ORIGINAL

FILED
COURT OF APPEALS
DIVISION II

10 SEP 29 PM 12: 13

STATE OF WASHINGTON
BY _____
DEPUTY

NO. 40481-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

STELLAR J CORPORATION, and TRAVELERS CASUALTY AND SURETY COMPANY, Appellants,

vs.

COASTAL CONSTRUCTION GROUP, INC., JAMES HEWITT, and TARINA THOMAS, Respondents.

OPENING BRIEF OF APPELLANTS

Albert F. Schlotfeldt, WSBA# 19153
Mark A. Wheeler, WSBA# 31492
Attorney for Appellants

Duggan Schlotfeldt & Welch PLLC
900 Washington Street, Suite 1020
P.O. Box 570
Vancouver, WA 98666-0570
Telephone: (360) 699-1201

pm 9/28/10

TABLE OF CONTENTS

I. **INTRODUCTION**. 1

II. **ASSIGNMENTS OF ERROR**. 1

No. 1 The Trial Court erred by ruling on January 7, 2010 and January 13, 2010 to deny Stellar J's motion for judgment as a matter of law to dismiss Coastal's total cost claim. 1

No. 2 The Trial Court erred by ruling on January 7, 2010 and January 13, 2010 to deny Stellar J's motion for judgment as a matter of law to dismiss Coastal's damages for failure of sufficient proof. 1

No. 3 The Trial Court erred by ruling on January 13, 2010 to grant Coastal's motion for judgment as a matter of law dismissing the fraud claims against Hewitt and Thomas. 1

No. 4 The Trial Court erred by ruling on February 12, 2010 that Travelers is liable under Coastal's bond claim. 1

No. 5 The Trial Court erred by entering the Order on February 26, 2010 awarding Coastal prejudgment interest on the judgment. 1

No. 6 The Trial Court erred by ruling on January 4, 2010 that Oregon substantive law applied for legal issues during trial of this matter. 1

No. 7 The Trial Court erred by ruling that Oregon substantive law governed the issues of law at trial, but then by applying a Washington post-judgment statutory interest rate. 2

No. 8 The Trial Court erred by entering the Order on June 12, 2009 denying Stellar J's Motion for Summary Judgment under the perfect tender rule pursuant to RCW 62A.2-105(1). 2

No. 9. The Trial Court erred by entering the Order on December 21, 2009 denying Stellar J's Motion for Leave to Amend Stellar J's Answer, Affirmative Defenses and Counterclaims. 2

No. 10 The Trial Court erred by entering the Order on January 4, 2010 granting Coastal's Motions in Limine. 2

No. 11 The Trial Court erred by entering the Order on January 4, 2010 granting Coastal's Motion in Limine excluding Stellar J's expert witness, Roy Rogers, from testifying at trial. 2

No. 12 The Trial Court erred by ruling on January 7, 2010 to deny Stellar J's Motion to strike the testimony of Coastal's expert witness, Nick Castorina. 2

No. 13 The Trial Court erred by entering the Order on January 4, 2010 denying Stellar J's Motions in Limine. 2

No. 14 The Trial Court erred by entering the Order on June 12, 2009 denying Stellar J's Motion to Strike the Declaration of Coastal's expert, Nick Castorina, submitted in opposition to Stellar J's Motion for Summary Judgment. 2

No. 15 The Trial Court erred by awarding some or all of Coastal's attorney fees against Stellar J and Travelers to the extent that some or all of the Trial Court's decisions are reversed in Stellar J and Travelers' favor. 2

Issues Pertaining to Assignments of Error 3

No. 1 Did the Trial Court err by denying Stellar J's Motion for judgment as a matter of law to dismiss Coastal's total cost claim? (Assignment of Error, No. 1). 3

No. 2 Did the Trial Court err by denying Stellar J's Motion for judgment as a matter of law to dismiss Coastal's damages for failure of sufficient proof? (Assignment of Error, No. 2). 3

No. 3 Did the Trial Court err by dismissing the fraud claims against Hewitt and Thomas under the economic loss rule? (Assignment of Error, No. 3). 3

No. 4 Did the Trial Court err by ruling that Travelers was liable to Coastal? (Assignment of Error, No. 4). 3

No. 5 Did the Trial Court err by awarding Coastal prejudgment interest on the judgment under a total cost claim? (Assignment of Error, No. 5). 3

No. 6. Did the Trial Court err by applying Oregon substantive law to legal issues raised at trial? (Assignment of Error, No. 6). 3

No. 7 Did the Trial Court err by determining that Oregon substantive law governed the issues of law at trial, and then later applying a Washington post-judgment statutory interest rate? (Assignment of Error, No. 7). 3

No. 8 Did the Trial Court err by denying Stellar J's Motion for Summary Judgment under the perfect tender rule pursuant to RCW 62A.2-105(1)? (Assignment of Error No. 8). 3

No. 9 Did the Trial Court err by denying Stellar J's Motion for Leave to Amend Stellar J's Answer, Affirmative Answer, Counterclaims and Third-Party Complaint? (Assignment of Error, No. 9). 3

No. 10 Did the Trial Court err by granting Coastal's Motion in Limine precluding Stellar J from arguing specific claims for damages at trial? (Assignment of Error No. 10). 4

No. 11 Did the Trial Court err by granting Coastal's Motion Limine precluding Stellar J from asserting the affirmative defense that Coastal's alleged damages, in all or in part, were caused by the City of Chehalis and/or the City's engineer, Brown & Caldwell? (Assignment of Error No. 10). 4

No. 12 Did the Trial Court err by granting Coastal's Motion in Limine to exclude Stellar J's expert witness, Roy Rogers, from testifying at trial? (Assignment of Error, No. 11). 4

No. 13 Did the Trial Court err by denying Stellar J's motion to strike the testimony of Coastal's testifying expert, Nick Castorina? (Assignment of Error, No. 12). 4

No. 14 Did the Trial Court err by denying Stellar J's Motion in Limine to exclude Coastal's total cost claim at trial? (Assignment of Error, No. 13). 4

No. 15 Did the Trial Court err by denying Stellar J's Motion in Limine to exclude Coastal's claim for monetary damages not properly pleaded? (Assignment of Error, No. 13). 4

No. 16 Did the Trial Court err by denying Stellar J's Motion in Limine to exclude Stellar J's settlement with Flowserve Corporation at trial? (Assignment of Error, No. 13). 4

No. 17 Did the Trial Court err by denying Stellar J's Motion to Strike the Declaration of Coastal's expert, Nick Castorina, submitted in opposition to Stellar J's Motion for Summary Judgment? (Assignment of Error, No. 14). 4

No. 18 Did the Trial Court err by awarding some or all of Coastal's attorney fees against Stellar J and Travelers to the extent that some or all of the Trial Court's decisions are reversed in Stellar J and Travelers' favor. (Assignment of Error, No. 15). 4

III. STATEMENT OF THE CASE. 5

A. Facts Relevant to Issues Presented for Review. . . 5

B. Procedure Below. 11

IV. ARGUMENT. 17

A. Standard of Review. 17

B. The Trial Court erred by denying Stellar J's CR 50 motion to dismiss Coastal's Total Cost Claim. 18

C. The Trial Court erred by denying Stellar J's CR 50 motion to dismiss Coastal's claims not supported by the evidence. . 22

D. The Trial Court erred by granting Hewitt and Thomas' CR 50 Motion to Dismiss Stellar J's fraud claims against them. 23

E. The Trial Court erred by Finding Travelers liable under Coastal's bond claim. 27

F. The Trial Court erred by Awarding Coastal Prejudgment Interest. 31

G. The Trial Court erred by applying an Oregon Choice of Substantive Law because the parties waived application of Oregon Law for Washington Law. 33

H. The Trial Court erred by awarding Coastal Post-Judgment interest at Twelve Percent. 39

I. The Trial Court erred by denying Stellar J's Motion for Summary Judgment because the Perfect Tender Rule under the UCC barred Coastal's claim in all or in part. . . . 40

J. The Trial Court Erred by Denying Stellar J's Motion for Leave to Amend the Answer, Affirmative Defenses and Counterclaims. 43

1. The Trial Court erred by denying Stellar J's Motion to Amend to allege claims against Coastal based on the parties' Subcontract. 45

2. The Trial Court erred by denying Stellar J's defense to assert fault against Chehalis. 46

3. The Trial Court erred by denying Stellar J's Motion to Amend to Clarify Stellar J's Affirmative Defenses. . . 48

K. The Trial Court Erred by Granting Coastal's Motions in Limine. 49

1. The Trial Court erred by excluding Stellar J's claims against Coastal under the Purchase Order. 50

2. The Trial Court erred by excluding Stellar J from asserting fault at trial for Coastal's alleged damages against the City and the City's agents. 54

3. The Trial Court erred by excluding Stellar J's expert witness, Roy Rogers, from testifying at trial. 55

L. The Trial Court erred by Denying Stellar J's Motion to Strike Mr. Castorina's testimony once he testified. 59

M. The Trial Court Erred by Denying Stellar J's Motions in Limine. 59

1. The Trial Court Erred by allowing Mr. Castorina to Testify to Coastal's alleged damages at trial. 60

i. The Trial Court should have excluded speculative and inadmissible testimony from Mr. Castorina. 60

ii. The Trial Court erred by allowing Mr. Castorina to testify regarding Coastal's alleged modified total cost claim. 61

2. The Trial Court erred by allowing Coastal to argue and submit evidence at trial of claims not properly pleaded by Coastal for any claim in excess of the $82,277.00 withheld by Stellar J. . . . 63

3. The Trial Court erred by allowing Coastal to submit Stellar J's settlement with Flowserve at Trial. 65

N. The Trial Court erred by Denying Stellar J's Motion to Strike the Declaration of Mr. Castorina upon Stellar J's Motion for Partial Summary Judgment. 67

O. Upon Reversal of some or all of the items in Stellar J's Appeal, the Attorney Fees and Costs Awarded to Coastal should be Overturned or Reduced accordingly. 68

P. Stellar J is entitled to its Attorney Fees on Appeal. 69

V. CONCLUSION. 69

TABLE OF CASES

Adams v. Allstate Ins. Co.,
58 Wn.2d 659, 364 P.2d 804 (1961) 43, 44

Alaska Pacific Trading Co. v. Eagon Forest Products, Inc.,
85 Wn. App. 354, 933 P.2d 417,
review denied, 133 Wn.2d 1006 (1997) 42

Alejandre v. Bull,
159 Wn.2d 674, 153 P.3d 864 (2007) 25, 26, 27

Anderson Hay & Grain Company, Inc. v.
United Dominion Industries, Inc.,
119 Wn. App. 249, 76 P.3d 1205 (2003),
review denied, 151 Wn.2d 1016 (2004) 67-68

Atherton Condo. Apt.-Owners Ass'n Bd. of Directors v.
Blume Dvlpmt. Co.,
115 Wn.2d 506, 799 P.2d 250 (1990) 26

Beardmore Heavy Hauling & Crane Service v. Morin,
71 Wn.2d 273, 427 P.2d 975 (1967) 29

Bentzen v. Demmons,
68 Wn. App. 339, 842 P.2d 1015 (1993) 52

Better Financial Solutions, Inc. v. Transtech Electric, Inc.,
112 Wn. App. 697, 51 P.3d 108,
as amended, review denied, 149 Wn.2d 1010, 69 P.3d 874 (2002) . 30

Bignold v. King County,
65 Wn.2d 817, 399 P.2d 611 (1965) 20, 62

Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.,
126 Wn. App. 352, 110 P.3d 1145 (2005) 26

Bonneville v. Pierce County,
148 Wn. App. 500, 202 P.3d 309,
review denied, 166 Wn.2d 1020 (2009) 52

Borish v. Russell,
155 Wn. App. 892, 230 P.3d 646 (2010) 25

Brown v. Spokane County Fire Protection Dist. No. 1,
100 Wn.2d 188, 668 P.2d 571 (1983) 18

Bryant v. Joseph Tree, Inc.,
119 Wn.2d 210, 829 P.2d 1099 (1992) 48

Burnett v. Spokane Ambulance,
131 Wn.2d 484, 933 P.2d 1036 (1997) 49

Byrne v. Cooper,
11 Wn. App. 549, 523 P.2d 1216,
review denied, 84 Wn.2d 1013 (1974) 34

Canron, Inc. v. Federal Ins. Co.,
82 Wn. App. 480, 918 P.2d 937 (1996),
review denied, 131 Wn.2d 1002 (1997) 37

Carlile v. Harbour Homes, Inc.,
155 Wn. App. 339, 229 P.3d 906 (2008) 24-25

Caruso v.
Local Union No. 690, International Brotherhood of Teamsters,
100 Wn.2d 343, 670 P 2d 240 (1983) 44

Charles G. Williams Constr., Inc. v. White,
271 F.3d 1058 (D.C.Cir. 2001) 20

City of Seattle v. McCready,
131 Wn.2d 266, 931 P.2d 156 (1997) 68

City Retail Lumber Co. v. Title Guaranty and Surety Co.,
72 Wash. 300, 130 P. 345 (1913) 29

Cowan v. Chicago, M. St. P. & P. P. R.,
55 Wn.2d 615, 349 P.2d 218 (1960) 59

Davis v. Globe Mach. Mfg. Co.,
102 Wn.2d 68, 684 P.2d 692 (1984) 17

Dautel v. Heritage Home Center, Inc.,
89 Wn. App. 148, 948 P.2d 397 (1997),
review denied, 135 Wn.2d 1003 (1998) 28, 31

Dauphin v. Smith,
42 Wn. App. 491, 713 P.2d 116 (1986) 26

Deutscher v. Gabel,
149 Wn. App. 119, 202 P.2d 355 (2009) 49

Dewey v. A. F. Klaveness & Co., A/S,
233 Or. 515, 379 P.3d 560 (1963) 23

Eichleay Corp.,
ASBCA No. 5183, 60-2 B.C.A. ¶ 2688 (ASBCA 1960) 20

Ellis v. Barto,
82 Wn. App. 454, 918 P.2d 540 (1996),
review denied, 130 Wn.2d 1026 (1997) 17

Estate of Borden ex rel. Andersen v. State,
122 Wn. App. 227, 240-41, 95 P.3d 764 (2004),
review denied, 154 Wn.2d 1003 (2005) 17

