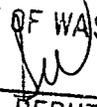


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

Case No. 42771-1-II

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

TYLER & DAWN MITCHELL, husband and wife,
Appellants,

v.

BUILDER OF DREAMS, LLC,
Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Builder of Dreams LLC built a custom home for Appellants Tyler and Dawn Mitchell based on plans and specifications provided by the Mitchells. During the course of construction, the Mitchells made frequent changes to the plans and specifications they had provided to Builder, and requested that Builder install those changes. Most of these changes called for upgrades to the materials used and required additional time to install; some of the changes required the involvement of additional specialty artisans. Some of the changes were required for compliance with the building codes.

In the end, however, the Mitchells did not want to pay for these changes to their custom home. Despite their ever-changing plans and specifications and the associated upgrades and costs, the Mitchells insisted that they were only obligated to pay for a basic house at the price stated in the original written contract between the parties. This action is a result of the Mitchells not wanting to pay for the custom home they asked for and got.

II. ASSIGNMENTS OF ERROR

A. Issues Pertaining to Assignment of Error.

1. May parties to a written construction contract modify or waive the terms of that contract by their conduct and course of dealing after execution of the written contract? (Assignments of Error 1-3)

2. Is a dispute resolution provision in a contract enforceable where it is fully susceptible to a reasonable interpretation? (Assignments of Error 1-3)

III. STATEMENT OF THE CASE

This case involves a dispute over monies that Appellants Tyler and Dawn Mitchell owe to Builder of Dreams LLC for the construction of their custom home.

A. Factual Background.

Builder of Dreams LLC (“Builder”) was a general contractor registered as such in the State of Washington. Through its owner, Dan Moore, Builder had significant experience in the construction of quality high-end custom homes in and around Pierce County, commanding purchase prices of up to two million dollars.

In April 2006, Tyler and Dawn Mitchell (the “Mitchells”) purchased real property on Lake Tapps with the intention of building a custom home. *RP 197*. Working with Cascade Residential Design, the Mitchells created plans and specifications for the house and started looking for a contractor to build it. *RP 197-99*. The Mitchells obtained bids from three contractors; those bids were between \$1.6 million and \$2.1 million. *RP 199-200*.

In early 2007, the Mitchells contacted Builder about building their custom home. *RP 200*. Builder discussed an initial bid amount of approximately \$1.5 million with the Mitchells, but the Mitchells’ lender would not approve that amount. *RP 28, 90, 367-68*. Builder worked with the Mitchells to reallocate and trim the budget, to allow the Mitchells to get a construction loan. *RP 28, 91, 368*. On that basis, Builder produced a written contract for reference by the bank, on which was entered a

Contract Price of \$1,032,023, the amount that could be approved by the Mitchells' lender. *RP 28, 90.*

The parties executed this written contract on March 9, 2007 (the "Contract"). *CP 49-56.* The Contract stated a Contract Price of \$1,032,023.00 to build the basic house described in existing plans and specifications that were presented by the Mitchells to Builder. *CP 52.* The Contract Price did not include sales, excise, and other taxes, *CP 52 at ¶9,* and did not include certain other necessary costs of construction, such as site preparation, *CP 52 at ¶10,* and additional work need for the Project to conform to code, *CP 51 at ¶16.* To finance the construction of the house, the Mitchells obtained at least one construction loan through Countrywide (now a part of Bank of America). *RP 211.*

Builder completed the Mitchells' custom home in July 2008. *RP 84.* However, by that time, the Mitchells had stopped paying Builder. *RP 77, 369-70.* As a consequence, Builder was not able to immediately pay several of its subcontractors, one of whom was J.J. Plumbing LLC, Plaintiff in the underlying action.

1. The Contract Price, Taxes, and the Mitchells' Payments

Paragraph 9 of the Contract specified a Contract Price of \$1,032,023.00, and additionally obligated the Mitchells to pay Builder any and all sales, excise, and other taxes associated with the Project. *CP 52.* At all relevant times, the applicable rate of sales tax in the Lake Tapps area was 8.8%. *RP 372.* When applied to the Contract Price alone, the applicable sales tax for Builder's work on the Project was \$90,818.02; thus, when added to the Contract Price, the Mitchells' minimum payment

obligation to Builder was \$1,122,841.02. But the Mitchells ultimately paid Builder less than even this basic sum of the Contract Price plus the applicable tax (unchallenged Findings 165, 166, *CP 470*).

2. The Contract Price Excluded the Cost of Certain Work

Paragraph 10 of the Contract excludes from the Contract Price “all site preparation work, including clearing, hauling, delivery of soils, compaction of adequate fill material, perc or other soil tests” *CP 52*. The costs associated with this work were in addition to the Contract Price, and were to be “provided by Owners at Owners' sole expense.” *CP 52*.

3. The Contract Price did not Include the Cost of Certain Work Required for Compliance with Code

Paragraph 16 of the Contract provides that “[i]f any changes in work are reasonably necessary to satisfy any applicable laws, codes or regulations, Contractor may install such changes with adjustments to Price and Completion Date.” *CP 51*.

