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No. 41563-1-II

IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

Realm, Inc.

Appellant,

vs.

City of Olympia

Respondent.

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APPELLANT'S OPENING BRIEF

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## **I. ASSIGNMENTS OF ERROR**

The appellants assign error to the trial court's court decision that Realm did preserve its right to file suit for payment above the amount in a proposed change order when it did not protest the change order offered by the City in compliance with Section 1-04.5 Procedure and Protest by the Contractor of the 2006 WSDOT Standard specifications.

## **II. ISSUES PRESENTED**

Did the trial court err by dismissing Realm's claim for compensation above the amount in a proposed change order for payment of the City of Olympia's Termination for Public Convenience of Realm's contract when Realm did not protest the proposed change order in accord with the WSDOT 2006 Standard Specifications Section 1-04.5 Procedure and Protest by the Contractor?

## **III. STATEMENT OF THE CASE**

In June 2008, Realm, Inc. ("Realm") entered into a public works contract with the City of Olympia ("City") to tunnel under a roadway to create a new salmon fish passage route. The City issued Realm a notice to proceed on July 21, 2008. Realm thereafter began constructing road access and began the tunneling operation. However, it soon became apparent that the soil conditions on site were not consistent with the City specifications for the tunneling operations. The tunneling work soon became impossible to accomplish under the soil conditions encountered and the work was stopped by the City while it evaluated its design deficiencies.

On September 30, 2008, after evaluation of the design, the City issued a letter terminating Realm's contract based on its right to Terminate for Public Convenience the contract pursuant to the WSDOT 2006 Standard Specifications 1-08.10(2). (CP 41-42).

On December 29, 2008, pursuant to WSDOT Standard Specifications Section 1-08.10(2), Realm timely filed a claim for reimbursement due to termination for convenience. Realm submitted the claim in the amount of \$1,109,418.75. (CP 43-46).

The City then retained Navigant Consulting, Inc., who audited Realm's claim's and proposed a settlement amount. On March 31, 2009 the City conveyed the findings of the auditor which proposed \$711,526.00 as the amount owed to Realm. (CP 47-48).

On April 24, 2009, the City sent a proposed Change Order No. 1 to Realm via e-mail thru counsel listing \$711,526.00 as the amount to be paid Realm with the language "full and final payment for all the work performed under the contract." (CP 127-128).

On May 4, 2009, Realm decided not to sign the Change Order as proposed. Realm authorized its counsel to send an e-mail to the City objecting to the "full and final" settlement language and its refusal thereby to sign the proposed Change Order. Realm's attorney conveyed this rejection of the proposed Change Order to the City. (CP 129-130).

On May 5, 2009, Realm was notified via an e-mail thru counsel that the City will issue a unilateral Change Order. (CP 130). The e-mail did not include a copy of the Change Order, but did reference that a check would be made available. After review of the e-mail from the City, Realm understood a check would be ready for pick-up from the City. (CP -112-113).

On May 7, 2009, Dave Follett, the principal owner of Realm, picked up a check from the City. At this time, the City did not provide Realm a copy of the unilateral Change Order. (CP 113). When Realm picked up the check, Carrie Follett, who accompanied Dave Follett, reviewed the document and did not see any language for "full and final settlement." (CP 113) The check merely contained the language "Pay Est." (CP 123). Dave Follett signed a document that indicated receipt of the payment. The only wording on the document is as follows: "Realm, Inc. Check #279959 for \$513,618.45." (CP 61). Realm understood that the check from the City was a partial payment on the undisputed portion of the claim. (CP 113). Realm did not receive a copy of the unilaterally issued Change Order until several months after they received the check. (CP 113).

Realm then proceeded to file suit in Thurston County Superior Court for the balance owed on its claim as submitted to the City. The City moved for summary judgment on several basis claiming 1) Realm did not meet precondition to file suit by protesting in writing under Section 1-04.5 the proposed change order, 2) Realm did not comply with the Notice provisions for its differing site conditions claim and 3) Realm's acceptance of the check issued in the amount of the unilateral change order operated as an accord and satisfaction of the entire claim. The trial court only reached a result on the first basis holding that Realm did not meet the precondition to file suit by protesting in writing under Section 1-04.5 the proposed change order offered by the City.