Erwin v. Cotter Health Centers,
161 Wn.2d 676, 167 P.3d 1112 (2007) 36

Fahnlander v. Fern,
81 Wn. App. 206, 913 P.2d 426,
review denied, 130 Wn.2d 1002 (1996) 50

Federal Signal Corp. v. Safety Factors, Inc.,
125 Wn.2d 413, 886 P.2d 172 (1994) 53

F. H. McGraw & Co. v. United States,
130 F.Supp. 394, 131 Ct.Cl. 501 (1955) 18, 19

Freeland v. Amigo,
103 F.3d 1271, (6th Cir. 1997) 56

Garcia v. Providence Medical Center,
60 Wn. App. 635, 806 P.2d 766,
review denied, 117 Wn.2d 1015 (1991) 59

Gilbert Hunt Co. v. Parry,
59 Wash. 646, 110 P. 541 (1910) 30

Go2net, Inc. v. Freeyellow.Com, Inc.,
158 Wn.2d 247, 143 P.3d 590 (2006) 40

H. John Homan Co. v. United States,
418 F.2d 522, 189 Ct.Cl. 500 (1969) 18

Heinz v. Blagen Timber Co.,
71 Wn.2d 728, 431 P.2d 173 (1967) 47, 54

Hensrude v. Sloss,
150 Wn. App. 853, 209 P.3d 543 (2009) 66

Hertz v. Riebe,
86 Wn. App. 102, 936 P.2d 24 (1997) 68, 69

Holly-Mason Hardware Co. v. National Surety Co.,
107 Wash. 74, 180 P.2d 901 (1919) 30

Ito International Corp. v. Prescott, Inc.,
83 Wn. App. 282, 921 P.2d 566 (1996) 36

Jackson v. Fenix Underground, Inc.,
142 Wn. App. 141, 173 P.3d 977 (2007) 39

Jacobs Meadow Owners Ass'n v. Plateau 44 II, LLC,
139 Wn. App. 743, 162 P.3d 1153 (2007) 22

J. D. O'Malley & Co. v. Lewis,
176 Wash. 194, 28 P.2d 283 (1934) 43

Kaplan v. Northwestern Mut. Life Ins. Co.,
115 Wn. App. 791, 65 P.3d 16 (2003) 40

Ketchum v. Albertson Bulb Gardens,
142 Wash. 134, 252 P. 523 (1927) 22

Kiewet-Grice v. State,
77 Wn. App. 867, 895 P.2d 6,
review denied, 127 Wn.2d 1018 (1995) 28, 31

Lewis v. Simpson Timber Co.,
145 Wn. App. 302, 189 P.3d 178 (2008) 17

Lewis v. Bell,
45 Wn. App. 192, 744 P.2d 425 (1986) 64

Lightner v. Balow,
59 Wn.2d 856, 370 P.2d 982 (1962) 51

Lockwood v. AC & S, Inc.,
109 Wn.2d 235, 744 P.2d 605 (1987) 66

Marassi v. Lau,
71 Wn. App. 912, 859 P.2d 605 (1993),
overruled on other grounds,
Wachovia SBA Lending, Inc. v. Kraft,
165 Wn.2d 481, 200 P.3d 683 (2009) 68-69

Maryland Casualty Co. v. City of Seattle,
11 Wn.2d 69, 118 P.2d 416 (1941) 29

Melka Marine, Inc. v. United States,
187 F.3d 1370 (D.C.Cir. 1999) 20

Modern Builders, Inc. of Tacoma v. Manke,
27 Wn. App. 86, 615 P.2d 1332,
review denied, 94 Wn.2d 1023 (1980) 28, 33

Mike M. Johnson, Inc. v. County of Spokane,
150 Wn.2d 375, 78 P.3d 161 (2003) 12, 13, 34, 37, 38

Northwest Natural Gas Co. v. Chase Gardens, Inc.,
328 Or. 487, 982 P.2d 1117 (1999) 22

N.W. Indepen. Forest Mfrs. v. Dep't. of Labor and Indus.,
78 Wn. App. 707, 899 P.2d 6 (1995) 22

O'Brien v. Shearson Hayden Stone, Inc.,
90 Wn.2d 680, 586 P.2d 830 (1978) 36, 37

Oliver-Finnie Co. v. United States,
279 F.2d 498, 150 Ct.Cl. 189 (1960) 18

Paul v. All Alaskan Seafoods, Inc.,
106 Wn. App. 406, 24 P.3d 447 (2001) 39

Poulsbro Group, LLC v. Talon Development, LLC,
155 Wn. App. 339, 229 P.3d 906 (2010) 25

Prime Start Ltd. v. Maher Forest Products Ltd.,
442 F.Supp.2d 1113, (W.D.Wa 2006) 35

Puget Sound Bridge and Dredging Co. v. Jahn & Bressi,
148 Wash. 37, 268 P. 169 (1928) 29

Quackenbush v. State,
72 Wn.2d 670, 434 P 2d 736 (1967) 43, 44

Reichelt v. Johns-Manville Corp.,
107 Wn.2d 761, 733 P.2d 530 (1987) 53, 56

Rothweiler v. Clark County,
108 Wn. App. 91, 29 P.3d 758 (2001),
review denied, 145 Wn.2d 1029 (2002) 68

Seattle Western Industries, Inc. v. David A. Mowat Co.,
110 Wn.2d 1, 750 P.2d 245 (1988) 19, 27, 61

S.L. Rowland Const. Co. v. Beall Piple & Tank Corp.,
14 Wn. App. 297, 540 P.2d 912 (1975) 18, 19, 20, 61, 62

State v. Blair,
117 Wn.2d 479, 816 P.2d 718 (1991) 47, 54

Tagliani v. Colwell,
10 Wn. App. 227, 517 P 2d 207 (1973) 44

Tegman v. Accident & Medical Investigations, Inc.,
107 Wn. App. 868, 30 P.3d 8 (2001) 47, 54

Terry v. United States Fidelity & Guaranty Co.,
196 Wash. 206, 82 P.2d 532 (1938) 27

Turnbull, Inc. v. United States,
389 F.2d 1007, 180 Ct.Cl. 1010 (1967) 18

University Village Ltd. Partners v. King County,
106 Wn. App. 321, 23 P.3d 1090,
review denied, 145 Wn.2d 1002 (2001) 40

U.S. Filter Distribution Group, Inc. v. Katspan, Inc.,
117 Wn. App. 744, 72 P.3d 1103 (2003) 29

V. C. Edwards Contracting Co. v. Port of Tacoma,
83 Wn.2d 7, 514 P.2d 1381 (1973) 19-20, 61-62

Wagner Dev., Inc. v. Fidelity and Deposit Co of Md.,
95 Wn. App. 896, 977 P.2d 639,
review denied, 139 Wn.2d 1005 (1999) 51-52

Walla v. Johnson,
50 Wn. App. 879, 751 P.2d 334 (1988) 44

Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n,
123 Wn.2d 621, 869 P.2d 1034 (1994) 43

West v. All State Boiler, Inc.,
146 F.3d 1377 (D.C.Cir. 1998) 20

Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.,
102 Wn. App. 488, 7 P.3d 861 (2000),
review denied, 143 Wn.2d 1003 (2001) 45

W.G. Cornell Co. v. Ceramic Coating Co.,
626 F.2d 990 (D.C. Cir. 1980) 20

Young v. Young,
164 Wn.2d 477, 191 P.3d 1258 (2008) 21, 62

STATUTES

RCW 4.22.070 . . . . . 47, 54

RCW 5.24. 34

RCW 39.08. . . . . 9, 24, 20, 30

RCW 30.09.010 30

RCW 39.08.030. . . . . 27, 29

RCW 60.28.010 . . . . . 9, 24

RCW 62A.2-105(1) 2, 3, 11, 42

RCW 62A.2-601(a) 42

RCW 62A.2-713. 43

RCW 62A.2-714. 43

COURT RULES

CR 8(a) 48

CR 15(a) 43

CR 15(b) . . . . . .

CR 30(b)(6) 51

CR 37(b) 49

CR 44.1(b) 34

ER 401 65

ER 402 65

ER 403 65

ER 408 65

RAP 18.1 69

OTHER AUTHORITIES

Restatement (Second) Conflict of Law § 187 (1971) 36

Restatement (Second) Conflict of Law § 188 (1971) 37, 38

APPENDIX

Appendix A . . . . . Special Verdict Form

I. INTRODUCTION.

Stellar J Corporation (hereinafter "Stellar J") and Travelers Casualty and Surety Company (hereinafter "Travelers") submit the following Opening Brief of Appellants in support of their appeal regarding the proceedings and trial against Coastal Construction Group, Inc. (hereinafter "Coastal"), James Hewitt (hereinafter "Hewitt"), and Tarina Thomas (hereinafter "Thomas").

II. ASSIGNMENTS OF ERROR.

No. 1 The Trial Court erred by ruling on January 7, 2010 and January 13, 2010 to deny Stellar J's motion for judgment as a matter of law to dismiss Coastal's total cost claim.

No. 2 The Trial Court erred by ruling on January 7, 2010 and January 13, 2010 to deny Stellar J's motion for judgment as a matter of law to dismiss Coastal's damages claim for failure of sufficient proof.

No. 3 The Trial Court erred by ruling on January 13, 2010 to grant Coastal's motion for judgment as a matter of law dismissing the fraud claims against Hewitt and Thomas.

No. 4 The Trial Court erred by ruling on February 12, 2010 that Travelers is liable under Coastal's bond claim.

No. 5 The Trial Court erred by entering the Order on February 26, 2010 awarding Coastal prejudgment interest on the judgment entered in this matter.

No. 6 The Trial Court erred by ruling on January 4, 2010 that Oregon substantive law applied for legal issues during trial of this matter.

No. 7 The Trial Court erred by ruling that Oregon substantive law governed the issues of law at trial, but then by applying a Washington post-judgment statutory interest rate.

No. 8 The Trial Court erred by entering the Order on June 12, 2009 denying Stellar J's Motion for Summary Judgment under the perfect tender rule pursuant to RCW 62A.2-105(1).

No. 9. The Trial Court erred by entering the Order on December 21, 2009 denying Stellar J's Motion for Leave to Amend Stellar J's Answer, Affirmative Defenses, Counterclaims and Third-Party Complaint.

No. 10 The Trial Court erred by entering the Order on January 4, 2010 granting Coastal's Motions in Limine.

No. 11 The Trial Court erred by entering the Order on January 4, 2010 granting Coastal's Motion in Limine excluding Stellar J's expert witness, Roy Rogers, from testifying at trial.

No. 12 The Trial Court erred by ruling on January 7, 2010 to deny Stellar J's Motion to strike the testimony of Coastal's expert witness, Nick Castorina.

No. 13 The Trial Court erred by entering the Order on January 4, 2010 denying Stellar J's Motions in Limine.

No. 14 The Trial Court erred by entering the Order on June 12, 2009 denying Stellar J's Motion to Strike the Declaration of Coastal's expert, Nick Castorina, submitted in opposition to Stellar J's Motion for Summary Judgment.

No. 15 The Trial Court erred by awarding some or all of Coastal's attorney fees against Stellar J and Travelers to the extent that some or all of the Trial Court's decisions are reversed in Stellar J and Travelers' favor.

Issues Pertaining to Assignments of Error

No. 1 Did the Trial Court err by denying Stellar J's Motion for judgment as a matter of law to dismiss Coastal's total cost claim? (Assignment of Error, No. 1).

No. 2 Did the Trial Court err by denying Stellar J's Motion for judgment as a matter of law to dismiss Coastal's damages for failure of sufficient proof? (Assignment of Error, No. 2).

No. 3 Did the Trial Court err by dismissing the fraud claims against Hewitt and Thomas under the economic loss rule? (Assignment of Error, No. 3).

No. 4 Did the Trial Court err by ruling that Travelers was liable to Coastal? (Assignment of Error, No. 4).

No. 5 Did the Trial Court err by awarding Coastal prejudgment interest on the judgment under a total cost claim? (Assignment of Error, No. 5).

No. 6. Did the Trial Court err by applying Oregon substantive law to legal issues raised at trial? (Assignment of Error, No. 6).

No. 7 Did the Trial Court err by determining that Oregon substantive law governed the issues of law at trial, and then by later applying a Washington post-judgment statutory interest rate? (Assignment of Error, No. 7).

No. 8 Did the Trial Court err by denying Stellar J's Motion for Summary Judgment under the perfect tender rule pursuant to RCW 62A.2-105(1)? (Assignment of Error, No. 8).

No. 9 Did the Trial Court err by denying Stellar J's Motion for Leave to Amend Stellar J's Answer, Affirmative Answer, Counterclaims and Third-Party Complaint? (Assignment of Error, No. 9).

No. 10 Did the Trial Court err by granting Coastal's Motion in Limine precluding Stellar J from arguing specific claims for damages at trial? (Assignment of Error No. 10).

No. 11 Did the Trial Court err by granting Coastal's Motion in Limine precluding Stellar J from asserting the affirmative defense that Coastal's alleged damages, in all or in part, were caused by the City of Chehalis and/or the City's engineer, Brown & Caldwell? (Assignment of Error No. 10).

No. 12 Did the Trial Court err by granting Coastal's Motion in Limine to exclude Stellar J's expert witness, Roy Rogers, from testifying at trial? (Assignment of Error, No. 11).

No. 13 Did the Trial Court err by denying Stellar J's motion to strike the testimony of Coastal's testifying expert, Nick Castorina? (Assignment of Error, No. 12).

No. 14 Did the Trial Court err by denying Stellar J's Motion in Limine to exclude Coastal's total cost claim at trial? (Assignment of Error, No. 13).

No. 15 Did the Trial Court err by denying Stellar J's Motion in Limine to exclude Coastal's claim for monetary damages not properly pleaded? (Assignment of Error, No. 13).

No. 16 Did the Trial Court err by denying Stellar J's Motion in Limine to exclude Stellar J's settlement with Flowserve Corporation at trial? (Assignment of Error, No. 13).

No. 17 Did the Trial Court err by denying Stellar J's Motion to Strike the Declaration of Coastal's expert, Nick Castorina, submitted in opposition to Stellar J's Motion for Summary Judgment? (Assignment of Error, No. 14).

No. 18 Did the Trial Court err by awarding some or all of Coastal's attorney fees against Stellar J and Travelers to the extent that some or all of the Trial Court's decisions are reversed in Stellar J and Travelers' favor. (Assignment of Error, No. 15).