In the Contract, the Mitchells warranted that the plans they had given to Builder were in compliance with all applicable code requirements. *CP 49 at ¶3*. The initial house plans specified that the garage was to be separate from the rest of the house. *RP 214-16, 319-20*. Above the garage, a living space was planned for either a bedroom or a media room. *RP 214-16*. However, after execution of the Contract, it was discovered that, for the upper floor of the garage to be considered habitable and in order to meet other code requirements, the garage needed to be connected to the house. *RP 26, 214-16*.

This was accomplished by the addition of a breezeway between the house and the garage. *RP 26.* This 130 square foot addition involved several trades for redesign, demolition, framing, insulation, sheetrock, electrical, siding, roofing, paint, and trim. *RP 58-59.* This addition resulted in additional costs for which the Mitchells were liable to Builder pursuant to Paragraph 16 of the Contract. *CP 51.*

4. The Parties' Course of Dealing Regarding Billing Statements and Payments

Throughout the construction of the house, Builder sent the Mitchells monthly billing statements, comprised line items delineating the time and materials that were being expended on the project plus contractor markup, and which included invoices, purchase orders, and receipts from subcontractors and suppliers that substantiated each billing statement. *RP 52-56. passim.* Upon presentation, the Mitchells met with Builder and reviewed the billing statements in detail. *RP 52-56.* And, except for the last two billing statements, the Mitchells paid Builder from these billing statements. *RP 75-77.*

But the Mitchells stopped paying Builder before the Project was complete and before it was fully paid for. According to the outstanding billing statements as of August 12, 2008, the balance that the Mitchells owed to Builder was \$121,253.12. *RP 140.* However, one subcontractor's invoice had inadvertently been omitted from Builder's billing statements to the Mitchells; when the amount of this invoice plus the applicable tax was added to the prior balance, the Mitchells ultimately owed a total of

\$126,598.57 to Builder for construction of the custom home (unchallenged Finding 171, *CP 471*).

5. The Mitchells Requested Numerous Changes to Their Plans and Specifications

Right from the start, and throughout the course of the construction, the Mitchells wanted numerous changes to their plans and specifications for the house and requested Builder to install them. *RP 45-46*. An example of one such change was made early on in the construction – the staircase in the entryway was dramatically altered to permit more space in the entryway itself. *RP 178*. The Mitchells’ oral change orders were numerous and were made at various times throughout the construction process. *RP 45-46, passim*.

As stated above, Builder provided the Mitchells with monthly billing statements, along with all supporting documentation, which included invoices and receipts from subcontractors and suppliers of materials purchased for the Project. *RP 52-56; RP 242; passim*. Each month, the Mitchells went over these billing statements with Builder with a fine-toothed comb, *RP 242-43*; these billing statements not only included work that was done for the basic house, as per the Mitchells’ original plans and specifications, but also charges for the special labor and materials that had been specifically requested by the Mitchells or otherwise required during the course of construction. *See, e.g., CP 57-58*. And each month, up until nearly the end, the Mitchells agreed to pay each of Builder’s invoices, either as presented, or with mutually agreeable adjustments. *RP 75-77; RP 368-70*.

In so doing, the Mitchells and Builder established a course of dealing for the management of the plethora of owner-driven modifications to the Project. And by paying for the additional work and materials that were not specified in their original plans, the Mitchells ratified these changes to the Contract, which affected the overall cost of construction that was to be billed to the Mitchells.

In sum, the Mitchells have not paid Builder the balance of the amounts they owe for the construction of their custom home. Instead of paying in full for a truly custom home with numerous specialty upgrades they specifically requested, the Mitchells paid Builder even less than the price of the basic house they had specified in their original plans.

B. Procedural Background.

In March 2009, J.J. Plumbing LLC brought this lien foreclosure action in Pierce County Superior Court, naming Builder and the Mitchells as defendants, among others.¹ Builder brought a Cross-Claim against the Mitchells primarily for breach of contract, to recover the remaining amounts due for construction of the house. The Mitchells counterclaimed against Builder for breach of contract, as well as alleging violations of the Consumer Protection Act.

This matter proceeded to a two-day bench trial on July 17, 2011, where the primary issues presented were with respect to Builder's Cross-Claim for breach of contract against the Mitchells. The trial court heard

¹ Builder ultimately satisfied the claims brought by J.J. Plumbing, leaving the claims between Builder and the Mitchells for trial.

the testimony of Dan Moore, Dustin Clanton (the construction foreman), Tyler Mitchell, and Dawn Mitchell. The Court also reviewed and heard testimony regarding numerous trial exhibits. At the conclusion of the trial, the court took the matter under advisement, and, on August 8, 2011, the Court delivered its oral ruling in the case. On October 21, 2011, the Court entered Findings of Fact and Conclusions of Law and Judgment in favor of Builder and against the Mitchells, which included an award of attorney fees and costs.

The Mitchells have appealed the trial court's characterization of the contract between Builder and the Mitchells, and the trial court's award of attorney fees.

IV. SUMMARY OF ARGUMENT

The Mitchells and Builder modified their construction contract from one that was arguably based on a fixed price to a cost-plus contract, through their mutual course of dealing and course of performance. The conduct of both the Mitchells and Builder subsequent to execution of the written contract resulted in a waiver of the contract provisions that required the Mitchells to submit their change order requests in writing. And, notwithstanding the characterization of the contract as a cost-plus contract, the Mitchells did not even pay Builder as much as would be due under a fixed price contract as alleged.