#### IV. ARGUMENT

##### A. The Applicable Standard of Review Is De Novo.

Appellate review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

##### B. Administrative Procedures in Section 1-04.5 are Not Required to Resolve a Payment Dispute Over a Termination for Convenience Claim.

Once the City determined that continuing the contract with Realm was not in the public's best interest, the City had the option to delete or terminate the work under two provisions of the WSDOT 2006 Standard Specification which was incorporated by reference in the contract between the City and Realm. Section 1-09.5 begins as follows:

**The engineer may delete work by change order as provided in Section 1-04.4 or may terminate the contract in whole or part as provided in Section 1-08.10(2). ... (emphasis added).**

The City chose **Section 1-08.10(2) Termination for Public Convenience** as authority to terminate its contract with Realm. The contract termination letter issued by the City directed Realm to submit its claim for payment in accord with Section 1-09.11 and Section 1-09.12. ( CP 41-42). In compliance with the directive, Realm submitted its “Certified Claim” under **Section 1-09.11(2) Claims**. (CP 43-46). The City then retained Navigant who audited Realm’s certified claim. Realm cooperated with Navigant and complied with the requirements in **Section 1-09.12 Audits** as directed by the City in its termination letter. Navigant then submitted its audit report dated April 2009 to the City. (CP 49-56).

The City without a finalized audit report from Navigant issued a letter dated March 31, 2009 to Realm with their finding that Realm was entitled an amount of \$711,526 for its termination claim. (CP 47-48). On April 24, 2009 the City sent Realm through counsel a change order to revise the contract price in accord with its letter of March 31, 2009. (CP 126-128). Realm and the City could not agree come to a mutual agreement on the amount of a change order for the terminated contract. The City issued a unilateral change order for Realm’s termination claim. (CP 59-60). Section 1-08.10(4) then provides the procedure for resolution of the dispute as to the amount owed Realm. Section 1-08.10(4) provides in pertinent part as follows:

If the Contracting Agency and the Contractor cannot agree as to the proper amount of payment, then the matter will be resolved as outlined in **Section 1-09.13** ...(emphasis **added**)

**Section 1-09(13) Claims Resolution** provides the parties the criteria by which they determine which one of three customary procedures they are required to engage in to resolve their dispute. The three are options are 1) Alternative Disputes Resolution

(ADR), Arbitration, and 3) Litigation. Realm knew its claim exceeded \$250,000 and then Realm correctly selected **1-09.13(4) Claims in Excess of \$250,000** as the basis to file suit in Thurston County Superior Court.

Realms' suit was dismissed with prejudice on summary judgment on the single basis that Section 1-09.13(1) required Realm as a condition precedent to filing suit to comply with the administrative procedure in **Section 1-04.5 Procedure and Protest by Contractor**. Realm admits it did not protest the offered change order. Section 1-09.13(1) reads in pertinent part is as follows:

Prior to seeking claim resolution through alternative dispute resolution, binding arbitration or litigation, the Contractor shall proceed under the administrative procedures in Sections 1-04.5, 1-09.11, and any other special provision provided in the contract for resolution of disputes....

(CP 176).

It is Realm's position that they are not required to comply with the administrative procedure in Section 1-04.5 as a necessity to resolve its dispute for the amount of payment for its Termination for Convenience claim against the City. The City argued and the trial court agreed that Realm's compliance with Section 1-04.5 by not protesting the proposed change order is a condition precedent to filing suit as set out in Section 1-09.13(1) was fatal and dismissed the suit on that basis.

C. City Directed Realm to File Claim For Payment Without Need to Invoke Administrative Procedures in Section 1-04.5.

**Section 1-09.11(1) Disputes** distinguishes which administrative procedures are to be employed by the parties and when in order to resolve disputes. Section 1-09.11(1) reads as follows:

When disputes occur during a contract, the contractor shall pursue resolution through the Project Engineer. The Contractor shall follow the procedures outlined in Section 1-04.5. If the negotiation using the procedures outlined in Section 1-04.5 fails to provide satisfactory resolution, the Contractor shall pursue the more formalized method outlined in Section 1-09.11(2) for submitting a claim.

(CP 171).