III. STATEMENT OF THE CASE

Stellar J submits the following Facts Relevant to Issues Presented for Review and Procedure Below regarding this appeal.

A. Facts Relevant to Issues Presented for Review.

On March 31, 2005, Stellar J, the general contractor, and Coastal, the subcontractor, entered into a subcontract (hereinafter "Subcontract") to provide construction services on a public works project known as the Riverside/Prindle Wastewater Pumping Stations Project in the City of Chehalis, Washington (hereinafter "Project"). Exs. 5, 301, RP 51, 01/05/10. Stellar J obtained bonding for the Project from Travelers. CP 605, 668, Ex. 2, Section 00410. The Subcontract incorporated by reference other contract documents, which formed the parties' entire contract. Ex. 5, p. 2, ¶ 2. Coastal was bound by the terms of the contract (hereinafter "Main Contract") between Stellar J and the City of Chehalis (hereinafter "City") for the Project, which included all of the general and special conditions, drawings, specifications, and addenda in the Main Contract that applied in anyway to the Subcontract. *Id*; Ex. 300, RP 53-54, 01/05/10. The Subcontract provided that time was of the essence for Coastal's performance. Ex. 301, p. 5, ¶ 10, RP 66-67, 01/05/10.

Concurrently therewith, Coastal also entered into a purchase order contract ("Purchase Order") with Stellar J dated March 22, 2005, to

provide certain materials to Stellar J, including Motor Control Centers ("MCC's"). CP 735-39, Exs. 6, 302. The Purchase Contract is one of the contractual documents forming the contract between Stellar J and Coastal. *Id*, CP 605.

Both the Subcontract and the Purchase Order were executed and signed by Hewitt, the President and Owner of Coastal. Exs. 5, 6, 301, 302, CP 736, RP 45, 51, 01/05/10. The Purchase Order required the MCCs be delivered to the Project Site no later than August 15, 2005. *Id*, CP 735, RP 46, 53, 01/05/10. Coastal was aware of its contractual obligation to Stellar J to deliver the MCCs to the Project site by August 15, 2005. *Id*, CP 731-32, 742. The Purchase Order also required Coastal to participate in a submittal process (hereinafter "Submittal") where Coastal was required to submit designs, dimensions and information regarding the goods and services it was providing to the Project Engineer, Brown and Caldwell, hired by the City, for review and approval. CP 735-36, Exs. 6, 302, 396, 397, 373, 402.

Coastal subcontracted with Tacoma Electric Supply, Inc. (hereinafter "Tacoma Electric") to supply electrical equipment, including the MCCs, to the Project. CP 731, RP 54-56, 01/05/10. Tacoma Electric subcontracted with its supplier Siemens (hereafter "Siemens"). CP 731-32,

742, RP 62-63, 01/05/10. Stellar J had no direct contractual relationship with Tacoma Electric or Siemens. CP 757-58, 847.

The MCCs were not delivered to the Project by August 15, 2005, but were delivered on January 19, 2006, over five months late. CP 732, 743-46, 952, Ex., 407, RP 18, 78-79, 01/05/10. The operation and maintenance manuals for the MCCs were not delivered until on or about March 14, 2006. CP 756-57, 952. Before Coastal's lawsuit was filed, Coastal stated that Tacoma Electric and Siemens were responsible for the delays and the associated back charges for the Project. CP 612, Ex. 407, RP 78-80, 01/05/10.

Stellar J provided Coastal notice of Coastal's untimely delivery and that Stellar J would seek damages. CP 743-46, 952-55. Stellar J only sought damages from Coastal commencing after the date another of Stellar J's vendor's, Flowserve Corporation's (hereinafter "Flowserve"), late delivery of goods to the Project. CP 745, Ex 157, RP 18-20, 01/08/10. Stellar J paid Coastal pursuant to invoices Coastal submitted to Stellar J except for approximately $80,000.00. Exs. 313, 314, 336, 338, 349, 350, 364, 365, 376, 380, 382, 386, 392, RP 81-103, 01/05/10. Stellar J withheld $82,277.00 from payment to Coastal; Stellar J withheld this amount under Stellar J's claim against Coastal for Coastal's tardy performance. CP 1693,

Ex. 408. Coastal received $257,193.02 in total payments from Stellar J. RP 164, 01/05/10.

Flowserve supplied pumps for the waste water stations. CP 1666. The MCCs were designed to energize and operate the pumps. Flowserve was also untimely with its delivery of the pumps. *Id.* Flowserve and Stellar J settled the resulting claims that were brought against each other. Ex. 200. Over Stellar J's objection, the Trial Court allowed Coastal to submit the settlement between Flowserve and Stellar J as evidence that Stellar J was not damaged as a result of Coastal's untimely performance. CP 1666, Ex. 200; RP 77-82, 12/30/09, RP 8-15, 01/05/10.

From the time the Subcontract and Purchase Contract were executed until the time the MCC's were delivered, Tacoma Electric and Siemens did not timely comply with or provide the necessary information to allow the Manager to approve the Submittal. CP 733, 945-49. Under the terms of the Purchase Contract, Coastal agreed to provide a signed Statement of Payment and Lien Release with each request for payment under which Coastal certified and warranted certain information. Exs. 6, p. 5, RP 47-51, 01/05/10.

Pursuant to the Purchase Contract and the "Statement of Payment and Lien Release", Coastal agreed to indemnify and hold Stellar J harmless from all liability cost and expense and/or loss or damages

growing out of, incidental directly or indirectly, to the performance of Coastal under the Purchase Contract. *Id.* Coastal affirmatively stated that it agreed to the terms of the "Statement of Payment and Lien Release", by its signature on the Purchase Contract. *Id.*

During the course of the Project, Coastal, Hewitt, and Thomas, submitted invoices to Stellar J along with Statements of Payment and Lien Release executed by Thomas under the Purchase Order on various dates. Exs. 310, 313, 328, 331, 336, 337, 349, 351, 363, 364, 370, 371, 375, 380, 381, 384, 385, 386, 391, 392, RP 48-50, 81-103, 01/05/10. On June 6, 2006, Tacoma Electric filed a Notice to Public Body of Claim against the bond and retained percentage pursuant to RCW 39.08 and RCW 60.28.010 for the sum of $84,199.91. CP 942, Ex. 406. Stellar J's third-party complaint against Hewitt and Thomas alleged that their representations that Coastal's contractors were paid were false. CP 682-86.

Despite demand by Stellar J, Stellar J submits that Coastal failed and refused to honor Coastal's contractual obligation to protect and indemnify Stellar J from the claim by Tacoma Electric, and failed or refused to remove the claim against the bond and retainage for the Project, thereby damaging Stellar J. Ex. 406, RP 111-12, 01/07/10. Hewitt stated that he chose not to obtain a bond to secure payment of Tacoma Electric's

lien claim to remove the Claim from Stellar J's Payment Bond and Retainage for the Project. CP 865, p. 101, ll. 7-9.

The parties' contract contains contractual notice provisions that required adherence by Coastal as a prerequisite and condition precedent before Coastal could allege claims for damages against Stellar J. Ex 300, sections 00710-8, 00710-11 2.05 C, 00710-12 2.05 F.2 Coastal was aware of the contractual notice provisions for claims for additional compensation because Coastal submitted change orders under the parties' contract that were accepted and paid. RP 65-77, 01/05/10. Coastal did not follow these provisions for Coastal claim for damages, which Stellar J submits barred, in all or in part, Coastal's claims for damages against Stellar J. Exs. 178, 402, RP 74-77, 01/05/10.

Trial began in this matter on January 4, 2010 and concluded on January 15, 2010. At trial, over Stellar J's objection, Coastal was allowed to submit a "modified total cost" claim to the jury, which basically is a damages claim computed by taking the alleged total costs incurred by a contractor less the amounts the contractor, Coastal, had already been paid. Stellar J argued before and during trial that the record and evidence precluded such a claim to be submitted to the jury. On January 15, 2010, the jury awarded Coastal total damages of $322,056.12. App. A. The jury awarded $270,056.12 under the Subcontract and $52,000.00 under the

Purchase Order. *Id.* Judgment was entered on February 26, 2010, against Stellar J for $809,921.71. CP 2418-22.

B. Procedure Below.

Prior to trial, Stellar J filed a motion for partial summary judgment against Coastal arguing that (1) Coastal was liable to Stellar J and that Coastal's claims against Stellar J were barred under Washington's Uniform Commercial Code ("UCC") for Coastal's untimely delivery of the MCCs pursuant to the perfect tender rule of RCW 62A.2-105(1), and (2) for Coastal's breach of contract under the parties' Purchase Contract for contractually agreeing to obtain lien releases from Tacoma Electric and failing to do so, which exposed Stellar J to liability from Tacoma Electric. CP 978-980, 808-1105. In response to Stellar J's motion for partial summary judgment, Coastal submitted, *inter alia*, the Declarations of its alleged expert, Nick Castorina. CP 1013-33, 1136-43. Stellar J moved to strike Mr. Castorina's declarations under the argument that his declaration testimony was inexpert testimony set forth without a sufficient foundation. CP 1106-35. On June 12, 2009, the Trial Court denied Stellar J's Motions for Partial Summary Judgment and to Strike the Declaration of Mr. Castorina. CP 1144-49, RP 1-37, 06/12/09.

One month before trial, Stellar J moved to amend its Complaint. CP 1262-81. Stellar J requested amendment to its Complaint, including

claims (1) to specify allegations regarding Stellar J's claims against Coastal under the Subcontract and Purchase Order, (2) to assert fault against the City as a result of actions and/or inactions of the City of Chehalis and its engineers for damages that Coastal claimed that were, in turn, asserted by Coastal against Stellar J, and (3) to clarify affirmative defenses in Stellar J's Answer. CP 1263-64. On December 12, 2010, the Court entered the Order denying Stellar J's Motion to Amend. CP 1674-77.

Before trial, the parties submitted their respective motions in limine. CP 1625-28, 1635-39, 1641-43, 1659-73, Ex. 200, RP 77-82, 12/30/09. Stellar J's Motions in Limine included: (1) the exclusion of Stellar J's settlement with Flowserve Corporation; (2) the exclusion of claims not properly pleaded by Coastal (in light of the Trial Court denying Stellar J's motion to amend) including (A) claims exceeding the $82,277.00 withheld by Stellar J, (B) any affirmative claims for relief by Coastal for delay damages relating to the Subcontract or Purchase Order, (C) any claims by Coastal relating to Coastal installing wire conduit above slab foundation, and (D) any claim that Stellar J did not timely complete its obligations under the Subcontract and Purchase Contract, except for withholding $82,277.00 as a back charge; (3) any testimony by Mr. Castorina for the claims noted at (A) through (D) above; and (3) any

testimony by Mr. Castorina regarding Coastal's modified "total cost" claim. CP 1659-66. On January 4, 2010 the Trial Court entered an Order denying these Motions in Limine brought by Stellar J. CP 2027-29.

Coastal's Motions in Limine included (1) to exclude Stellar J's expert witness, Roy Rogers, from testifying at trial; (2) to exclude claims not pleaded in Stellar J's Complaint, which were disallowed by the Trial Court by denying Stellar J's Motion to Amend, including (A) the exclusion of Stellar J's claims based on the Subcontract against Coastal, and (B) the exclusion of evidence that the City of Chehalis, or the City's engineer, Brown & Caldwell, were liable for Coastal's damages. CP 1625-1628, 1641-43. On January 4, 2010, the Trial Court entered an Order granting Coastal's Motions in Limine precluding Stellar J from presenting these issues at trial. CP 2023-26.

The Subcontract between the parties contains an Oregon choice of law provision, which was raised by Coastal in its Complaint. CP 606. From the time when Coastal submitted its Complaint until the parties submitted trial briefs, all substantive and procedural issues were argued by the parties and decided by the Trial Court under Washington law. See e.g., CP 37-39, 73-75, 808-1105, 568-80, 1635-44, 1981-2003. When trial briefs were submitted, Stellar J submitted argument under the case of *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161

(2003), as a bar, in all or in part, to Coastal's claims. CP 1688-89. After receiving Stellar J's trial brief, and for the first time since submitting its Complaint, Coastal raised the Oregon choice of law in the parties' Subcontract as a defense in its trial brief. CP 2016-2022. On January 4, 2010 the Trial Court denied Stellar J's Motion to apply Washington substantive law. RP 1-13, 01/04/10.

On January 6, 2010, Stellar J moved to exclude Coastal's expert, Nick Castorina, from testifying regarding electrical contracting, general contracting, engineering accounting or financial accounting after Stellar J's voir dire of Mr. Castorina's credentials. RP 76-90, 01/06/10. The Trial Court denied the motion. *Id* at 90. On January 7, 2010, Stellar J moved for a directed verdict to dismiss Coastal's damages for failure of sufficient proof. CP 2049-53; RP 4-12, 01/07/10. On January 7, 2010, the Trial Court denied Stellar J's motion for directed verdict. RP 12, 01/07/10. On January 7, 2010, Stellar J moved to disqualify Mr. Castorina, regarding his testimony in support of Coastal's total cost claim. CP 2049-53; RP 4-12, 01/07/10. The Trial Court denied Stellar J's motion to strike Mr. Castorina's testimony in this respect. RP 12, 01/07/10. On January 13, 2010, Stellar renewed the motion for directed verdict to dismiss Coastal's total cost claim. RP 39-42, 01/13/2010 pm. On January 13, 2010, the Trial Court again denied the motion for directed verdict. *Id* at 42.

On January 13, 2010, Coastal brought a motion for directed verdict to dismiss the fraud claims against Hewitt and Thomas under Washington's economic loss rule. RP 42-44, 01/13/10 pm. While the Trial Court found that the evidence factually supported the elements of fraud, the Trial Court dismissed Stellar J's fraud claims against Hewitt and Thomas under the economic loss rule. *Id.*

On January 15, 2010, the jury awarded Coastal damages of $322,056.12. App. A. Coastal, post-trial, moved for judgment against Travelers regarding the jury's verdict. CP 2319-2321. As Coastal's damages were based on a modified total cost claim, Stellar J argued that the judgment should not attach to Travelers. CP 2374-77. On February 12, 2010, the Court granted Coastal's motion for judgment against Travelers. RP 24-27, 02/12/10.