The Dispute Resolution clause found in Paragraph 28 of the written contract supports the trial court's award of attorney fees to Builder.

V. ARGUMENT

A. Unchallenged Findings of Fact Support the Judgment and Award

1. Standard of Review

Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *see also* RAP 10.3(g).

2. The Mitchells Do Not Challenge Certain Findings of Fact that Support the Judgment and Award

In this case, the Mitchells do not challenge numerous Findings of Fact (“Findings”) that collectively support the trial court's award of damages to Builder. First of all, under the express terms of the written contract, the Mitchells do not challenge that they were obligated to pay Builder an amount equal to the sum of the following:

- The Contract Price of \$1,032,023, (Findings 13, 14; *CP 457*);
- Sales, excise, or other taxes, (Findings 14-17, *CP 457*);
- Finance charges, (Finding 23, *CP 457*; Finding 73, *CP 462*)
- Charges for site preparation work and other items enumerated in Paragraph 10 of the written contract, (Findings 18 - 22, *CP 457*); and
- Charges for work reasonably necessary to satisfy any applicable laws codes, or regulations, (Findings 24-25, *CP 458*).

Furthermore, the Mitchells do not challenge that they were obligated to pay Builder at least \$1,185,951.09 for the construction of their custom home, comprised of the following amounts:

- \$1,085,972.35 as the principal amount for the construction of the custom home through November 3, 2008. (Finding 66, *CP 461*).

- \$95,192.84 for taxes for construction of the custom home through November 3, 2008. (Finding 71, *CP 462*).
- \$4,785.90 for finance charges that accrued through November 3, 2008 for the construction of the custom home. (Finding 73, *CP 462*).

The Mitchells also do not challenge the fact that the total amount they paid Builder for construction of the custom home was even less than the sum of Contract Price plus applicable tax. (Findings 165, 166, *CP 470*).

Most importantly, the Mitchells do not challenge the trial court's Finding that, as of November 3, 2008, the Mitchells owed a total of \$126,598.57 to Builder for construction of the custom home (Finding 171, *CP 471*). Nor did they challenge the trial court's findings that 1) the amounts that Builder billed to the Mitchells were reasonable and appropriate for construction of the custom home on a cost-plus basis (Finding 141, *CP 468*), and 2) that the total principal amount that Builder billed to the Mitchells to build the custom home was not so disproportionate to the other bids that the Mitchells received from other contractors as to make the total principal amount unreasonable (Finding 69, *CP 461*).

In addition to the principal amount of the judgment, the Mitchells do not challenge the trial court's finding that prejudgment interest began to accrue as of November 3, 2008 at a rate of one percent (1%) per month, to be compounded monthly, on a principal amount of \$126,598.57 (Finding 180, *CP 471*).

Because they are verities on appeal, the unchallenged Findings of Fact identified above render moot the Mitchells' challenge to the trial court's

characterization of the contract between the parties as being a cost-plus contract as opposed to a fixed-price contract.

B. The Mitchells Waived Certain Claims.

1. Standard of Review.

Appellate review is limited to argument and authority first identified in some manner in the appellant's opening brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Under RAP 10.3(a)(4) and (6), an Appellant's brief must include Assignments of Error, arguments supporting the issues presented for review, and citations to legal authority. RAP 10.3(a). A party challenging a finding of fact bears the burden of showing that it is *not* supported by the record. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 425, 10 P.3d 417 (2000). Failure to support a challenged finding or conclusion with appropriate argument and citations to the record waives the assignment. RAP 10.3(a)(5)-(6); *Milligan v. Thompson*, 110 Wn.App. 628, 635, 42 P.3d 418 (2002); *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (1998) (“[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration”), review denied, 136 Wn.2d 1015 (1998).

2. The Mitchells Do Not Support All of Their Challenges to Findings and Conclusions.

a. Findings Challenged Without Argument.

In their brief, the Mitchells summarily challenged the following Findings, but failed to provide any argument to support these challenges, and have thus waived them.

Finding 181: “Builder has claimed it is entitled to an award of attorney fees and costs as the prevailing party, pursuant to Paragraph 28 of the Contract.” This Finding is based on Builder’s Cross-Claim filed May 29, 2009 (*CP 42-64*) and Builder’s Motion for Attorney Fees and Costs filed August 26, 2011 (*CP 228-36*). The Mitchells have not made any argument that this is not the case.

Finding 182: This Finding quotes language directly from the written contract between the parties. *CP 55*. The Mitchells have not made any argument that this is not the case.

Finding 183: “The facts and circumstances of this action constitute a ‘dispute,’ as that term is used in Paragraph 28 of the Contract.” This Finding applies the ordinary meaning of the English language word “dispute” to Paragraph 28, just as it is used in Paragraph 26 of the same written contract. *CP 55*. Both Tyler Mitchell and the Mitchells’ counsel even described this as a dispute. *RP 10, 25, 283-84*. The Mitchells have not made any argument to the contrary.

b. Conclusions Challenged Without Argument.

In their brief, the Mitchells also summarily challenged the following Conclusions of Law ("Conclusions"), but failed to provide any argument supported by legal authority regarding these challenges, and have thus waived them.