A critical fact is that Realm was directed to use the “more formalized method outlined in Section 1-09.11(2) for submitting a claim”. The City Engineer directed Realm to submit its payment request in accord with the claim procedures outlined in 1-09.11 in its termination letter. . Explicit in this request is that the City had no need to require Realm to comply with Section 1-04.5 when the more formalized method would provide more extensive information on the costs payable to Realm also provide for an audit process which occurred by the City’s auditor, Navigant.

The City did not reject Realm’s the certified claim for any administrative procedural deficiencies. The City has only disputed the amount claimed. It is undisputed that at the time of the City offering a change order to Realm that would be a “full and final settlement”, Realm had complied with all administrative procedures to settle the “Termination for Convenience” claim.

This leaves unanswered, why if compliance with Section 1-04.5 is not required as a condition precedent of Realm to submit its formal claim, why was it necessary when a dispute arose as to the amount to be paid for the formal claim? It is not. Because Section 1-04.5 is a means for the Project Engineer to evaluate and resolve issues during construction or the contract, not a procedure to resolve a dispute that occurs after the contract. Section 1-09.11(1) reads in pertinent part as follows:

When **disputes occur during a contract**, the contractor shall pursue resolution through the Project Engineer. The Contractor shall follow the procedures outlined in Section 1-04.5. ... (emphasis added)

There was no dispute during the contract, there was only a dispute after the contract the contract was terminated. As noted above Section 1-09(11)1 cites to 1-04.5 for resolving disputes during the contract.

In interpreting contracts, courts must read each contract as an average person would read it without giving it strained or forced meaning. *New Hampshire Indem. Co., Inc. v. Budget Rent-A-Car Systems, Inc.*, 148 Wn.2d 929, 64 P.3d 1239 (2003) (contract should be interpreted as an average person would). The words used in a contract should be given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 745 P.2d 53 (1987). Realm does not argue that the contract language is ambiguous, but that the court when it interprets the contract as a whole it should find that Section 1-04.5 is intended as an administrative procedure for the Engineer to evaluate issues to avoid prejudice to the Owner.

D. Administrative Procedures in Section 1-04.5 are to Resolve Issues During Construction.

Reviewing the standard specification as a whole one observes that Section 1-04.5 is intended for the contractor to Protest a decision by the Engineer during the course of the contract. Section 1-04.5 begins as follows;

If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:

1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field inspectors *before doing the work*;
2. *Supplement* the written protest within 15 calendar days with a written statement providing the following:
  - a. The date of the protested order;
  - b. The nature and circumstances that caused the protest;
  - c. The contract provisions that support the protest;
  - d. *The estimated dollar cost, if any, of the protested work* and how that estimate was determined; and
  - e. An analysis of the *progress schedule showing the schedule change or disruption* if the Contractor is asserting a schedule change or disruption; and ... (emphasis added).

The Standard Specifications paragraph (1) above requires the contractor to file a protest "before doing the work". Rhetorically, how does any contractor file a protest "before doing the work", when their contract has been terminated?

Paragraph 2 (d) above requires an "estimated dollar cost" of the protested work. Estimates are for the engineer ordered work in be performed, not payment for the actual work performed. 1-08.10(4) requires a contractor who was terminated for convenience to submit a claim pursuant to Section 1-09.5 for the actual work performed. Again this is a protest of work ordered by the Engineer under Section 1-04.4. The purpose of this estimate is to allow the engineer to assess the magnitude of the change they have ordered so adjustments could be made if the cost were too expensive.

Paragraph 2(e) requires a schedule to show changes in schedule or disruption. Again, if the work is terminated what difference does a hypothetical schedule or disruption analysis mean? It is meaningless. The purpose of this schedule is to allow the engineer to assess the magnitude of the change as ordered so adjustments could be made

if the schedule were too long and further allows for schedule coordination with other work or trades.

The next paragraph of Section 1-04.5 is as follows:

*Throughout any protested work*, the Contractor shall keep complete records of extra costs and time incurred. The Contractor shall permit the Engineer access to these and any other records needed for evaluating the protest as determined by the Engineer.

Again, how does a contractor provide records throughout the protested work when they have been terminated? They don't.

The fourth paragraph of Section 1-04.5 reads as follows:

In spite of any protest, the contractor shall proceed promptly with the work as the Engineer orders.

Again, how does a contractor proceed with the work when the contract is terminated?