Post trial, as part of its judgment, Coastal moved for prejudgment interest against Stellar J and Travelers. CP 2108-10. Stellar J argued that as Coastal's damages were based on a modified total cost claim, such damages were unliquidated and thus did not allow a claim for prejudgment interest. CP 2357-59. On February 12, 2010, the Court granted Coastal's motion for prejudgment interest, and the Trial Court calculated damages awarded under the Subcontract at the Oregon statutory rate of nine percent (9%). RP 17-24, 02/12/10.

Coastal presented the Findings of Fact and Conclusions of Law in Support of Award of Attorney Fees and Costs, Judgment and Judgment Summary. CP 2414-21. Coastal requested post-judgment interest for the entire judgment, including the Subcontract, under Washington's statutory rate of twelve percent (12%). Stellar J argued that as the Trial Court determined Oregon substantive law applied, and as the Trial Court already awarded prejudgment interest at the Oregon statutory rate of nine percent (9%), any award of post-judgment interest should be at the Oregon statutory rate of nine percent (9%). CP 2358-59; RP 5-6, 02/26/10. On February 26, 2010, the Court granted Coastal's motion for post-judgment interest for the entire judgment at the Washington statutory rate of twelve percent (12%) and entered the Findings of Fact and Conclusions of Law in Support of Award of Attorney Fees and Costs, Judgment and Judgment Summary. CP 2414-21; RP 5-6, 02/26/10.

On February 26, 2010, the judgment entered against Stellar J was $809,921.71, including the principal amount of $322,056.12, prejudgment at nine-percent (9%) for $99,214.50, post-judgment interest from January 29, 2010 through February 12, 2010 for $1,482.34, attorney fees of $260,983.05, costs of $126,185.70 and post-judgment interest at twelve percent (12%) from February 16, 2010 until paid. CP 2419-21. On March 8, 2010, Stellar J posted a supersedeas bond for $942,112.32 upon

application to the Trial Court and after the parties submitted argument regarding the amount of the bond. CP 2411-13, 2423-24. On March 9, 2010, Stellar J filed an endorsement to the bond which added Travelers as a principal under the bond. CP 2425-2428. On March 24, 2010, Stellar J's Notice of Appeal was filed. CP 2429-2476.

IV. ARGUMENT.

Stellar J submits the following argument in support of this appeal.

A. Standard of Review.

An Appellate Court reviews the denial of a motion for judgment as a matter of law de novo, applying the same standard as the Trial Court. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 322, 189 P.3d 178 (2008) (citation omitted). A party is not required to renew a motion for judgment as a matter of law post-trial to maintain de novo review. *Estate of Borden ex rel. Andersen v. State*, 122 Wn. App. 227, 240-41, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005). Issues of law are reviewed de novo on appeal. See *Ellis v. Barto*, 82 Wn. App. 454, 457, 918 P.2d 540 (1996), *review denied*, 130 Wn.2d 1026 (1997) (citation omitted).

Admission of evidence lies within the discretion of the Trial Court, which is reviewable under an abuse of discretion standard. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 76, 684 P.2d 692 (1984). A Trial Court

abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id* at 77 (citation omitted). If the Trial Court makes an erroneous evidentiary ruling, the issue becomes whether the error was prejudicial because prejudicial error is grounds for reversal. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (citation omitted). Error is prejudicial if it affects, or presumptively affects, the outcome of the trial. *Id.*

B. The Trial Court erred by denying Stellar J's CR 50 motion to dismiss Coastal's Total Cost Claim.

To calculate alleged damages suffered by Coastal, Mr. Castorina used a total cost basis approach (RP 90-144, 01/06/10), which is not favored in law and is generally upheld only when better proof is not available. *S.L. Rowland Const. Co. v. Beall Piple & Tank Corp.*, 14 Wn. App. 297, 303-04, 540 P.2d 912 (1975), *review denied*, 87 Wn.2d 1001 (1976) (citing *H. John Homan Co. v. United States*, 418 F.2d 522, 528, 189 Ct.Cl. 500 (1969); *Turnbull, Inc. v. United States*, 389 F.2d 1007, 1015, 180 Ct.Cl. 1010 (1967); *Oliver-Finnie Co. v. United States*, 279 F.2d 498, 505, 150 Ct.Cl. 189 (1960); *F. H. McGraw & Co. v. United States*, 130 F.Supp. 394, 399, 131 Ct.Cl. 501 (1955)).

The total cost approach calculates damages by taking the total costs incurred by a contractor less the amounts it has already been paid. See *Seattle Western Industries, Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 6, 750 P.2d 245 (1988). "The criticisms leveled against the approach include that it assumes the contractor's costs are reasonable and that the contractor was not responsible for any increases in such costs." *S.L. Rowland Const Co.*, 14 Wn. App. at 304 (citing *F. H. McGraw & Co.*, 130 F.Supp. at 400). Under a "modified" total cost claim, the claiming party deducts the cost that it or its subcontractors caused from the total cost. *Seattle Western Industries, Inc.*, 110 Wn.2d at 6. Mr. Castorina's testimony was the only basis to support Coastal's total cost claim. Mr. Castorina did not testify to the reasonableness of Coastal's total cost claim, nor was he qualified to offer such testimony. RP 60-166, 01/06/10.

The total cost basis for establishing damages can be used only in building and construction contract cases when substantial changes occur which are not covered by the contract or within the contemplation of the parties and which are not such that the contractor should have anticipated or discovered them. *S.L. Rowland Const Co.*, 14 Wn. App. at 304. In such cases, the contractor is permitted to recover damages in quantum meruit for extra work and materials required and including a profit factor on such amount. *V. C. Edwards Contracting Co. v. Port of Tacoma*, 83 Wn.2d 7,

13, 514 P.2d 1381 (1973); *Bignold v. King County*, 65 Wn.2d 817, 826, 399 P.2d 611 (1965).

In order for a party to recover under a total cost claim, the claiming party must show that (1) a substantial change occurred that is not covered by the contract or within the contemplation of the parties and which are not such that the contractor should have anticipated or discovered; (2) the change or delay was sudden and unpredictable; (3) the change or delay made it impossible for the claiming party to either undertake the performance of other work or to cut back on home office personnel or facilities; (4) the claiming party is not responsible for any part for the change or delay; and (5) the claiming party is unable to continue performing the contract, even in a capacity that is not as efficient or as effective as the claiming party initially planned when the contract was executed. *S.L. Rowland Const Co.*, 14 Wn. App. at 304; *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. ¶ 2688 (ASBCA 1960); *Charles G. Williams Constr., Inc. v. White*, 271 F.3d 1055, 1058 (D.C.Cir. 2001) (quoting *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1377 (D.C.Cir. 1998); *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1376 (D.C.Cir. 1999); *W.G. Cornell Co. v. Ceramic Coating Co.*, 626 F.2d 990, 994 (D.C. Cir. 1980).

Mr. Castorina should not have been permitted to testify about Coastal's alleged damages under a total cost claim, modified or otherwise, because the evidence at trial, collectively from Mr. Castorina and Hewitt's testimony showed that (1) the change and/or delay complained of by Coastal was covered by the parties' contract, which Coastal did not follow (RP 74-74, 01/05/10), in light of the fact that Coastal followed the contract to request for payment for other changes on the Project (RP 75-76, 01/05/10), (2) there were no substantial changes to the contract, (3) provisions for receiving compensation for changes in work outside of what was contracted to be done were specifically set out in the contract documents with which Coastal failed to comply, (4) the alleged changes raised by Coastal as a basis for extra compensation were addressed by the contract documents through the use of change orders, which Coastal failed to submit, and (5) Coastal did not subtract the damages caused by Coastal or its subcontractors' delay from Coastal's total cost claim. RP 64-108, 01/04/10, RP 4-107, 01/05/10, RP 90-166, 01/06/10.

Additionally, as a total cost claim is a claim for quantum meruit, recovery under such a claim must be for the reasonable amount of services provided. *Young v. Young*, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008). Coastal did not provide sufficient evidence regarding the reasonableness of its total cost claim. RP 64-108, 01/04/10, RP 4-107, 01/05/10, RP 90-

166, 01/06/10. Accordingly, the Trial Court should have excluded Coastal's total cost claim, including any testimony by Mr. Castorina in this respect.

C. The Trial Court erred by denying Stellar J's CR 50 motion to dismiss Coastal's claims not supported by the evidence.

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the plaintiff. *N.W. Indepen. Forest Mfrs. v. Dep't. of Labor and Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). If any one element is not satisfied, then a breach of contract action is not recoverable. See *id.* A failure to prove damages warrants dismissal. *Jacobs Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754, 162 P.3d 1153 (2007); *Ketchum v. Albertson Bulb Gardens*, 142 Wash. 134, 139, 252 P. 523 (1927) (mere proof of contract breach, without more, does not warrant verdict, even for nominal damages).

A claim lacking in causation should be dismissed by directed verdict at trial. *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 501-502, 982 P.2d 1117 (1999). The issue of whether a defendant's conduct is a "proximate cause" of a plaintiff's injury asks not only to determine whether there is an actual causal connection between conduct and injury, but also to determine whether causally connected

conduct gives rise to liability in a particular case. See *Dewey v. A. F. Klaveness & Co., A/S*, 233 Or. 515, 523-24, 379 P.3d 560 (1963). In deciding such matters, the Court may be called upon to determine whether there is sufficient evidence of a factual cause to submit the matter to the jury. *Id* at 524.

Coastal failed to demonstrate proximate causation for its alleged damages. RP 161-165, 01/06/10. The delays for the project were caused by Coastal's failure to timely deliver. CP 732, 743-46, 952, Ex., 407, RP 18, 78-79, 01/05/10. Further, even if Coastal sufficiently presented evidence of Stellar J's alleged breach, Coastal failed to present sufficient evidence to show that Coastal's alleged damages were causally related to Stellar J's alleged breach. RP 144-165, 01/06/10. Next, Coastal did not prove that its damages were reasonable. RP 60-166, 01/06/10.

Stellar J respectfully requests that the Court reverse the decision of the Trial Court and direct verdict dismissing Coastal's total cost claim and order a new trial limiting Coastal's alleged damages to the amounts withheld by Stellar J.

D. The Trial Court erred by granting Hewitt and Thomas' CR 50 Motion to Dismiss Stellar J's fraud claims against them.

Under the terms of the Purchase Order, Coastal agreed to provide a signed Statement of Payment and Lien Release with each request for

payment under which Hewitt and Thomas verified in writing to Stellar J. Under the terms of the Purchase Order and the "Statement of Payment and Lien Release", Coastal agreed to indemnify and hold harmless Stellar J from all liability, cost and expense and/or loss or damages growing out of, incidental directly or indirectly, to the performance of Coastal under the Purchase Contract. Ex. 6, p. 5, RP 47-51, 01/05/10.

On June 6, 2006, Tacoma Electric filed a Notice to Public Body of Claim against the bond and retained percentage pursuant to RCW 39.08 et. seq. and 60.28.010 for the sum of $84,199.91. CP 942, Ex. 406. Despite demand by Stellar J, Coastal failed or refused to protect and indemnify Stellar J from the Claim by Tacoma Electric, and/or failed and refused to remove the Claim from the bond and retainage for the Project. *Id*; Exs. 310, 313, 328, 331, 336, 337, 349, 351, 363, 364, 370, 371, 375, 380, 381, 384, 385, 386, 391, 392, RP 81-103, 01/05/10.

Stellar J relied on Hewitt and Thomas' representations that Tacoma Electric would be paid upon receipt of payment from Stellar J. RP 21-24, 01/13/10 pm. While the Trial Court concluded that the facts and circumstances supported Stellar J's third-party complaint against Hewitt and Thomas for fraud, the Trial Court, after considering Hewitt and Thomas' motion for directed verdict, ruled that the Division I, Court of Appeals case of *Carlile v. Harbour Homes, Inc.*, 155 Wn. App. 339, 229

P.3d 906 (2008), was dispositive in favor of dismissal of the fraud claims against Hewitt and Thomas under the economic loss rule. RP 56-57, 01/13/10 pm.

Two Division II, Court of Appeals cases have been decided since *Carlile* was issued. In *Poulsbro Group, LLC v. Talon Development, LLC*, 155 Wn. App. 339, 346-47, 229 P.3d 906 (2010), this Court determined that the economic loss rule prohibits claims for intentional misrepresentation if contract remedies exist. Subsequent to *Poulsbro Group, LLC*, this Court decided *Borish v. Russell*, 155 Wn. App. 892, 230 P.3d 646 (2010). The line of recent Appellate Division cases interpreting the economic loss rule emanate from the Supreme Court of Washington's decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).

The purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic. *Borish*, 155 Wn. App. at 900 (citing *Alejandre*, 159 Wn.2d at 683-84). In order for the economic loss rule to apply, there must be a contract between the parties. *Borish*, 155 Wn. App. at 901.

In this matter, the economic loss rule did not bar Stellar J's third-party complaint against Hewitt and Thomas. First, there was not a direct contractual relationship between Stellar J and Hewitt and Thomas. Second, Stellar J's damages for Hewitt and Thomas' fraud arose from

their representations that Tacoma Electric was paid. Third, there was not a contractual relationship between Stellar J and Tacoma Electric. As a result of Hewitt and Thomas' false representations that Tacoma Electric was paid, Stellar J was brought into suit by Tacoma Electric. Stellar J submits that the "ABC" rule of equitable indemnity provides an exception to the economic loss rule.

Under the "ABC" rule, when the natural and proximate consequences of a wrongful act of A involve B in litigation with C, B may as a general rule recover damages from A for reasonable expense incurred in the litigation, including attorney fees. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358-359, 110 P.3d 1145 (2005); *Dauphin v. Smith*, 42 Wn. App. 491, 494, 713 P.2d 116 (1986). The "ABC" rule of equitable indemnity sounds in tort, which creates an exception to the economic loss rule.

Lastly, the Supreme Court of Washington in *Alejandre*, expressly found that a claim for fraudulent concealment is not barred by the economic loss rule. *Alejandre*, 159 Wn.2d at 871 (citing *Atherton Condo. Apt.-Owners Ass'n Bd. of Directors v. Blume Dvlpmt. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990)). The *Alejandre* Court analyzed the plaintiffs' common law fraud claims under the facts of that case. *Alejandre*, 159 Wn.2d at 872. As the Supreme Court analyzed the facts of common law

fraud in the *Alejandre* case outside the scope of the economic loss rule, that review supports the conclusion that claims for fraud are not barred by the economic loss rule. *Id.*

Stellar J respectfully requests that the Court reverse the Trial Court's dismissal of Stellar J's third-party complaint against Hewitt and Thomas and order a new trial.