- the trial court's award of prejudgment interest (Conclusions 27, 29, and 31; *CP 477*),

- the trial court's description of Paragraph 23 of the written contract as being a "boilerplate clause" (Conclusion 8; *CP 474*);
- the trial court's award of \$126,598.57 as the principal amount of the judgment (Conclusion 28, *CP 477*), which is based on unchallenged Finding 171 (*CP 471*); and
- the trial court's award of prejudgment interest (Conclusion 29, *CP 477*), which is based on unchallenged Finding 180, *CP 471*.

Because the Mitchells have advanced no arguments regarding these challenges, these challenges should not be considered on review.

The Mitchells also challenged Conclusion 31 (*CP 477*), that Builder is entitled to Post-Judgment Interest at a rate of 12% per annum on the Total Judgment Amount, which is calculated as the sum of the Principal Amount, Prejudgment Interest as of the date of entry of judgment, and Attorneys Fees and Costs. Post-judgment interest is properly awardable here, and applicable to the components stated, pursuant to RCW 4.56.110 and *Sharbono v. Universal Underwriters Ins. Co.*, 158 Wn. App. 963, 247 P.3d 430 (2010). As with the other Conclusions above, the Mitchells have not made any argument to the contrary, and this challenge should not be considered on review.

C. The Ultimate Contract Between the Parties was a Cost-Plus Contract

Notwithstanding the foregoing arguments, Builder offers the following in support of the trial court's well-considered decision that this was indeed a cost-plus contract.

1. Standard of Review.

When evaluating evidence in a bench trial, an appellate court's review is limited to determining whether substantial evidence supports the findings that were challenged and whether the findings support the conclusions of law. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104-05, 267 P.3d 435 (2011). Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Jensen*, 165 Wn.App. at 104, quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003). "An appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party. *Wright v. Dave Johnson Ins. Inc.*, ___ Wn. App. ___, 275 P.3d 339, 351 (2012). Appellate courts may not hear or weigh evidence, find facts, or substitute their judgment or opinions for those of the trier-of-fact, even though the reviewing court might have found the facts differently if it had been the trier of the facts. *Jensen*, 165 Wn.App. at 104; *State Farm Mut. Auto. Ins. Co. v. Erickson*, 5 Wn.App. 688, 692, 491 P.2d 668 (Div. 2 1971), citing *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959) (substitution of findings not permitted by Constitution).

Instead, a reviewing court must defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of

the evidence and credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). The deference accorded under the substantial evidence standard recognizes that the trier of fact is in a better position than the reviewing court to evaluate the credibility and demeanor of the witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994).

If a reviewing court determines that the evidence supports the findings, it must then consider whether the findings support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Such questions of law and conclusions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

2. Substantial Evidence Supports a Cost-Plus Contract

The trial court was correct in finding that the parties ultimately had a "cost-plus" contract, and not a contract for a fixed-price. The Mitchells have posited otherwise, contending that the evidence did not support findings that the contract was a cost-plus as opposed to a fixed-price contract. However, each of the trial court's Findings is supported in the record by substantial evidence, as discussed below.

Finding 37: By challenging Finding 37, the Mitchells contend that there were no separate oral agreements upon which they relied to define their contractual relationship. However, the Mitchells admittedly requested and accepted numerous changes and upgrades from their original plans and specifications. *RP 237-239, 322-24, 364*. In making their oral requests, the Mitchells repeatedly expanded the scope of the work beyond the scope specified in the Mitchells' original plans and

specifications. In reliance upon those requests, Builder made these changes and upgrades to the Mitchells' house. In each case where the Mitchells requested changes to their plans and specifications, and where Builder fulfilled those requests, a separate oral agreement was created upon which each of the parties relied to define their contractual relationship. And Mr. Mitchell's own testimony about oral agreements for the placement of stucco and stone on the house, *RP 262*, is also at odds with the Mitchells' challenge to Finding 37. This course of performance modified the contractual relationship of the parties.

Finding 85: The record is replete with testimony that extra work was required by code or expressly requested by the Mitchells, which changed the scope of the work contemplated by the Mitchells' original plans and specifications. *RP 45-50, 57-58, 61-63, 67-69, 73, 78*.

Each month, Builder presented the Mitchells with a billing statement, accompanied by supporting documentation, that stated the time and materials expended on each aspect of the work, and the associated cost for each, including extra work required or requested by the Mitchells that changed their plans and specifications. And, although the Mitchells periodically expressed concern about the overall cost of construction, the Mitchells never objected to the conduct of the specific new work that they had requested or to the manner in which they were being billed. After carefully reviewing these billing statements and supporting documents, the Mitchells paid Builder for that work based on the time and materials billing statements they were presented.

The Mitchells' agreement to pay for the extra work caused by their requested changes and upgrades is readily implied by the fact that the Mitchells did pay for that extra work, at least to begin with. The Mitchells' acceptance of the benefits of the extra work and the fact that they did pay for that extra work ratified their agreement that they would pay for work that they had requested Builder perform above and beyond their original plans and specifications.

Finding 43: "There was an understanding between the Mitchells and Builder that the amount that was going to be billed to the Mitchells and the cost to build this custom home was going to exceed the amount that was going to be financed by the Lender." *CP 459*. At least part of this understanding between the Mitchells and Builder was memorialized in the written contract, signed by Tyler Mitchell and Dan Moore on behalf of Builder. *CP 49-56*. The Contract Price in the written contract was \$1,032,023, which was equal to the amount that the Lender had approved for the Mitchells' loan. *CP 52*. However, as discussed above, the written contract specified that the Contract Price did not include taxes, site preparation work, or work that would be required for the house to conform to the building codes. *CP 51, 52*. Because, at the very least, sales tax was to be charged to the Mitchells, the amount to be billed to the Mitchells to build this custom home was obviously going to exceed \$1,032,023, the amount that was going to be financed by the Lender.