The intent of Section 1-04.5 is to provide a mechanism whereby a contractor provides a written objection to allow the engineer an opportunity to change the directive should the cost be too high or the impact on the schedule be significant. Section 1-04.5 is not intended to protest a decision on the pricing of the claim after the contract work has been terminated.

Here, to require adherence to an administrative procedure that was not required to submit a claim, but is later required during negotiation of the claim, as a condition precedent to filing suit, is futile at best. A written protest of an engineer's decision in a change order made after the termination of the contract makes no logical or contract sense.

Practically, a protest under Section 1-04.5 is form over substance as it would relate to the change order. For example, Realm could have written a two sentence letter that said,

Dear City of Olympia:

Realm protests your change order pursuant to Section 1-04.5.

See the Certified Claim submitted for details.

Sincerely,

Realm, Inc.

Realm had no additional information to provide the City. The purpose of the protest requirements is to provide the engineer with information to make informed and timely decisions while the project is underway. It is not to require Realm to draft documents that serve no purpose and in short are a futile exercise.

E. Mike M. Johnson v. City Of Spokane Is Distinguishable Because Realm Complied With the Required Contractual Protest and Claim Provisions and the City's Actions Evidenced an Intent to Waive.

The City drew the trial courts attention to the *Mike M. Johnson, Inc. v. County of Spokane* 78 P.3d 161, 150 Wn.2d 375 (2003) decision arguing that strict compliance with the WSDOT contract provisions mandated dismissal of the present matter. The trial court followed the City's argument in dismissing the matter. The case at issue is distinguishable from *Mike M. Johnson, Inc. v. County of Spokane*, 98 P.3d 60, 62 (2004). because Realm complied with the required contractual protest and claim provisions and/or the City waived such compliance. In a similar case, *Weber Const., Inc. v. County of*

*Spokane*, the contractor claimed its case was distinguishable from *Johnson* because it did indeed comply with the contractual protest and claim provisions and the County's actions evidenced an intent to waive compliance with those provisions in any event. *Weber Const., Inc. v. County of Spokane*, 98 P.3d 60, 62 (2004). In agreement, the Weber court determined in reconsideration, based on remand for reconsideration by the Washington Supreme Court, in light of *Mike M. Johnson, Inc. v. County of Spokane* 78 P.3d 161, 150 *Wash.2d* 375 (2003), Weber presented substantial evidence it either complied with the contractual notice provisions or the County waived strict contractual compliance so as to prevail on the merits. *Weber*, 98 P.3d 60, 61. The court looked at the Section 1-04.5 provisions at issue in *Johnson* and *Weber*, and similarly, in the case at issue.

The contract here required the parties to abide by the 1988 standards for road construction. Section 1-04.5 detailed the protest procedure, the same provision at issue in *Johnson*... The section also provides that failure to comply with the procedures of Sections 1-04.5 and 1-09.11 waived any claim for protested work.

...Section 1-04.5 requires "[t]he estimated dollar cost, if any, of the protested work and how that estimate was determined." Here, there was none. Weber indicated no estimated cost existed at the time because it lacked the information to provide that estimate. The County did not provide the requested information so Weber could not have stated in good faith how any such estimate was determined. In these circumstances, Weber complied with the contract terms when the evidence is viewed as true and all reasonable inferences are drawn from that evidence. Acknowledging the need to provide an estimate and telling the County why it was unable to do so, it also advised the County what information it needed to provide the estimate. Weber presented substantial evidence that it complied with the protest procedures set forth in Section 1-04.5....

The 1998 specifications include a second section on claim procedures in Section 1-09.11, which provides that if the protest procedures in Section 1-04.5 did not result in a satisfactory conclusion, the Contractor must follow the more formalized claim

procedures in this section. There was no resolution following the procedures in Section 1-04.5. On March 10, 2000, Weber filed a claim in conformity with Section 1-09.11(2). Again, Weber has presented substantial evidence that it complied with this contract provision and thus preserved its right to seek judicial relief.

*Weber*, at 62-3.

Weber also claims the County, by its conduct, evidenced its intention to waive strict contractual compliance of Section 1-04.5. The Weber court held that the County knew that Weber was trying to comply with the estimate requirements in Section 1-04.5, but could not comply because information was not provided by the County necessary for the estimate to be prepared. In essence, strict compliance with the specification was not possible for reasons beyond control of the contractor.

