execution and completion of the work to be done.

c. Where the contract does not call for a specific grade or specification, the contractor will install materials, which are new and conform to industry practice. The contractor is not responsible for the suitability or function of materials specified by the Owner. Contractor is not responsible for the safety, function, or quality of ~~designs furnished by the Owner~~ work constructed. The Contractor is not responsible for property damage, or the consequence thereof, or personal injury, or the consequences thereof caused by chemical, biological, or toxic agents or elements that may be part of any material utilized in construction, subject to Jim James signed approval

6. **Payment Provisions**. The Owner shall make monthly payments of the Contract Price to Contractor on the basis of the percentage of work completed each month by the Contractor plus any additional amounts as specified elsewhere in the Contract Documents. Each payment shall be made pursuant to an invoice prepared by

Contractor and delivered to Beth, at David Alan Development, LLC on or before the 30th day of each month. Full payment shall be delivered to Contractor on or before the tenth (10th) day of each month from Owner. Owner may not withhold any portion as a retainage or retention.

7. **Change Orders, Extras, and Credits**. The Owner reserves the right to order extras and to make change orders in the nature of the additions, deletions or modifications without invalidating the Agreement. Owner-requested extras and change orders will be authorized only after execution of a written change order whereby both the Contractor and Owner accept the proposal. The costs of any changes subsequent to the execution of this Agreement shall be billed as time and materials plus sales tax. All changes and extras will be invoiced and payable as part of the draw request in the month following installation, unless otherwise agreed to by Contractor in writing.

8. **Termination**. In the event that any payments called for under this Agreement are not made within ten days (10) of its due date, Contractor shall have the right to terminate this Agreement upon three (3) days prior written notice thereof to Owner and, if applicable, Owner's lending institution. Upon such termination, or other basis for termination as provided for herein, Contractor shall be under no further obligation to provide materials or labor to the Owner or the Property and Owner shall pay Contractor for all work, materials and labor provided to the date of termination.

9. **Time is of the Essence**. Time is of the essence with respect to all payments called for herein. Owner acknowledges that the Contract Price is predicated upon prompt payment, allowing Contractor to take advantage of favorable terms provided by various suppliers and material men as well as retaining dependable, reliable subcontractors and employees who must be paid on a regularly scheduled basis.

10. **Work Stoppages and Delays**. Any delay in payment or the performance of any other obligations required of Owner herein shall cause the completion date to be extended to a date determined by Contractor. In addition, Contractor may, in its sole discretion, stop work until either the payment is received or the required performance completed to Contractor's satisfaction. In the event of a work stoppage or delay, Owner agrees to pay all costs and expenses reasonably associated with the work stoppage or delay and restarting the work to be done and the completion date shall be extended to a date determined by the Contractor.

11. **Contractor's Liability Insurance Coverage**. Contractor agrees to obtain and keep in force throughout the construction period, at its sole expense, such liability insurance as will protect Contractor from claims, under workers compensation and other employee benefit laws, for bodily injury and death, and for property damage, that might arise out of the work to be performed under this Agreement, whether directly or indirectly by Contractor or directly or indirectly by any subcontractor or sub-subcontractor of Contractor.

12. **Liens**. Contractor shall cause any lien filed and maintained on the subject Property by laborers, subcontractors, material men or equipment suppliers chargeable to Contractor in connection with Contractor's work hereunder to be released or removed and Contractor shall hold the Owner harmless there from. Contractor agrees to and shall pay all such persons the amounts that may be owed to them hereunder. It is understood that there are or may be claims of lien filed resulting from Contractor's work relationship with such others that may be disputed by Contractor. Contractor reserves the right to dispute and contest any such lien claim but if the same is not released or removed prior to the time set for final payment hereunder, Contractor may post a bond or make other financial arrangements reasonably required by the Owner's lending institution and/or title insurance company, as the case may be, to complete the closing thereof.

13. **Governing Law/Venue**. This agreement shall be governed and interpreted pursuant to the laws of the State of Washington. Venue for any action or proceeding relating to this Contract shall be Kitsap County.

14. **Attorney's Fees and Costs**. In the event of any dispute arising out of or in connection with the enforcement or interpretation of this agreement, the prevailing party shall be entitled to recover from the other their costs and expenses incurred, including a reasonable sum as and for attorney's fees.

15. **Assignment**. The Owner shall not assign this Agreement without the prior written consent of the Contractor.

16. **Entire Agreement**. This Agreement sets forth the entire understanding of the parties and it shall not be changed or terminated orally. The parties acknowledge that there are no other agreements, written or oral, that have not been set forth in the text of this Agreement. Failure to enforce any breach of any term or condition contained herein shall not constitute a waiver of any subsequent breach or default. If any portion of this agreement is determined or declared to be invalid, the same shall not serve to invalidate any other portion or term hereof and the remaining terms and conditions shall remain valid. Section captions or headings are not substantive and are for purposes of reference only.

17. **Binding Effect**. All the terms and provisions of this agreement shall be binding upon and inure to the benefit of and be enforceable by the legal representatives, successors and permitted assigns of the respective parties hereto.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed as of the day and year first above written.

David Alan Development, LLC

By: David Milne
Its: Manager

Ron Coleman

Jim James

No. 39766-8-II

COURT OF APPEALS - DIVISION II
OF THE STATE OF WASHINGTON

RON COLEMAN d/b/a COLEMAN AND SON CONSTRUCTION,

Respondent,

v.

DAVID MILNE and VIRGINIA MILNE, et al.

Appellants.

CERTIFICATE OF SERVICE

DEBRA R. SMITH declares as follows:

That on the 22nd day of December, 2009, Affiant deposited in the Federal Express overnight mail, prepaid, a properly addressed envelope directed to:

Stephan Todd
Attorney at Law
14319-15th Drive SE
Mill Creek, WA 98012

LAW OFFICE OF DAVID P. HORTON, INC. PS
3212 NW Byron Street Suite 104
Silverdale, WA 98383
Tel (360) 692 9444
Fax (360) 692 1257

containing copy of RESPONDENT'S BRIEF.

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

Dated this 22nd day of December, 2009 at Silverdale, Washington.

DEBRA R. SMITH

LAW OFFICE OF DAVID P. HORTON, INC. PS
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Silverdale, WA 98383
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