E. The Trial Court erred by Finding Travelers liable under Coastal's bond claim.

Coastal obtained a judgment for the jury's verdict against Travelers pursuant to RCW 39.08.030. Coastal's decision to assert its damages under a "modified" total cost basis bars its bond claim against Travelers. A surety's bond under RCW 39.08.030 is liable to an aggrieved contractor for labor and materials. However, a bond is not liable for an unliquidated claim for damages against the contractor. *Terry v. United States Fidelity & Guaranty Co.*, 196 Wash. 206, 212, 82 P.2d 532 (1938).

A "modified" total cost method consists of subtracting the bid or estimated cost of completion from the actual total cost for a project subtracted further by whatever additional costs the plaintiff contractor caused. *Seattle Western Industries, Inc. v. David A. Mowat, Co.*, 110 Wn.2d 1, 6, 750 P.2d 245 (1988). Damages are unliquidated if a

factfinder must exercise discretion or rely on opinion evidence to determine the amount of damages. *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397 (1997), *review denied*, 135 Wn.2d 1003 (1998) (citation omitted). A total cost claim cannot exist without expert opinion evidence because such a claim admits that verification of damages under the contract is impossible, which, in turn, requires juror discretion to accept the expert's opinion that calculation of damages under the contract is not possible. See *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 93-94, 615 P.2d 1332, *review denied*, 94 Wn.2d 1023 (1980).

In other words, under a "modified" total cost claim, a claimant is unable to claim labor or materials "furnished in the prosecution of the work" pursuant to RCW 39.08.030. Where "a defendant has challenged the reasonableness of the amount awarded for extra work arising outside of the contract, the award is unliquidated because reliance upon opinion and discretion [is] necessary in determining the reasonableness of the amounts expended." *Kiewet-Grice v. State*, 77 Wn. App. 867, 872, 895 P.2d 6, *review denied*, 127 Wn.2d 1018 (1995). Coastal submitted this exact position: "Coastal was awarded damages for additional time and materials actually provided to the project...". CP 2303. Yet, Coastal did

not provide sufficient evidence of the reasonableness of Coastal's total cost claim. CP 60-166, 01/06/10.

A surety's liability to a claimant against a bond is governed by the surety statute (RCW 39.08) and the surety agreement, not by the contract between a supplier and a primary contractor. *U.S. Filter Distribution Group, Inc. v. Katspan, Inc.*, 117 Wn. App. 744, 754, 72 P.3d 1103 (2003). Washington Courts have recognized several types of costs that do not properly constitute labor or materials furnished to a project, and are not allowed under RCW 39.08. *Beardmore Heavy Hauling & Crane Service v. Morin*, 71 Wn.2d 273, 275, 427 P.2d 975 (1967) (RCW 39.08.030 does not trigger a bond's liability for damages caused by a general contractor's delay; *Maryland Casualty Co. v. City of Seattle*, 11 Wn.2d 69, 72-73, 118 P.2d 416 (1941) (insurance premiums for liability and property damage policies are not recoverable under a public works bond); *Terry*, 196 Wash. at 211-12 (a bond is not liable for an unliquidated claim of lost profits) *Puget Sound Bridge and Dredging Co. v. Jahn & Bressi,* 148 Wash. 37, 47, 268 P. 169 (1928) (a subcontractor cannot recover costs from a bond in excess of the reasonable value of services performed and materials provided); *City Retail Lumber Co. v. Title Guaranty and Surety Co.*, 72 Wash. 300, 304-05, 130 P. 345 (1913) (a bond does not cover costs of capital equipment of the claimant not

consumed in the work); *Better Financial Solutions, Inc. v. Transtech Electric, Inc.*, 112 Wn. App. 697, 704, 51 P.3d 108, *as amended, review denied*, 149 Wn.2d 1010, 69 P.3d 874 (2002) (a subcontractor's loan or financing costs are not provided for by RCW 39.08.010). As these authorities demonstrate, a surety's liability under a bond issued pursuant to RCW 39.08 does not extend to general breach of contract damages. Rather, that liability is limited to the reasonable labor and material costs which the claimant satisfactorily proves were actually furnished for the project.

When "lienable" costs are included with "nonlienable" costs, the entire claim of lien is of no effect. *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 650, 110 P. 541 (1910) (regarding a private mechanic's lien claim). If "nonlienable" items are intentionally inserted into a claim, the "lienable" items should not be segregated. See *Holly-Mason Hardware Co. v. National Surety Co.*, 107 Wash. 74, 76, 180 P.2d 901 (1919). By knowingly asserting a "modified" total cost claim for the entirety of Coastal's damages, based on a broad breach of contract measure of damages, Coastal submitted an unliquidated claim to the jury incapable of segregation, which, therefore, vitiates any claim against Travelers. RP 90-144, 144-165, 01/06/10. Accordingly, Travelers is not liable for the damages awarded by the jury. Stellar J respectfully requests that the Court

reverse the decision of the Trial Court and order Travelers to be removed as a liable party for the jury's award and subsequent judgment entered by the Trial Court if this matter is not remanded for a new trial.

F. The Trial Court erred by Awarding Coastal Prejudgment Interest.

Prejudgment interest is available if a claim is liquidated, meaning that "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397 (1997), *review denied*, 135 Wn.2d 1003 (1998) (citation omitted) (emphasis added). "If the factfinder must exercise discretion to determine the amount of damages, the claim is unliquidated." *Id* at 153-54. By these very definitions, Coastal's claim is not liquidated. Coastal's "modified" total cost claim was submitted to the jury solely based upon the opinion by Mr. Castorina. As Coastal relied on Mr. Castorina's opinion, the jury, in turn, exercised its discretion to accept Mr. Castorina's opinion of Coastal's "modified" total cost claim. Coastal's "modified" total cost claim required the jury's discretion to accept Mr. Castorina's opinion and to calculate the damages award. Thus, the jury's award was unliquidated. *Dautel, supra.*

Further, Division II, Court of Appeal's decision in *Kiewet-Grice v. State*, 77 Wn. App. 867, 873, 895 P.2d 6, *review denied*, 127 Wn.2d 1018 (1995), rejected a claim similar to Coastal's claim for prejudgment interest. In *Kiewet-Grice*, the Trial Court awarded prejudgment interest for a delay claim in a construction contract. The *Kiewet-Grice* Court first stated the law that:

> An unliquidated claim is one where the exact amount of the sum to be allowed cannot definitely be fixed from the facts proved, disputed or undisputed, but must in the last analysis depend on the opinion or discretion of the judge or jury as to whether a larger or smaller amount should be allowed.
>
> ...
>
> A defendant should not be required to pay prejudgment interest in cases where he is unable to ascertain the amount owed.

Id at 872-73. The Court then held that where "a defendant has challenged the reasonableness of the amount awarded for extra work arising outside of the contract, the award is unliquidated because reliance upon opinion and discretion [is] necessary in determining the reasonableness of the amounts expended." *Id* at 872. The *Kiewet-Grice* Court reversed the Trial Court's award of prejudgment interest. *Id* at 874.

A total cost claim, by its very nature, cannot exist without expert opinion evidence because such a claim admits that verification of damages under the contract is impossible, which, in turn, requires juror discretion to

accept the expert's opinion for damages in quantum meruit. See *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 93-94, 615 P.2d 1332, *review denied*, 94 Wn.2d 1023 (1980). A total cost claim, whether "modified" or not eliminates any potential to recover prejudgment interest.

Accordingly, Stellar J respectfully requests that the Court reverse the decision of the Trial Court and reverse the award of prejudgment interest if this matter is not remanded for a new trial.

G. The Trial Court erred by applying an Oregon Choice of Substantive Law because the parties waived application of Oregon Law for Washington Law.

The Purchase Order between Coastal and Stellar J is not subject to the Oregon choice of law provision in the parties' Subcontract. Ex. 5, p. 3. Coastal waived any right to rely on the Oregon choice of law in the parties' Subcontract. The parties abandoned reliance on Oregon law as both parties litigated this matter under Washington law for the period of several years after initial pleading until the eve of trial, and after trial for certain issues, including attorney fees and Coastal's claim against Travelers. See e.g., CP 613-625, 626-48, 649-653, 961-980, 1106-1110, 1407-1433, 1641-1644, 1659-1668, 1971-80, 1994-2003, 2054-60, 2299-2306, 2319-2321. Further, as the State of Washington has a significant interest in this litigation as the dispute regards a Washington public works project, the Oregon choice of law provision should have been voided.

"A party to a contract may waive a contract provision, which is meant for its benefit, and may imply waiver through its conduct." *Mike M. Johnson v. County of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003) (citation omitted). Waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive. *Id.* CR 44.1(b) provides that the law of a state of the United States shall be determined in accordance with RCW 5.24. *Byrne v. Cooper*, 11 Wn. App. 549, 523 P.2d 1216, *review denied*, 84 Wn.2d 1013 (1974), interprets RCW 5.24. In that case, the plaintiff pleaded that the laws of England and the laws State of Washington were applicable. In discussing the sufficiency of that pleading, the *Byrne* Court held that "the pleading of foreign law should be in substance the foreign law relied upon and inform the opposing party of the basis in foreign law for the claim or defense raised." *Byrne*, 11 Wn. App. at 550-51. "[D]ecisional foreign law should be concisely recapitulated." *Id* at 551.

Here, other than pleading the Oregon choice of law in the parties' contract in its Answer to Stellar J's counterclaims up until it submitted its trial brief (CP 1984), Coastal did not cite or rely on any authority asserting that an Oregon choice of law should be used to interpret the parties' Subcontract, specifically to refute notice provisions in the Subcontract. To the contrary, Coastal cited and relied on Washington law in defending

against Stellar J's Motion for Partial Summary Judgment and Coastal relied on Washington law in support of Coastal's claims for damages identified in Coastal's Trial Brief. Coastal only sought to apply Oregon law to rebut one defense raised by Stellar J in Stellar J's trial brief based on contractual notice provisions in the parties' contract. In essence, Coastal was allowed to cherry pick application of one State's law which provided a better defense and then was allowed to apply another State's law for the remainder of Coastal's claims under the same contract.

A party's use of Washington law is a clear acquiescence by application, and an opposing party's lack of opposition to citations during summary judgment may be construed as the same. See *Prime Start Ltd. v. Maher Forest Products Ltd.*, 442 F.Supp.2d 1113, 1119 (W.D.Wa 2006) (interpreting Washington law). Parties acquiesce in the application of Washington law if both sides have either relied on or tacitly approved of reliance on Washington law. *Id.*

Earlier in this matter, Stellar J moved for partial summary judgment requesting that the Court enter an Order finding that Coastal breached the parties' contract. In support of that Motion, Stellar J argued Washington law supported Stellar J's argument. CP 961-80, 1083-1095. In response, Coastal argued (CP 990) that "Stellar J entered into contracts [thus including both the Purchase Order and Subcontract] where it agreed

to provide payment to Coastal in exchange for providing a portion of the electrical materials for the project and performing the electrical installation." CP 981-96. Before and after stating this alleged fact, Coastal only argued Washington law to defend against the summary judgment motion. *Id.* Likewise, in Coastal's Trial brief, other than one defense, Coastal argued that Washington law provided the basis for relief to Coastal's claims arising from the Subcontract. CP 1981-1993. Coastal waived any reliance on Oregon law.

Additionally, "Washington courts will not implement a choice of law provision if it conflicts with a fundamental state policy or if the state has a materially greater interest than the other jurisdiction in the resolution of this matter." *Ito International Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 288, 921 P.2d 566 (1996) (citation omitted). In determining choice of law, Washington applies the most significant relationship test under which each State's interests must be analyzed in relation to the specific issue. *Id* at 289. Section 187 of the Restatement (Second) Conflict of Law (1971) provides the rule for conflicts of law in which the parties have made an express contractual choice of law. *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 694, 167 P.3d 1112 (2007) (citing *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 685, 586 P.2d 830 (1978)).

The Court must review three issues: (1) does the policy of enforcing the contractual notice provisions as stated by the Supreme Court of Washington in *Mike M. Johnson v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003), conflict with an Oregon choice of law; (2) does the State of Washington have a materially greater interest in determining this issue than Oregon; and (3) if there had been no choice of law by the parties, would Washington law, under section 188 of the Restatement, be the applicable law. See *O'Brien*, 90 Wn.2d at 685-86. Under section 188 of the Restatement, Washington courts employ the most significant factor test, including: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile of the parties. *Canron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 492-93, 918 P.2d 937 (1996), *review denied*, 131 Wn.2d 1002 (1997).

In *O'Brien*, the Supreme Court of Washington invalidated a New York choice of law regarding a usury issue because the State of Washington (1) had an interest regarding how usury rates apply to its citizens, (2) had a greater interest of usury rates charged to Washington citizens than the State of New York, and (3) had the most significant contacts. *O'Brien*, 90 Wn.2d at 686. Like, *O'Brien*, here, all three factors are satisfied in favor of Washington law: (1) Coastal acknowledged at a

pretrial hearing that there is a "difference" between Washington's policy of enforcement of contractual notice provisions compared to Oregon (RP 94, 12/30/09), (2) as the issue regards a Washington public works project, Washington has a greater interest in this matter than Oregon, and (3) the parties' contacts under Section 188 of the Restatement are Washington contacts. Exs. 5, 6, 300.

Lastly, in the very same paragraph containing the Oregon choice of law provision in the Subcontract, the parties also agreed to a venue selection clause for Clark County, Washington. Ex. 5, p. 6, ¶ 23. Stellar J filed suit as plaintiff against Coastal in Clark County based upon this clause and moved to dismiss the Lewis County lawsuit for improper venue. CP 613-25, 649-53. Coastal resisted the venue selection clause (under Washington law), which the Lewis County Superior Court voided thereby creating venue in Lewis County. CP 626-48, 654-55.

On the same token, as Coastal was allowed to disavow a contractual provision which it accepted, Stellar J should not have been denied the same recourse. See RP 16-17, 01/04/10. As the Trial Court refused to apply Washington law, Stellar J was denied the ability to submit a jury instruction based on *Mike M. Johnson*, *supra*, to have the jury determine whether Coastal's claims in all or in part were barred by Coastal's failure to follow notice provisions in the parties' contract.