Here, a similar same factual situation arises. The City knew that Realm could not comply with Section 1-04.5 in as a condition of resolving the termination claim. First, a proper protest under Section 1-04.5 requires the contractor to protest **“as this section provides”**. A general objection or protest will not suffice. As noted in the previous section of this opening brief, there is no information that Realm could provide that was not already provided. Navigant was retained by the City to audit the certified claim and costs incurred by Realm. I note that Navigant meet with Dave and Carrie Follett in their offices on March 4, 2009. The Navigant report begins as follows:

Megan Wells of Navigant Consulting and Danelle Larson of the City of Olympia visited the Olympia, Washington offices of Realm, Inc. (“Realm”) on March 4, 2009. Navigant consulting and City of Olympia representatives **worked directly with Carrie Follett and Dave Follett**. Navigant Consulting’s work scope included analyzing Realm’s total project costs and related claim. (emphasis added)

(CP 49).

The City and its accounting experts Navigant met with Realm directly and were provided any information needed to evaluate the claim. The City worked at Realm's office to obtain all the necessary information to evaluate the claim. The City knew and still knows that Realm could provide nothing further by protesting the change order. A protest under Section 1-04.5 serves no purpose in the current matter, but provided a technical hurdle for Realm to leap. *Johnson and Weber* do not require futile efforts by the contractor to provide information to owner that it does not need and the contractor can't supply.

F. City Denied Request for Differing Site Conditions Section 1-04.7 After Termination.

City argues that Realm should be denied any claim for any differing site conditions because they failed to protest the decision of the engineer. The City references Interrogatory No. 10 at page 7 of the Memorandum Supporting the Motion for Summary Judgment. The City claims they denied Realm's request for a differing site condition. What the City failed to advise the court is that the denial by the City was issued on October 7, 2008 a week after the termination for convenience letter was issued. (CP 116-122). The termination letter issued on September 30, 2008 has a paragraph on the second page that reads as follows:

The City acknowledges receipt of correspondence from Realm in which it claims that its performance failures were caused by differing site conditions and/or defective specifications. The City will respond to the correspondence as soon as practicable. ...

Then on October 7, 2008 the City engineer issues a letter finally addressing the issues Realm had raised throughout the job. (CP 116) The October 7, 2008 letter begins as follows:

This letter is a follow up to some of the outstanding issues between the City and Realm, including the City's field order that Realm, Inc. suspend all field operations work as of September 9, 2008 at 11:00 a.m., as well as Realm's letters of September 2, 3, 24, and 29, 2008.

The letter of September 3, 2008 which the City says Realm did not protest is included in the list. Again, the City has now terminated the contract and then Realm receives the engineer's decision. It appears to be a clean-up letter to put in writing what should have been done during the job. Realm has no contract obligation to follow written protest requirements when the contract has been terminated. Whether Realm is entitled to extra work is no longer of import. Realm was not allowed to finish the work as bid and contracted. Realm is entitled to its actual work as performed pursuant to Section 1-09.5. A protest of an engineer's written decision extra work made after the termination of the contract makes no logical or contract sense.

G. City Fails To Establish An Accord And Satisfaction Because No Meeting Of The Minds Occurred Between Realm and the City.

The City's obligation to pay Realm \$1,109,418.75 was not discharged by an accord and satisfaction. An accord and satisfaction is a new contract between the parties, complete in itself. 1 Am.Jur.2d Accord and Satisfaction § 12 (1962). An accord and satisfaction consists of: (1) a bona fide dispute; (2) an agreement to settle that dispute; and (3) performance of that agreement. *Ward v. Richards & Rossano, Inc.*, 51 Wn. App. 423, 429, 754 P. 2d 120 (1988).

Whether there has been an accord and satisfaction is generally a mixed question of law and fact. *Kibler*, at 525. Here, the facts are in dispute. Realm agrees a bona fide dispute exists between the parties regarding the amount owed to Realm. However, Realm

disputes that an agreement exists to settle the dispute by payment to Realm in the amount of \$711,526.00. ( CP 112-113).

An accord requires a "meeting of minds" and intention on the part of both parties to create an accord and satisfaction as a matter of law. *Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wn.2d 523, 525, 439 P.2d 416 (1968); *U.S. Bank Nat. Ass'n v. Whitney*, 119 Wn. App 339, 81 P.3d 135 (2003) (debtor's payment to bank did not constitute accord and satisfaction of notes, where dispute existed as to amount owed and bank accepted debtor's check since there was not meeting of the minds that money tendered on condition of accord and satisfaction).