Finding 86: The Mitchells contend that "[t]here was no evidence presented that Builder of Dreams ever told the Mitchells that any changes would require additional payments." *Appellants' Brief at 22*. However,

the written contract itself says, “Any change order may increase the Contract Price and/or delay the Completion Date.” *CP 53 at ¶17* (emphasis added). Even if one were to disregard common sense, it would be patently unreasonable to think that the Mitchells truly believed that they were getting any changes, including all of the custom upgrades, for free.

Finding 110: The parties did treat the Contract to be as one for the construction of a custom home on a cost-plus basis. The initial terms of the contract between Builder and the Mitchells were set forth in the written Contract dated March 9, 2007. As discussed above, after the parties executed that written contract, however, the Mitchells orally requested many changes to the design of the house that deviated from the Mitchells’ original plans and specifications. Although the Mitchells did not submit these requests for changes in writing as contemplated by the terms of the written contract, Builder acquiesced and gave the Mitchells “whatever they asked for.” *RP 82, 122, 364-65*.

Right from the start, Builder billed the Mitchells monthly on a cost-plus basis, submitting time and materials billing statements to the Mitchells. Until near the end of construction, the Mitchells paid Builder from these statements on this cost-plus basis. No evidence was presented at trial that there was anything wrong with any of Builder’s invoices, including duplications or charges that were being billed for labor or materials that were not applied to or used in the Mitchells’ custom home. (unchallenged Finding 154, *CP 469*). In their course of performance during construction, the parties did conduct themselves in a manner consistent with a cost-plus contract.

Finding 111: Mr. Moore repeatedly testified on behalf of Builder that he considered this a cost-plus contract and treated it as such:

Q (By Mr. Anderson) Did you understand this contract to be anything other than a fixed-price contract?

A Yes. It's been cost-plus since Day 1.

RP 27; see also, RP 29 ("It was all verbal. Anything that they wanted to be done, it was cost-plus. It's been that way since Day 1."); *RP 87, 91, 93, 110-11.*

Findings 118, 119, 137, and 173; Conclusion 3: Although the contractual relationship between the parties began pursuant to the written contract dated March 9, 2007, the parties changed the terms of that relationship each time the Mitchells orally requested changes to the project, each time Builder did specifically what the Mitchells requested, and each time the Mitchells ratified the agreement by paying Builder for those changes.

The Mitchells do not contest that, on Builder's first invoice dated April 10, 2007 and on every invoice thereafter, Builder billed the Mitchells on a cost-plus basis. (unchallenged Finding 115, *CP 466*). And, each month, the Mitchells reviewed and paid from Builder's cost plus billing statements, which comprised line items delineating the time and materials that were being expended on the Project plus contractor markup. While the Mitchells periodically expressed concern about the amount of money they were spending on their project, *RP 220*, they never testified that they ever objected to the manner of the billing or that construction of the custom home was being billed on a cost-plus basis. *RP 54, 242-244.*

Consistent with the testimony adduced at trial, the Mitchells did not challenge Finding 117, *CP 466*.

Through a repeated pattern of the Mitchells' oral requests for upgrades and changes, Builder's installation of those upgrades and changes, the Mitchells' acceptance of those upgrades and changes, and the Mitchells' payment for those upgrades and changes, the parties engaged in a pattern of conduct that constituted a waiver of any requirement that the Mitchells put change order requests in writing.

3. **The Parties Waived Terms of the Written Contract**

Conclusion 26 correctly states that "[t]he Mitchells, by their conduct subsequent to execution of the Contract, waived any requirement contained in the Contract that change orders be memorialized in writing." Parties to a contract can agree to modify a contract and waive provisions that are for their benefit.

A building contract provision requiring a written order for alterations or extras will be enforced. However, ***the requirement of a writing is for the benefit of the owner, and the owner, either expressly or by conduct, may waive such a requirement.***

Swenson v. Lowe, 5 Wn.App. 186, 188, 486 P.2d 1120 (1971) (emphasis added), cited with approval in *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 387, 78 P.3d 161 (2003). See also *Am. Sheet Metal Works, Inc. v. Haynes*, 67 Wn.2d 153, 159, 407 P.2d 429 (1965) ("There is evidence in the instant case indicating that appellant authorized, permitted, and directed respondent to perform the work in question.... The trial court did not err in considering the condition waived.").

Based on the repeated course of performance of the parties following the execution of the written contract, the trial court correctly found that the Mitchells (and Builder) had waived any requirement that change orders be in writing.

4. The Merger Clause Was Ineffective

As correctly stated in the trial court's Conclusion 9, Paragraph 23 of the Contract was not factually correct at the time it was entered into. Paragraph 23 states as follows:

Owners acknowledge and understand that their written contract is the complete and entire understanding of the parties, and no verbal promise or representation by anyone shall vary or modify the written contract. All discussions shall have no effect unless signed in writing by the parties.

CP 55.