Stellar J respectfully requests that the Court reverse the decision of the Trial Court and order a new trial.

H. The Trial Court erred by awarding Coastal Post-Judgment interest at Twelve Percent.

Application of conflicting interest rate is a substantive issue of law. See *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 428-29, 24 P.3d 447 (2001). Parties are able to contract to a specific interest rate. *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 146-47, 173 P.3d 977 (2007). In denying Stellar J's request to apply Washington substantive law, the Court ruled that Oregon substantive law applied. RP 10-21, 01/04/10. Despite this ruling and the fact that the Trial Court calculated prejudgment interest at Oregon's statutory rate of nine percent (9%), the Trial Court erred by awarding post-judgment interest under Washington's statutory rate of twelve percent (12%) interest. Accordingly, Stellar J respectfully requests that the Court reverse the decision of the Trial Court and apply Oregon's statutory rate of nine percent (9%) interest if the Court determines Oregon substantive law applies and does not remand this matter for a new trial.

I. The Trial Court erred by denying Stellar J's Motion for Summary Judgment because the Perfect Tender Rule under the UCC barred Coastal's claim in all or in part.

Coastal alleged that the Purchase Order and Subcontract are different documents subject to different laws. See e.g., CP 605-06, 1983-85, RP 45-46, 51, 01/05/10. Coastal argued that the Purchase Order regarded Coastal's supply of goods for the Project, interpreted under Washington law; Coastal argued that the Subcontract regarded Coastal's supply of services for the Project, interpreted under Oregon law. *Id.* If Coastal is correct, then the Trial Court erred by denying Stellar J's Motion for Summary Judgment.

An Appellate Court reviews a Trial Court's decision on summary judgment de novo. *Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wn.2d 247, 252, 143 P.3d 590 (2006). Ordinarily, an Appellate Court does not review an order denying summary judgment after trial on the merits; however, an Appellate Court will review such an order de novo if the issue turns solely on a substantive issue of law. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 803-04, 65 P.3d 16 (2003); *University Village Ltd. Partners v. King County*, 106 Wn. App. 321, 324, 23 P.3d 1090, *review denied*, 145 Wn.2d 1002 (2001).

The Purchase Order required delivery of the MCCs to the Project no later than August 15, 2005. Ex. 6, p. 1. Coastal was at all times aware

of its contractual obligation to deliver the MCCs to the Project site by August 15, 2005. CP 742. The Purchase Order also required Coastal to participate in a submittal process where it was to submit designs, dimensions and information regarding the product and service it was providing to the Project Engineer, hired by the City of Chehalis, for review and approval. Ex. 6, p. 1. Coastal subcontracted with Tacoma Electric to supply electrical equipment, including the MCCs, to the Project site. CP 731.

The MCCs were not delivered to the Project by the contractually agreed on date of August 15, 2005, but were delivered on January 19, 2006, over five months late. CP 732. The operation and maintenance manuals for the MCCS were not delivered to the Project site until after March 14, 2006. CP 756-57, 952. Stellar J provided Coastal timely notice of breach and that Stellar J would seek damages against Coastal for the breach. CP 743-46, 952-55. From the time the Purchase Order was executed until the time the MCC's were delivered, Tacoma Electric and Siemens did not timely comply or provide the necessary information to allow the Project Enginner to approve the Submittal. CP 747, Ex. 407.

In a letter dated July 7, 2006 to Tacoma Electric, three months after the MCCs had been delivered, Hewitt admitted that Coastal's initial submittal packet did not comply with the submittal process. Ex. 407.

Next, Coastal failed to appeal the Manager's decisions as authorized under the Main Contract regarding the submittal process. RP 74-75, 01/05/06. As set forth above, Coastal admitted it was bound by the terms of the Main Contract to process changes to specifications of the MCC's. Hewitt admitted that the delivery of the MCC's to Stellar J was untimely. Ex. 407. At the time Coastal entered into the Purchase Order, Coastal knew that it could not provide delivery of the MCCs by August 15, 2005, even though Coastal agreed to do so. CP 861-62. Coastal breached the parties' contract by delivering goods between 157 and 211 days past the contractually promised delivery date.

A contract for the sale of goods is governed by the Uniform Commercial Code, Article 2. *Alaska Pacific Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn. App. 354, 359, 933 P.2d 417, *review denied*, 133 Wn.2d 1006 (1997). "Goods" are defined in RCW 62A.2-105(1) as:

> "[A]ll things (including specifically manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid investment securities (Article 8) and things in action. . ."

The MCCs are "goods" as defined in RCW 62A.2-105(1).

Under the UCC, if the goods or the **tender of delivery** fail in any respect, the buyer may reject the whole. *Alaska Pacific Trading Co.*, 85 Wn. App. at 359 (citing RCW 62A.2-601(a)) (emphasis added). This

includes failure on the part of the seller to deliver the goods by the contractually agreed delivery date. *Id.* Failure by the seller to timely tender delivery allows the buyer to seek remedies for damages. RCW 62A.2-713, RCW 62A.2-714.

In this matter, it is undisputed that Coastal agreed to a delivery date of August 15, 2005. It is undisputed that Coastal did not deliver the MCCs until January 19, 2006 and the operation and maintenance manuals for the MCCs until March 14, 2006. The Trial Court erred by not granting Stellar J's Motion for Partial Summary Judgment.

J. The Trial Court Erred by Denying Stellar J's Motion for Leave to Amend the Answer, Affirmative Defenses and Counterclaims.

CR 15(a) provides that leave of the Court to amend a pleading "shall be freely given when justice so requires." The word "shall" "imposes a mandatory duty." *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n,* 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). Amendments to pleadings shall be liberally allowed. *Adams v. Allstate Ins. Co.*, 58 Wn.2d 659, 672, 364 P.2d 804 (1961) (citation omitted); *J. D. O'Malley & Co. v. Lewis*, 176 Wash. 194, 198, 28 P.2d 283 (1934) (emphasis added). See also *Quackenbush v. State*, 72 Wn.2d 670, 672, 434 P 2d 736 (1967). A party is entitled to amend a pleading "unless it

appears to a certainty that plaintiff would not be entitled to any relief under any state of facts." *Adams*, 58 Wn.2d at 672.

The party opposing the amendment has the burden to show prejudice resulting from the amendment. *Caruso v. Local Union No. 690, International Brotherhood of Teamsters*, 100 Wn.2d 343, 350, 670 P 2d 240 (1983). To oppose a motion to amend, the adverse party must demonstrate "actual prejudice" that would result from the amendment. *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988). "Conclusory allegations" about difficulties in preparing for trial are insufficient. *Id.*

> If the underlying facts or circumstances relied upon by a plaintiff [party] may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits.

Walla, 50 Wn. App. at 883 (quoting *Tagliani v. Colwell*, 10 Wn. App. 227, 233, 517 P 2d 207 (1973)). If a party can meet the new issue without undue prejudice or surprise, the amendment should be allowed. *Id.* *Quackenbush*, 72 Wn.2d at 672 (where amendment to a pleading on the day of trial was upheld).

The Trial Court erred by denying Stellar J's Motion to Amend. RP 4-27, 12/04/09. Sufficient discovery was completed prior to trial notifying Coastal of the entirety of Stellar J's claims. CP 1814-45 (excerpts from the

deposition of Stellar J's CR 30(b)(6) representative, Jeff Walker), CP 1846-1868. Stellar J's Motion to Amend on one hand would have eliminated any prejudice to Coastal at trial while serving the liberal rule of amendment on the other. Coastal was not unduly prejudiced or surprised because the amendment to Stellar J's Complaint regarded facts that were within the parties' knowledge well before Stellar J moved to amend. The Trial Court erred by denying Stellar J's Motion to Amend.

1. The Trial Court erred by denying Stellar J's Motion to Amend to allege claims against Coastal based on the parties' Subcontract.

The parties' contract incorporates the terms of the Master Contract between Stellar J and the City. Incorporation by reference allows parties to incorporate contractual terms by reference to a separate agreement to which they are not parties, including separate documents which are unsigned. *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.,* 102 Wn. App. 488, 494, 7 P.3d 861 (2000), *review denied*, 143 Wn.2d 1003 (2001) (citation omitted).

The Purchase Order and Subcontract refer to each other and the Master contract. See e.g., Ex 301, Attachment A, p. 8., last ¶ re: MCC submittals [i.e., equipment under the Purchase Order], p. 9, cell nos. 5 and 10 ("deduct for materials ordered under separate purchase order #561-004") and handwritten entries at bottom of page identifying "main

contract", Ex. 302, p. 1, cell no. 1 (Electrical Materials deducted from Coastal Construction subcontract Items 5 and 10"), and bullet points on the same page re: MCC [equipment] submittals and delivery. The three documents are interrelated as to the scope of work and the method and means of how the work was to be completed.

Stellar J's allegations that Coastal breached the Purchase Order factually placed Coastal on notice that claims arose out of all documents comprising the contractual agreement. CP 679-711. The contract documents between Coastal and Stellar J are the Purchase Order, Subcontract and Master Contract. Stellar J should not have been precluded from amending its pleading to allege a counterclaim under the parties' contract because the same documents formed the basis of Coastal's Complaint against Stellar J and are the same contractual documents under which Coastal sought relief. CP 604-12. Moreover, Stellar J argued Coastal's liability under the Subcontract at summary judgment, and Coastal responded to the merits of that argument. CP 1764-80, 1781-96, RP 50-58, 12/29/09. Accordingly, the Trial Court erred by denying Stellar J's Motion to Amend.

2. The Trial Court erred by denying Stellar J's defense to assert fault against Chehalis.

Each party is entitled to have his theory of the case presented to the

jury if there is evidence in the record to support it. *Heinz v. Blagen Timber Co.*, 71 Wn.2d 728, 732, 431 P.2d 173 (1967) (citations omitted). Under the "empty chair" doctrine, "it has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, ... he fails to do so, – the jury may draw an inference that it would be unfavorable to him." *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quotation omitted); see also *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 882, 30 P.3d 8 (2001) (citing RCW 4.22.070).

During discovery, Stellar J disclosed evidence demonstrating that Coastal's claims for additional compensation should have been submitted to the City or the City's engineer, Brown and Caldwell, particularly where Brown and Caldwell's rejection of Coastal's submittals caused the damages Coastal claims arose from this process. CP 1815-68, Exs. 396, 397, 373, 402. At trial, Coastal submitted evidence arguing that Brown and Caldwell was responsible for the delay in the submittal process. Exs. 39, 43, 51, 60, RP 159, 01/06/10. Stellar J denied liability for this process. CP 1815-68, Exs. 396, 397, 373, 402. Stellar J also notified Coastal that Coastal should have claimed relief through the claim process outlined in the Main Contract with the City. Ex. 402. The trier of fact was entitled to

consider whether the City was responsible for any damages alleged by Coastal. As such evidence was probative to Coastal's alleged damages and Stellar J's defense to those claims, the Trial Court erred by denying Stellar J's Motion to Amend.

3. The Trial Court erred by denying Stellar J's Motion to Amend to Clarify Stellar J's Affirmative Defenses.

Paragraph 42 in Stellar J's Answer containing Stellar J's First Affirmative Defense states that Coastal failed to follow all required contractual and statutory requirements to maintain its claims asserted against Stellar J. CP 670, 682. Washington is a notice pleading state. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). The civil rules then only require a short, plain statement showing that the claimant is entitled to relief. *Id* (citing CR 8(a)). Stellar J's First Affirmative Defense was pleaded sufficiently under Washington's civil rules to provide notice of Stellar J's defenses to all of Coastal's claims. Under any circumstance, the Trial Court erred to Stellar J's prejudice by denying Stellar J's motion to amend to clarify this affirmative defense and by precluding Stellar J from pursuing certain defenses at trial. Accordingly, the Trial Court's decision in this respect should be reversed.

K. The Trial Court Erred by Granting Coastal's Motions in Limine

A Trial Court has discretion to order sanctions once a discovery order is violated. *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). The exclusion of evidence is a harsh sanction. *Id* at 494-96. When the Trial Court chooses one of the harsher sanctions under CR 37(b), it must be apparent from the record that the Trial Court explicitly considered whether a less harsh sanction would have corrected the violation and whether the Trial Court found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. *Burnett*, 131 Wn.2d at 494.

It is an abuse of discretion to exclude testimony as a sanction for noncompliance with a discovery order absent any showing of intentional, willful violation of a court order or other unconscionable conduct. *Id.* Any case prior to *Burnett* suggesting that a Court has unfettered discretion to exclude witness testimony for violation of a scheduling order has been abrogated by *Burnett*. *Deutscher v. Gabel*, 149 Wn. App. 119, 142, 202 P.2d 355 (2009) (Dwyer, J., dissenting). Lastly, a late attempt to call a testifying expert witness does not merit the sanction of exclusion if counsel timely designates the witness, if counsel did not intentionally

violate a discovery rule or order, and if opposing counsel's scheduling problems contributed to the difficulty in deposing the witness. *Fahnlander v. Fern*, 81 Wn. App. 206, 211, 913 P.2d 426, *review denied*, 130 Wn.2d 1002 (1996).

1. The Trial Court erred by excluding Stellar J's claims against Coastal under the Purchase Order.

Stellar J's pleadings complied with Civil Rule 8. Stellar J properly set forth a short and plain statement showing that it was entitled to relief against Coastal, James Hewitt, and Tarina Thomas as a result of Coastal's breach of the Purchase Order. CP 679-711. In addition, Stellar J properly denied the allegations set forth by Coastal and set forth the appropriate affirmative defenses. *Id.* Terms of the accompanying Subcontract were incorporated by reference into the Purchase Order. The Purchase Order was subject to terms of the Main Contract between the City and Stellar J, which is set forth in both the Subcontract and the Purchase Order. Ex. 301, Attachment A, p. 8, last ¶, p. 9, cell nos. 5 and 10, Ex 302, p. 1, cell no. 1, and bullet points on the same page re: MCC submittals and delivery.

The contents of Stellar J's counterclaims adequately and properly alleged that Coastal was in breach of its contractual obligations to Stellar J that were undertaken by Coastal during this Project. Furthermore, Stellar J

properly prayed for damages against Coastal as a result of Coastal's breach of its obligations to Stellar J.