The City fails to prove the acceptance of the check by Realm constitutes an accord and satisfaction. The burden is on the party alleging accord and satisfaction, here the City, to show that there was indeed a meeting of the minds. *Kibler*, at 527. No meetings of the minds existed based on Realm's refusal to sign the unilateral change order containing "full and final settlement" language. (CP 130). Realms' refusal to sign the change order was communicated to the City via e-mail. (CP 129-130). Realm intended to refrain from entering into any agreement with the City due to the on the inclusion of the "full and final settlement" language on the change order. (CP 113).

The City erroneously argues that the authority of the City Engineer to issue unilateral change orders negates necessity of establishing a meeting of the minds. Although the City's intention may have been as full and final settlement, the City fails to prove only the City's unilateral issuance of a change order indicates Realm's agreement to accept the lower number as full and final settlement.

Further, no accord is established where the amount owed remains open to further negotiation. *Kibler*, at 527. The tender must be accompanied by conduct and declarations by the debtor from which the creditor cannot fail to understand that the money is tendered on the condition that its acceptance constitutes satisfaction. *U.S. Bank*, at 142 (fact that creditor received less than amount due from debtor with knowledge that debtor claimed to be indebted only to extent of payment did not establish accord and satisfaction). "The mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to be indebted to him only to the extent of the payment made, does not necessarily establish an accord and satisfaction." *Kibler*, at 527 (quoting *Ingram v. Sauset*, 121 Wash. 444, 446-47, 209 P. 699 (1922)). Likewise, here, the mere fact that Realm received less than the amount of their claim, with knowledge that the debtor claims to be indebted to Realm only to the extent of the payment made, does not necessarily establish an accord and satisfaction. Also the check at issue was issued with a stub that identified the monies as Pay Estimate #2. (CP 123) Nothing else was attached to the check. (CP 113). The City argues that Pay Estimate # 2 was final through a supporting document. (CP 234). This document was never presented to Realm. Further executed unilateral change order was only presented to Realm several month after the check was picked up.

In the instant case, there is nothing in the record to indicate that Realm accepted the check as full payment. First, Realm refused to sign the Change Order No. 1 containing any "full and final settlement" language. Second, there was nothing contained in the document Dave Follett signed when he picked up the check that could reasonably be said to place Realm on notice that the check was tendered on the condition that acceptance

thereof would discharge the entire debt. The statement on plain white paper without any City markings in entirety reads: "Realm, Inc. Check #279959 for \$513,618.45." Third, attached to the check was a voucher or stub that contained the abbreviated language "Pay Est." (CP 123). Finally, the check itself did not contain any "full and final settlement" language. Nothing contained on the check, stub, or document verifying receipt by Dave Follett of the check could reasonably place Realm on notice the check was for full and final payment and discharge of the entire debt. Finally, the unilateral change order was not attached to the check nor was it conveyed to Realm before they received and deposited the check.

No accord and satisfaction exists between the parties because the City did not establish a meeting of the minds that the money was offered only on condition of accord and satisfaction. As a matter of law, the City's Engineer's ability to unilaterally issue a Change Order does not negate Realm's necessary participation to establish a meeting of the minds. Further, Realm's actions demonstrate no intention to enter into a new agreement to accept a lower payment to discharge the debt.

When viewing the facts most favorably to the non moving party, the court should find that issue of fact require a determination by the fact finder.

## V. CONCLUSION

Appellant asks that the court reverse the decision of the trial court and remand the matter for further proceedings.

RESPECTFULLY Submitted this 25<sup>th</sup> day of April, 2011

  
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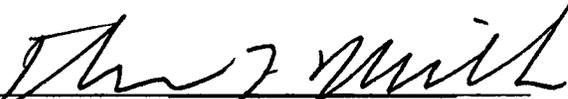
**CERTIFICATE OF MAILING**

I certify that on the \_\_\_\_ day of April, 2011, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Appellant's Brief to the individuals and parties at the addresses listed below:

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DATED this 25<sup>th</sup> day of April, 2011

By:   
THOMAS F. MILLER, WSBA #20264  
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