However, the Mitchells testified at trial that their contractual relationship with Builder was controlled not only by the written contract dated March 9, 2007, but also, at the same time, by a Construction Cost Breakdown. *RP 202-04*. Regardless of whether this Construction Cost Breakdown itself constitutes a written contract, the Mitchells' sworn reliance upon this document at trial belies their current position that Paragraph 23 of the written contract was factually correct at the time that it was entered into.

Moreover, immediately subsequent to execution of the written contract, the conduct and performance of the parties deviated from the express terms of that contract. In particular,

- 1) The Mitchells repeatedly requested upgrades and changes to their plans and specifications without putting them in writing as required;
- 2) Builder fulfilled the Mitchells' numerous requests for upgrades and changes without requiring a written change order.
- 3) Builder billed the Mitchells in writing on a time and materials (a cost-plus) basis; and
- 4) The Mitchells paid Builder, using checks, on a time and materials (a cost-plus) basis.

This course of repeated agreement to deviate from the terms of the written contract render Paragraph 23 of the written contract ineffective.

When there is material parol evidence to show that outside agreements were relied upon, those parol agreements should be given effect rather than permit boilerplate to vitiate the manifest understanding of the parties.

Lyall v. DeYoung, 42 Wn.App. 252, 257-58, 711 P.2d 356 (1985). And so it is here. The parties in this case relied upon their course of performance, through numerous oral agreements made during the construction of the custom home. The Mitchells may not now use the boilerplate of Paragraph 23 to "vitate the manifest understanding of the parties."

In Conclusion 10, the trial court properly held that there was a merger of the oral and written terms of the contract. The question of whether a merger of oral and written terms of the Contract occurred is a question for the trier of fact. *Ban-Co Inv. Co. v. Loveless*, 22 Wn.App. 122, 587 P.2d 567 (1978); *Olsen Media v. Energy Sciences, Inc.*, 32 Wn.App. 579, 584, 648 P.2d 493 (1982).

Each of the parties' admitted practices and patterns of conduct with regard to change requests and fulfillment, billing, and payment were

integral to the process of building this custom home. As such, by their course of performance during the construction of the custom home, the parties created new oral terms of their contract that merged with and superseded the original written terms of that contract.

D. The Trial Court Properly Awarded Attorney Fees

The terms of the Dispute Resolution provision of the Contract were not ambiguous and do support an award of attorney's fees in favor of Builder, as the trial court held in its Conclusion 30.

1. Standard of Review.

When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable. *Ethridge are v. Hwang*, 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001), citing *Public Util. Dist. 1 v. International Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994). Whether a party is entitled to attorney fees is an issue of law that is reviewed *de novo*, and the reasonableness of a fee award is reviewed for an abuse of discretion. *Id.*

The Mitchells urge this court to find that "... the trial court abused its discretion in making an award of attorney fees based upon Paragraph 28...." *Appellants' Brief at 35*. However, "[a] trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Davis v. Globe Machine Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). "An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." *Singleton v. Frost*, 108 Wn.2d 723, 730, 742 P.2d 1224

(1987) (quoting *Wilkinson v. Smith*, 31 Wn. App. 1, 14, 639 P.2d 768 (1982)).

2. The Award of Attorney Fees is Authorized by Contract.

In Washington, attorney fees may be awarded when authorized by a private agreement, a statute, or a recognized ground of equity. *Fisher Properties, Inc., v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). "The measure and mode of compensation of attorneys and counselors, *shall be left to the agreement, expressed or implied, of the parties.* . ." RCW 4.84.010 (2009) (emphasis added). Where a contract specifies an award of attorney fees, the amount of those fees remains to be fixed by the Court. RCW 4.84.020.

The written contract between Builder and the Mitchells identifies Builder as the "Contractor" and the Mitchells as "Owners." CP 49. That written contract contains a Dispute Resolution provision at Paragraph 28, which allows for an award for attorney fees in this situation:

28. **Dispute Resolution.** To the extent that Purchasers may have any claim against Contractor for faults, construction defects, or breach of contract, Owners agree that, regardless of any warranty periods, they shall assert in writing any and all claims against Contractor within six (6) months of warranty expiration, or forever waive and release said claims in full against Contractor. Any warranty work, regardless of when made, shall not extend this provision. For *any dispute, Owners* are solely responsible for *any* consequential expenses, damages, *and attorney fees* incurred in resolving the *dispute*.

(emphasis added). CP 55. So, while the first part of Paragraph 28 speaks to the timing and limitation of certain claims against the Contractor (Builder), this last sentence speaks to assignment of liability for the

payment of *any* expenses, damages and attorney fees for *any dispute* under this Contract. Naturally, this would include Builders' attorney fees as well as those incurred by the Mitchells.

3. Builder is Entitled to its Attorney Fees and Costs Under the Contract.

This lawsuit involves breach of contract claims and is a judicial manifestation of a *dispute* over those claims. A plain reading of this unambiguous language can only lead to one reasonable conclusion: as Owners, the Mitchells are obligated to pay for all expenses, damages, and attorney fees incurred in resolving this *dispute* over the performance of the parties under the Contract, including those incurred by Builder.

Builder brought its Cross-Claims against the Mitchells to recover principal amounts due pursuant to a contract between the parties, along with interest and attorney fees and costs of suit. The Mitchells, on the other hand, sought to recover from Builder for alleged breaches of that contract between the parties, and asked for attorney fees as well.