Stellar J's counterclaims against Coastal identify facts alleging that the parties entered into a contractual arrangement and that Coastal breached its obligations under the terms of the Contract. Stellar J fully and adequately complied with pleading its breach of contract cause of action against Coastal. See *Lightner v. Balow*, 59 Wn.2d 856, 370 P.2d 982 (1962). Stellar J's pleading asserted counterclaims against Coastal and prayed for damages arising from Coastal's breach.

Stellar J's claims against Coastal were properly pleaded and Coastal was fairly notified of the claims made against Coastal by Stellar J through (a) the discovery process, including through any responses to Coastal's Interrogatories and Requests for Production; and (b) through the Deposition of Jeff Walker, Stellar J's CR 30(b)(6) representative. CP 1813-68.

In addition, by virtue of Stellar J's Motion for Summary Judgment, Coastal waived any objection to Stellar J's damages claimed under the Subcontract, Purchase Contract, or Main Contract (between Stellar J and the City of Chehalis). CP 1764-98. "Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence." *Wagner Dev., Inc. v. Fidelity and Deposit Co of Md.*, 95 Wn. App. 896, 907, 977

P.2d 639, *review denied*, 139 Wn.2d 1005 (1999). "A party may object to an affidavit filed in support of a motion for summary judgment if it sets forth facts that would not be admissible in evidence." *Bonneville v. Pierce County*, 148 Wn. App. 500, 508-09, 202 P.3d 309, *review denied*, 166 Wn.2d 1020 (2009) (citation omitted). "If a party fails to object or bring a motion to strike deficiencies in affidavits or other documents in support of a motion for summary judgment, the party waives any defects." *Id.* A waiver at summary judgment is waiver at trial. See *Bentzen v. Demmons*, 68 Wn. App. 339, 345, n. 3, 842 P.2d 1015 (1993).

At summary judgment, Stellar J submitted the contract documents into evidence. The Court found that an issue of fact existed which, by rule, submits the matter to the trier of fact. Coastal did not object to Stellar J submitting these documents or Stellar J's breach of contract claim on these documents at summary judgment. Accordingly, Coastal waived any objection to these documents or Stellar J's claim for damages under those documents.

In response to Stellar J's Motion for Summary Judgment, Coastal addressed the contractual arrangement it had with Stellar J in an effort to deny liability for its breach of contract. CR 1783-84. CR 15(b) provides that if issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had

been raised in the pleadings. When issues that are not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766, 733 P.2d 530 (1987) (citing CR 15(b)). In determining whether the parties impliedly tried an issue, an Appellate Court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue. *Federal Signal Corp. v. Safety Factors, Inc.,* 125 Wn.2d 413, 435-36, 886 P.2d 172 (1994).

In this matter, Coastal conveyed its implied consent to the issues and claims asserted by Stellar J, including claims for breach of contract under both the Purchase Order and the Subcontract, as a result of its failure to object in Coastal's response to Stellar J's Motion for Summary Judgment. Coastal was provided information on the nature of all contracts and the damages suffered by Stellar J as a result of Coastal's breach of contract. Lastly, the Trial Court allowed Coastal to present claims based upon plain statements in Coastal's Complaint, which was incongruent with the Trial Court's denial of similar relief requested by Stellar J. Compare

RP 46-58 with 68-74, 12/30/09. Stellar J respectfully request that the Court reverse the decision of the Trial Court and order a new trial.

2. The Trial Court erred by excluding Stellar J from asserting fault at trial for Coastal's alleged damages caused by the City.

Each party is entitled to have his theory of the case presented to the jury if there is evidence in the record to support it. *Heinz v. Blagen Timber Co.*, 71 Wn.2d 728, 732, 431 P.2d 173 (1967) (citations omitted). Under the "empty chair" doctrine, "it has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, ... he fails to do so, – the jury may draw an inference that it would be unfavorable to him." *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quotation omitted); see also *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 882, 30 P.3d 8 (2001) (citing RCW 4.22.070).

While Stellar J did not initially plead a cause of action against the City or its engineering agent, Brown and Caldwell, during the discovery process, Stellar J presented documentation demonstrating that Coastal's claims for any additional compensation should have been directed to the City or Brown and Caldwell. Exs. 396, 397, 373, 402. To the extent Coastal suffered any damage, Stellar J consistently denied liability and

continually stated that Coastal's claim for relief should follow the claim process outlined in the Master Contract with the City. *Id.* To the extent that the City was responsible for any damages alleged by Coastal, Stellar J should not have been prevented from presenting such evidence because it was probative and relevant to Stellar J's defense of Coastal's alleged damages.

3. The Trial Court erred by excluding Stellar J's expert witness, Roy Rogers, from testifying at trial.

Roy Rogers is an accounting expert who Stellar J intended to call to support its claims and to refute Coastal's claims. Coastal's Motion in Limine to exclude Mr. Rogers should have been denied because Stellar J did not violate the Trial Court's Pretrial Order. The Court's Pretrial Conference Report and Order required that Stellar J designate its expert witnesses by December 1, 2009, which is precisely what Stellar J accomplished. CP 1241-45. On December 1, 2009, Stellar J designated its expert witnesses pursuant to the Court's Pretrial Order. CP 1282-95. Once Coastal indicated its intent to move to strike Stellar J's expert witnesses, Stellar J sought clarification from the Court of the Pretrial Report. CP 1554-67.

The Trial Court accepted Coastal's argument that Stellar J did not timely designate expert opinions. Coastal's argument was flawed for

several reasons. The Court's Pretrial Order did not require a disclosure of expert opinions. CP 1243. Further, Stellar J was not able to complete the deposition and discovery of Mr. Castorina, until December 3, 2009, because of Coastal's scheduling. CP 1435-36, 1440-1444. Moreover, the substance of Stellar J's expert witness designation equaled the substance of the opinions disclosed by Coastal's expert. CP 1436, 1480-87, 1555-56, RP 31-32, 12/30/09. Coastal did not request a conference pursuant to CR 26(i) and Coastal did not complain about the substance of Stellar J's expert witness designation until approximately one week after Stellar J served its expert witness designations. CP 1555.

"A party must exercise reasonable diligence in pursuing a legal claim." See *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987). Moreover, a party should not be rewarded for delay, which he, in part, caused, especially when the deposition of a plaintiff's expert witness should precede the deposition of the defendant's expert witness. *Freeland v. Amigo*, 103 F.3d 1271, 1281 (6th Cir. 1997). Coastal complained about not being able to adequately depose Stellar J's expert. Stellar J disagrees. If Coastal was unable to depose Stellar J's expert witnesses, this inability resulted, in all or in part, from Coastal's refusal to utilize the time that was available to Coastal. Stellar J attempted to cooperate with Coastal to assist with Coastal's completion of discovery,

including scheduling Mr. Roger's deposition. Coastal rejected those overtures by Stellar J.

The Pretrial Conference Report and Order allowed the deposition process to take place until December 29, 2009, or three (3) business days before trial. CP 1243. Stellar J repeatedly attempted to schedule depositions of Stellar J's expert witnesses with Coastal. CP 1556-62. Initially, Coastal expressed willingness to schedule the depositions of Stellar J's expert witnesses. CP 1563-64. On December 9, 2009, Coastal's counsel indicated that once he was provided with Stellar J's expert witness availability, he would do his best "juggle things to schedule it." CP 1563. Coastal's counsel retracted this willingness. On December 15, 2009, the Court rescheduled the pretrial hearing from December 23, 2009 to December 30, 2009. On that same day, after the Court rescheduled the pretrial hearing, Stellar J again provided the available dates for Coastal to depose Mr. Rogers on December 16, December 21 through December 24, and December 28 through December 30, 2009. CP 1698.

Stellar J provided Coastal with eight (8) dates when Mr. Rogers was available for depositions. *Id.* However, Coastal refused to take depositions until after the Court heard Coastal's Motion in Limine at the pretrial hearing. CP 1697, 1701-03. Coastal cannot claim prejudice because Coastal, in fact, took the deposition of Stellar J's other testifying

expert witness, Jeff Busch, on December 30, 2009, immediately before the hearing on the parties' motions in limine. RP 30, 12/30/09. At that hearing, before argument, Coastal withdrew its motion in limine to exclude Jeff Busch from testifying. *Id.*

Coastal had ample opportunity and the ability to complete discovery of Mr. Rogers in a span of approximately three (3) weeks before the December 30, 2009 pretrial hearing. Coastal chose not to use this opportunity offered in good faith by Stellar J.

Stellar J cooperated with Coastal on other matters for Coastal's trial preparation. Coastal requested that Stellar J's counsel accept trial subpoenas for Stellar J personnel, including Brint Devilling and Tom Williams, which Coastal caused to be served on Stellar J's counsel, which Stellar J's counsel accepted. CP 1699. The Pretrial Conference Report and Order scheduled non-ER 904 documents to be served fifteen (15) days before hearing on December 21, 2009 as the next business day. *Id.* CP 1242. Coastal requested that the parties stipulate to overnight delivery of the non-ER 904 documents on Monday, December 21, 2009, for service on Tuesday, December 22, 2009, which Stellar J accepted. CP 1699. Stellar J cooperated with Coastal for Coastal's trial preparation. *Id.* In sum, Coastal was willing to stipulate to deadlines beyond the dates in the Pretrial Order when the same was convenient for Coastal. CP 1699-70.

L. The Trial Court erred by Denying Stellar J's Motion to Strike Mr. Castorina's testimony once he testified.

The party introducing a witness must show he is qualified to testify to the matters asserted. *Cowan v. Chicago, M. St. P. & P. P. R.*, 55 Wn.2d 615, 622, 349 P.2d 218 (1960). A Trial Court has the discretion to strike a witness' testimony after the witness has testified. *Id.* Mr. Castorina, in essence, is a witness whose alleged expertise and credentials primarily involve welding. Mr. Castorina was not qualified to offer an opinion regarding Coastal's alleged damages arising from a general contractor's or subcontractor's performance. RP 76-90, 01/06/10. As Mr. Castorina was not qualified to testify to Coastal's alleged damages in conjunction with Mr. Castorina's inexpert testimony regarding Coastal's total cost claim, the Trial Court abused its discretion by not striking Mr. Castorina's testimony. Stellar J respectfully requests that the Court reverse the decision of the Trial Court, strike Mr. Castorina's testimony and dismiss Coastal's total cost claim.

M. The Trial Court Erred by Denying Stellar J's Motions in Limine.

Unless the Trial Court specifies further objection is necessary, a party losing a motion in limine has a standing objection. *Garcia v. Providence Medical Center*, 60 Wn. App. 635, 641, 806 P.2d 766, *review denied*, 117 Wn.2d 1015 (1991). The denial of Stellar J's Motions in

Limine preserved objections for Stellar J's appeal. Based on the following, Stellar J respectfully requests that the Court order the relief requested by Stellar J.

1. The Trial Court Erred by allowing Mr. Castorina to Testify to Coastal's alleged damages at trial.

Coastal's expert, Nick Castorina, was allowed to testify to Coastal's alleged damages that were not properly pleaded. Based on the foregoing and following, Stellar J respectfully requests that the Court reverse the decision of the Trial Court and order a new trial.

i. The Trial Court should have excluded speculative and inadmissible testimony from Mr. Castorina.

The testimony provided by Mr. Castorina should have been excluded as it pertained only to possible claims which were not properly disclosed and pleaded in Coastal's Complaint. CP 604-12, RP 60-166, 10/06/10. The only fact alleged in Coastal's Complaint supporting any cause of action was that Stellar J withheld money from Coastal for an alleged delay in the electrical equipment being supplied by Tacoma Electric. CP 604-12. The sole issue in Coastal's Complaint was whether the amount withheld by Stellar J was justified as a result of the late delivery of the MCCs by Coastal. CP 606. That was the only fact relating to the damages pleaded by Coastal. Mr. Castorina's testimony at trial

regarding delay damage calculations and Coastal's modified total cost claim were irrelevant and are unfairly prejudicial to Stellar J. RP 60-166, 10/06/10. As the Trial Court allowed Coastal to submit Mr. Castorina's testimony while denying Stellar J the same opportunity (compare RP 46-58 with 68-74, 12/30/09), the Trial Court's decision should be reversed and Stellar J respectfully requests a new trial.

ii. The Trial Court erred by allowing Mr. Castorina to testify regarding Coastal's alleged modified total cost claim.

Mr. Castorina used a total cost basis approach which is not favored in law and is generally upheld only when no better proof is available. *S.L. Rowland Const. Co. v. Beall Piple & Tank Corp.*, 14 Wn. App. 297, 304, 540 P.2d 912 (1975) (citations omitted). The total cost basis approach calculates damages by taking the total costs incurred by a contractor less the amounts it has already been paid. See *Seattle Western Industries, Inc.*, 110 Wn.2d at 6.

In Washington, the total cost basis for establishing damages can be used only in building and construction contract cases when substantial changes occur which are not covered by the contract or within the contemplation of the parties and which are not such that the contractor should have anticipated or discovered them. *S.L. Rowland Const. Co.*, 14 Wn. App. at 304; see also *V. C. Edwards Contracting Co. v. Port of*

Tacoma, 83 Wn.2d 7, 13, 514 P.2d 1381 (1973); *Bignold v. King County*, 65 Wn.2d 817, 826, 399 P.2d 611 (1965).

Mr. Castorina's testimony failed to show that there were substantial changes to the contract or that compensation for changes in work was not capable of being remedied by the parties' contract. RP 60-166, 01/06/10. See *S.L. Rowland Const. Co.*, 14 Wn. App. at 310. Furthermore, Mr. Castorina's calculations did not include any adjustment or reduction for Coastal's deficiencies during performance. *Id.* Next, Mr. Castorina's testimony did not provide sufficient evidence that Coastal's total cost claim was reasonable. RP 60-166, 01/06/10; *Young*, 164 Wn.2d at 485. Accordingly, and in addition to the argument set forth under the immediately preceding subsection and sections B. and C., *supra*, As Coastal's case-in-chief for damages beyond the retained amounts was solely dependent on Mr. Castorina's testimony, Stellar J requests that the Court grant Stellar J's motion to strike, dismiss Coastal's total cost claim and order a new trial limiting Coastal's alleged damages to the amount withheld by Stellar J.