At trial, Builder successfully prosecuted its claims against the Mitchells, and the Mitchells did not succeed on any of their cross-claims against Builder. Indeed, the Mitchells have not challenged Finding 184 that "Builder is the prevailing party in this action." *CP 472*. As such, Builder is entitled to an award of its attorney fees and costs pursuant to Paragraph 28 of the Contract.

4. The Context Rule Supports an Award of Attorney Fees to Builder

The Mitchells' argument, however, invites an examination of just *why* the trial court was correct in its oral ruling. The Washington Supreme Court has adopted the "Context Rule" for the interpretation of contracts:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990), quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973). Extrinsic evidence may be considered whether or not the contract terms are ambiguous. *Berg*, 115 Wn.2d at 669.

In applying the Context Rule, one factor for the Court to take into account is the reasonableness of the interpretations advocated by the parties. The Mitchells have set forth what they believe to be four possible interpretations of the Dispute Resolution provision of the Contract, none of which are particularly availing in the context of the Contract as a whole.

As a preliminary observation, and contrary to the Mitchells' position, Paragraph 28 does not "define" or limit the scope of the word "dispute." The word "dispute" is not even used in the body of Paragraph 28 until its last sentence: "***For any dispute***, Owners are solely responsible for ***any*** consequential expenses, damages, and attorney fees incurred in resolving the ***dispute***." CP 55.

Notably, Paragraph 26 of the Contract also uses the word “dispute”:

Owners agree that *any dispute arising out of this transaction* shall be with Contractor only, . . .

(emphasis added) *CP 55*. In this last sentence of Paragraph 26, the Mitchells, as Owners, are acknowledging the scope of disputes – 1) that they are disputes arising out of *this transaction* between Builder and the Mitchells, and 2) that they are disputes *with Builder*, and not with any third parties.

The Mitchells’ argument regarding the import of the remainder of Paragraph 28 is frustrated by the holding of the Supreme Court in *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 145 P.3d 371 (2006). The contract at issue in *Scoccolo* contained a Paragraph 5, the first sentence of which was an indemnification clause dealing with suits between contractor Scoccolo and third parties, and the second sentence of which was a broad attorney fee provision. The *Scoccolo* Court held that, despite the existence of the indemnification language immediately preceding it, the attorney fee provision of the second sentence applied to disputes between the City and the contractor as well as to actions between the contractor and third parties. *Scoccolo*, 158 Wn.2d at 520-21. And so it is the case here.

The Context Rule espoused in *Berg* requires that this attorney fee provision be viewed in light of this Contract as a whole between Builder on the one hand and the Mitchells on the other hand, as well as in light of all other factors set forth in *Berg*. When viewed this way, at least three irrefutable points jump out and should be considered:

- The only parties to this Contract are the Mitchells and Builder; there are no third parties to this Contract;
- This attorney fee provision is contained *in this Contract* under the heading of Dispute Resolution, *CP 55*; and
- Under Paragraph 26 of the Contract, the Mitchells have agreed, *as Owners*, that any dispute *arising out of this transaction* shall be with Builder only. *CP 55*.

A reading of this provision in the context of the remainder of the Contract, and consideration of the other *Berg* factors, leads to a logical and reasonable conclusion that this is an attorney fee provision that is enforceable against the Mitchells.

5. As a Unilateral Attorney Fee Provision, Paragraph 28 Entitles Builder to an Award of Attorney Fees.

a. RCW 4.84.330 applies.

After careful reading, however, Paragraph 28 could appear to be a *unilateral* attorney fee provision, to which RCW 4.28.330 would apply.² The purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral; to ensure that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009). It does so by expressly awarding fees to the prevailing party in a contract action. *Id.*

² RCW 4.84.330 provides in pertinent part as follows:

. . . where [a] contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

[RCW 4.84.330] further protects its bilateral intent by defining a prevailing party as one that receives a final judgment. ***This language must be read into a contract that awards fees to one party any time an action occurs, regardless of whether that party prevails or whether there is a final judgment.***

Wachovia, 165 Wn.2d at 489 (emphasis added).

The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the first two requirements of RCW 4.84.330, that (1) the action is “on a contract or lease,” and (2) it contains a unilateral attorney fee or cost provision. Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 859, 158 P.3d 1271 (2007), review granted 163 Wn.2d 1011, 180 P.3d 1291, affirmed 165 Wn.2d 481, 200 P.3d 683, citing Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

RCW 4.84.330 also requires that there be a “prevailing party.” A party may be considered the prevailing party even in cases where not all of that party’s claims are allowed or where the opposing party succeeds in some measure. See e.g., Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 772, 115 P.3d 349 (2005), reconsideration denied (contractor deemed to be “prevailing party” even though trial court ruled in favor of subcontractor on secondary claim).

b. As the Prevailing Party, Builder Must Be Awarded Its Attorney Fees.

Builder is the prevailing party in this action. Builder prevailed on the overwhelming bulk of its breach of contract claims against the Mitchells. Builder successfully defended against all of the Mitchells’ claims against Builder. The Mitchells prevailed on *none* of their claims

against Builder. Indeed, the Mitchells did not challenge the trial court's Finding 184 that "Builder is the prevailing party in this action." CP 472.

Application of RCW 4.84.330 here *mandates* an award of attorney fees to Builder. *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140, 157 P.3d 415 (2007), *review denied* 162 Wn.2d 1022, 178 P.3d 1033 (RCW 4.84.330 does not allow for exercise of discretion in deciding whether to award fees; the only discretion concerns the amount). *See also, Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 859, fn 6, 158 P.3d 1271 (2007), *citing Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987). And because Builder is the prevailing party in this action, Builder must be awarded its fees against the Mitchells.

6. The Attorney Fee Provision is not Irreconcilably Ambiguous

The Mitchells contend that the use of the word "Purchasers" in the Contract is an ambiguity that somehow relieves the Mitchells, as Owners, from their liability for attorney fees and costs of resolving this dispute under the last sentence of Paragraph 28. This contention is not well-founded.

Courts are obliged to give words and provisions in a contract their ordinary meaning. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). If their meaning is uncertain or if they may reasonably be understood as having more than one meaning, those particular words or provisions are considered ambiguous. *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994), *review denied*, 127 Wn.2d 1003, 898 P.2d 308 (1995).

But ambiguity will not be read into a contract where it can be reasonably avoided. McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983); Mayer v. Pierce County Med. Bureau, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). And words and provisions in a contract are not ambiguous simply because a party suggests an opposing meaning. Shafer, 76 Wn. App. at 275; Mayer v. Pierce County Med. Bureau, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). “There is ... no hard and fast rule against applying common sense to situations of this kind.” James S. Black & Co. v. P & R Co., 12 Wn. App. 533, 530 P.2d 722 (1975). Courts interpret contract provisions to render them enforceable whenever possible. Patterson v. Bixby, 58 Wn.2d 454, 459, 364 P.2d 10 (1961).

In this framework, the ordinary and usual meaning of the word “Purchasers” is this: parties who are buying and paying for something and, in the context of this Contract, the parties who are buying and paying for a house. There can be no reasonable meaning for use of the word “Purchasers” in Paragraph 28 of the Contract other than to refer to the Mitchells, as purchasers of the house under the terms of the Contract. The use of the word “Purchasers” does not introduce irreconcilable ambiguity and is not fatal to any pertinent portion of this Contract, including the last sentence of Paragraph 28.

Other parts of the Contract support this same conclusion. Paragraph 26 of the Contract, for example, begins as follows:

26. Party In Interest. Purchasers understand that the sole party they are contracting with is Builder of Dreams, LLC, a Washington limited liability company.

CP 55. Other than Builder, the Mitchells were the only other parties to the subject Contract; Builder was the sole party with whom the Mitchells are contracting under this Contract, and *vice versa*. As such, the Mitchells were the only ones who could acknowledge this Contract with Builder.

In sum, the ordinary meaning of the word “Purchasers” clearly applies to the Mitchells. The only reasonable interpretation of this use of the word “Purchasers” is that it was referring to the Mitchells and not to some unnamed third party.

7. Any Claimed Ambiguity is Moot

If, after viewing the contract in the manner set forth in *Berg*, the intent of the parties can be determined, and there is no need to resort to the rule that ambiguity be resolved against the drafter. *Roberts, Jackson & Assoc. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985), citing to *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 468 P.2d 666 (1970).

The meaning of the last sentence of Paragraph 28 of the Contract should be as abundantly clear to anyone reading this Contract as it was to the trial court; its meaning is unaffected by the presence of the word “Purchasers” elsewhere in that paragraph. Even if the trial court had perceived any ambiguity in the Contract, as contrived by the Mitchells,

application of the Context Rule resolved that ambiguity, and there is no need to consider it in the interpretation of the Contract. As such, there was no need to construe such an ambiguity against Builder as the drafter of the Contract.

E. Builder Requests Its Attorney Fees and Costs on Appeal

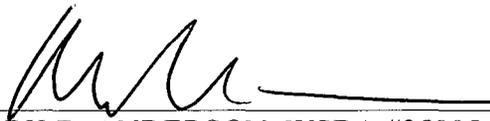
Builder respectfully requests that it be awarded attorney fees and costs on appeal pursuant to RAP 18.1, and pursuant to the provisions of the written contract between the parties as more fully discussed above.

VI. CONCLUSION

Builder of Dreams is entitled to full compensation for building the custom home the Mitchells wanted and got. Builder therefore respectfully requests that the decision of the trial court be AFFIRMED, and that Builder be awarded its costs and reasonable attorney fees on appeal.

Respectfully submitted this 28th day of June 2012.

ANDERSON LAW FIRM PLLC



MARK B. ANDERSON, WSBA #25895
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a citizen of the United States of America and a resident of the State of Washington, am over the age of twenty-one years, am not a party to this action, and am competent to be a witness herein.

I hereby certify that on the 28th day of June 2012, I personally delivered a copy of the foregoing Brief of Respondents to the following parties entitled to service:

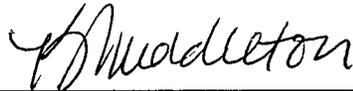
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FILED
COURT OF APPEALS
DIVISION II
2012 JUN 28 PM 4:00
STATE OF WASHINGTON
BY _____
DEPUTY

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

DATED this 28th day of June 2012, at Tacoma, Washington.



Kimberly A. Middleton