2. The Trial Court erred by allowing Coastal to argue and submit evidence at trial of claims not properly pleaded by Coastal for any claim in excess of the $82,277.00 withheld by Stellar J.

It is undisputed that Stellar J retained $82,277.00 from payment to Coastal under the parties' contract. Despite Stellar J's objection to the contrary, Coastal was allowed to argue claims for labor and materials, additional work, change orders, delay damages, Stellar J's tardy performance, and for affirmative award, all greater than the $82,277.00 retained by Stellar J. RP 68-74, 12/30/09. Coastal did not plead these specific claims for relief. CP 604-12, 1568-80, 1659-67. Thus, the Trial Court denied Stellar J's motion to amend and granted Coastal's motion in limine to exclude Stellar J from arguing claims and defenses at trial, but yet allowed Coastal to argue claims not specifically raised in its Complaint, which should have been disallowed under the same basis as the Trial Court used to preclude Stellar J from arguing its claims and defenses at trial. *Id*, compare RP 46-58 with 68-74, 12/30/09.

Pursuant to Civil Rule 8(a), a pleading which sets forth a claim of relief shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) demand for judgment for the relief to which he deems himself entitled. In any claim for relief, the facts must be properly pleaded and the facts alleged must give notice to the

opposing party notice of the claims and the grounds upon which it rests or it is insufficient. *Lewis v. Bell*, 45 Wn. App. 192, 197, 744 P.2d 425 (1986). Except for alleging that Stellar J improperly withheld monies from Coastal for labor as a result of delays in electrical equipment being supplied by Coastal's subcontractor Tacoma Electric, Coastal did not allege any other facts supporting a cause of action or alleging any facts giving rise to these claims. CP 604-12. If Stellar J was precluded from arguing claims under its Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint, Coastal likewise should have been precluded from introducing evidence of any other claims and Coastal should have been restricted to the $82,277.00 in retained funds as the limit of Coastal's damages.

When the Trial Court denied Stellar J's motion to amend, the Trial Court reasoned that Stellar J sought to litigate "new theories of liabilities" and a "new theory of damages." RP 24-25, RP 12/04/09. The "new theories" of liability and damages arose out of the same facts and transactions in this matter. The logic of the Trial Court's ruling should have applied with equal force and effect to Coastal's claims that were not specifically alleged in Coastal's Complaint. The Trial Court's denying Stellar J's motion to amend, granting Coastal's motion in limine to exclude Stellar J from raising claims and defenses at trial, and denying

Stellar J's motion in limine from allowing Coastal to try claims in contradiction to the disparate ruling against Stellar J was reversible error.

3. The Trial Court erred by allowing Coastal to submit Stellar J's settlement with Flowserve at Trial.

Evidence is relevant if the evidence has the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence. Evidence which is irrelevant is inadmissible. ER 401. Irrelevant evidence is inadmissible. ER 402. Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. ER 403. Offers of compromise are not admissible to prove liability for or invalidity of the claim or its amount. ER 408, Ex. 200, RP 77-82, 12/30/09.

The Trial Court erred by allowing Coastal to submit the settlement entered into between Stellar J and Flowserve at trial. The pumps were delivered by Flowserve to the Project on January 4, 2006. Stellar J did not allocate any damages for Coastal's failure to timely deliver the MCCs during the time period in which Flowserve was in breach. CP 745, Ex. 157, RP 18-20, 01/08/10. Stellar J only assessed damages for the time period after Flowserve performed. *Id.* Moreover, Stellar J paid Coastal for

all invoices from Coastal through the time when the goods were delivered by Flowserve. CP 1693, Ex. 408, RP 164, 01/05/10

The claims set forth in Coastal's Complaint against Stellar J only regard the amount that Stellar J withheld from labor invoices and said amounts withheld by Stellar J were for costs incurred by Stellar J after the date Flowserve performed. *Id*, Exs. 313, 314, 336, 338, 349, 350, 364, 365, 376, 380, 382, 386, 392, RP 81-103, 01/05/10. Any reference to Flowserve and its breach of its contractual obligations with Stellar J were not relevant and were submitted by Coastal to show that Stellar J received compensation even though Stellar J's settlement with Flowserve involved a different part of the Project and did not address Coastal's breach. See *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987) (unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one); see also *Hensrude v. Sloss*, 150 Wn. App. 853, 861, 209 P.3d 543 (2009) (where the Court held in interpreting UCC-2 that a settlement agreement is invalid under ER 408 to prove the invalidity of a claim or its amount).

The jury's award demonstrates the jury's confusion. In Coastal's opening statement, Coastal argued that, based on what Mr. Castorina's testimony would show, Coastal was entitled to $261,733.00 in delay damages plus $108,454.66 for retainage. RP 33-34, 01/05/10. The jury

awarded a total of $322,056.12 in damages. The jury's award of $270,056.12 under the Subcontract and $52,000.00 under the Purchase Order demonstrates juror confusion because these amounts were not requested by Coastal, nor were these amounts supported by the evidence. The evidence of Stellar J's settlement with Flowserve resulted in unfair prejudice to Stellar J and in all likelihood resulted in a confusion of the issues to and the misleading of the jury. The error by the Trial Court was reversible and Stellar J respectfully requests a new trial.

N. The Trial Court erred by Denying Stellar J's Motion to Strike the Declaration of Mr. Castorina upon Stellar J's Motion for Partial Summary Judgment.

The Trial Court should have stricken Mr. Castorina's Declarations submitted by Coastal in opposition to Stellar J's motion for summary judgment. Mr. Castorina's Declarations failed to set forth: (1) facts demonstrating that he had personal knowledge of the matters and was qualified to testify as an expert in this matter; (2) factual information and documentation to support his conclusions; and (3) a sufficient evidentiary foundation to satisfy the rules of evidence. CP 1013-1033, 1136-1143.

An expert's opinion will not be considered during summary judgment if the opinion is offered in the form of an affidavit or declaration and the factual basis for that opinion is not explained in the same document. *Anderson Hay & Grain Company, Inc. v. United Dominion*

Industries, Inc., 119 Wn. App. 249, 259, 76 P.3d 1205 (2003), *review denied*, 151 Wn.2d 1016 (2004) (citations omitted). Mr. Castorina's Declarations did not provide sufficient factual bases or documentation to support his conclusions. An expert must support his opinion with specific facts or a court will disregard expert opinions where the factual basis for the opinion is found to be inadequate. *Rothweiler v. Clark County*, 108 Wn. App. 91, 100-101, 29 P.3d 758 (2001), *review denied*, 145 Wn.2d 1029 (2002). The conclusions in Mr. Castorina's declarations lacked adequate foundation. Accordingly, the Trial Court erred by not striking Mr. Castorina's Declaration.

O. Upon Reversal of some or all of the items in Stellar J's Appeal, the Attorney Fees and Costs Awarded to Coastal should be Overturned or Reduced accordingly.

An award of attorney fees must be based on contract, statute or recognized ground in equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997) (citation omitted). The contract between the parties in this matter awards the prevailing party attorney fees and costs. CP 2114. If both parties prevail on a major issue, neither is a prevailing party. *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997) (citations omitted). Alternatively, under the proportionality approach announced in the case of *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605 (1993), *overruled on other grounds*, *Wachovia SBA Lending, Inc. v. Kraft*, 165

Wn.2d 481, 200 P.3d 683 (2009), the plaintiff is awarded attorney fees for the claims under which it succeeds, and the defendant is likewise awarded fees for the claims it prevailed upon. The fee awards are then offset. *Id.* Stellar J submits that if the Court reverses the decision or decisions of the Trial Court, Stellar J is entitled to attorney fees against Coastal, or no attorney fees to be awarded to either party, or to a reduction of attorney fees awarded against Stellar J.

P. Stellar J is entitled to its Attorney Fees on Appeal.

It is undisputed that the parties' contract allows for attorney fees to the prevailing party. If Stellar J prevails on appeal, Stellar J is entitled to attorney fees on appeal. *Hertz*, 86 Wn. App. at 26; RAP 18.1.

V. CONCLUSION.

Based on the foregoing, Stellar J respectfully requests the relief identified, including a new trial in this matter.

Respectfully submitted this 28 day of September, 2010.

DUGGAN SCHLOTFELDT & WELCH PLLC

ALBERT F. SCHLOTFELDT, WSBA# 19153
MARK A. WHEELER, WSBA# 31492
Of Attorneys for Appellants

APPENDIX A

(attached)

SPECIAL VERDICT FORM 06-2-913-2 (183)

QUESTION 1: Was Stellar J Corporation justified in assessing a back charge against Coastal Construction for delays on the Riverside/Prindle Pump Station project caused by Coastal Construction?

Filed
COUNTY, WASH
Superior Court
JAN 15 2010
A. Brack, Clerk
Deputy

ANSWER: NO *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 1, answer question 2. If you answered "no" to Questions 1, skip to Question 3.)

QUESTION 2: What amount was Stellar J Corporation justified in back charging Coastal Construction for the delays on the Riverside/Prindle Pump Station project caused by Coastal Construction?

ANSWER: N/A

QUESTION 3: Did Coastal Construction follow all required contractual and statutory requirements, including the proper change order procedure, to maintain the claims it asserted against Stellar J Corporation?

ANSNWER: YES *(Write "yes" or "no")*
(INSTRUCTION: If you answered "yes" to Question 3, ~~answer~~ skip to question 5. If you answered "no" to Question 3, ~~skip to~~ answer Question 4.)

QUESTION 4: Was Coastal Construction justifiably excused from complying with the change order procedure in the contract documents?

ANSWER: N/A *(Write "yes" or "no")*
(If you answered "no" to Question 4 ~~then verdict should be entered in favor of Stellar~~ then you may not award delay damages and you then should proceed to Question ~~"12"~~ 5; If you answered "yes" to Question 4, then proceed to question 5)

QUESTION 5: Did Stellar J Corporation breach the subcontract with Coastal Construction Group, Inc.?

ANSWER: YES *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 5, answer Question 6. If you answered "no" to Question 5, skip to Question 9)

QUESTION 6: Was Stellar J Corporation's breach a material breach of the subcontract?

ANSWER: YES *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 6, answer Question 7. If you answered "no" to Question 6, skip to Question 9.)

QUESTION 7: Was Stellar J Corporation's material breach of the subcontract a proximate cause of Coastal Construction Group, Inc.'s damages?

ANSWER: YES *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 7, answer Question 8.; If you answered "no" to Question 7, skip to Question 9.)

QUESTION 8: What do you find to be the amount of money that Coastal Construction Group, Inc. is entitled to receive from Stellar J Corporation as a result of Stellar J Corporation's breach of the subcontract?

ANSWER: $270,056.12

(INSTRUCTION: Now answer Question 9.)

QUESTION 9: Did Stellar J Corporation breach the Purchase Order with Coastal Construction Group, Inc.?

ANSWER: YES *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 9, answer Question 10. If you answered "no" to Question 9, skip to Question 13)

QUESTION 10: Was Stellar J Corporation's breach a material breach of the Purchase Order?

ANSWER: YES *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 10, answer Question 11. If you answered "no" to Question 10, skip to Question 13.)

QUESTION 11: Was Stellar J Corporation's material breach of the purchase order a proximate cause of Coastal Construction Group, Inc.'s damages?

ANSWER: YES *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 11, answer Question 12.; If you answered "no" to Question 11, skip to Question 13.)

QUESTION 12: What do you find to be the amount of money that Coastal Construction Group, Inc. is entitled to receive from Stellar J Corporation as a result

of Stellar J Corporation's breach of the Purchase Order Contract?

ANSWER: $52,000.00

(INSTRUCTION: Now answer Question 9.)

QUESTION 13: Did Coastal Construction Group, Inc. breach the Purchase Order Contract?

ANSWER: NO *(Write "yes" or "no")*

(INSTRUCTION: If you answered "yes" to Question 13, answer Question 14. If you answered "no" do not answer Question 14 and proceed to sign verdice and notify the bailiff.

QUESTION 14: What do you find to be the amount of money that Stellar J Corporation is entitled to receive from Coastal Construction Group for Coastal Construction Group's breach of the Purchase Order Contract?

ANSWER: N/A

(INSTRUCTION: After answering Question 14, sign the verdict and notify the bailiff.)

Dated this 15 **day of** JAN **, 20** 10 **.**

Michael Smith

Presiding Juror

ORIGINAL

FILED
COURT OF APPEALS
DIVISION II

10 SEP 29 PM 12: 13

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 40481-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

STELLAR J CORPORATION and TRAVELERS CASUALTY AND SURETY COMPANY, Appellants,

vs.

COASTAL CONSTRUCTION GROUP, INC., JAMES HEWITT, and TARINA THOMAS, Respondents,

---

AFFIDAVIT OF SERVICE

Albert F. Schlotfeldt, WSBA #19153
Mark A. Wheeler, WSBA# 31492
Attorneys for Appellants

Duggan Schlotfeldt & Welch PLLC
900 Washington Street, Suite 1020
P.O. Box 570
Vancouver, WA 98666-0570
Telephone: (360) 699-1201
Facsimile: (360) 693-2911

MARK A. WHEELER, being first duly sworn upon oath, hereby deposes and says:

1. I am one of the attorneys for Stellar J Corporation and Travelers Casualty and Surety Company in this matter and I base the following on my own, personal knowledge.

2. On September 28, 2010, I caused true and correct copies of Opening Brief of Appellants and this Affidavit to be served via e-mail and hand-delivery, to the following addresses:

Kevin Roberts
Dunn & Black, P.S.
North 111 Post, Suite 300
Spokane, WA 99201

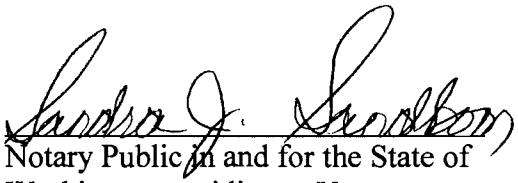
kroberts@dunnandblack.com

William Hillier
Hillier Scheibmeir Vey & Kelly PS
299 N.W. Center Street
Chehalis, WA 98532

bhillier@localaccess.com

MARK A. WHEELER, WSBA# 31492

SUBSCRIBED AND SWORN to before me this 28th day of September, 2010.



Notary Public in and for the State of Washington, residing at Vancouver
Commission expires: 9-1-2012

SANDRA J. SANDBOM
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
SEPTEMBER 1, 2012