No. 103658-2

SUPREME COURT
OF THE STATE OF WASHINGTON

CR CONSTRUCTION, LLC,
a Washington limited liability company,

Plaintiff,

and

CORSTONE CONTRACTORS LLC,
a Washington limited liability company,

Petitioner,

v.

SHERLOCK INVESTMENTS DUVALL, LLC,
a Washington limited liability company,

Respondent,

and

THE HANOVER INSURANCE COMPANY, bond no. BL21050154; ALASKA USA FEDERAL CREDIT UNION,

Defendants.

ANSWER TO PETITION FOR REVIEW

George A. Mix
WSBA #32864
Joshua A. Grissom
WSBA #58864
Mix Sanders Thompson, PLLC
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101
(206) 521-5989

Aaron P. Orheim
WSBA #47670
Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Mark A. Clausen
WSBA #15693
Clausen Law Firm, PLLC
9655 SE 36th Street, Suite 100
Mercer Island, WA 98040
(206) 223-0335

Attorneys for Respondent
Sherlock Investments – Duvall, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Statutes

Rules

Other Authorities

A. INTRODUCTION

This Court has reviewed change order procedures in construction contracts multiple times in recent years, setting bright-line rules that the Court of Appeals consistently applies across its three divisions. If a party discovers a reason why it wishes to increase the contract sum, it must abide by the mandatory notice and change order provisions of a construction contract, or it waives the right to request additional payment.

This Court should deny review because Division I's unpublished opinion applied that clear rule based on uncontested facts. The trial court should have granted relief as a matter of law. Issues of contract interpretation, based on undisputed facts, are a matter for a court not a jury, as Division I correctly concluded. Its unpublished decision creates no conflict, changes nothing about the law, and affects zero persons beyond the private parties in the caption of this isolated civil lawsuit. Corstone cannot meet the criteria of RAP 13.4(b).

B. STATEMENT OF THE CASE

Division I's opinion accurately describes the facts, as does Sherlock's Court of Appeals briefing. In short, the parties had a construction contract that made prior written change orders a condition precedent should Corstone Contractors, LLC ("Corstone") seek additional compensation for additional work. Ex. 4 §15.1.4 ("If the Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work."). Specifically regarding subsurface conditions, including soils, the Contract stated that the "[f]ailure to provide prompt notice as required herein shall constitute a waiver by Contractor of any adjustment of the Contract Sum or Contract Time for such condition." Ex. 4 §3.7.4.

These mandatory change order rules were clear, undisputed, and agreed to. Corstone's project manager *admitted* that "if the contractor wanted to make a claim for increase in the contract sum, written notice was required to be given before

executing the work." RP 1460. *See also*, RP 738 (Corstone confirming the Contract established a clear procedure for increasing the Contract Sum).

Yet Corstone told its subcontractor, CR Construction, to undertake significant work excavating soils that it claimed entitled Corstone to an increase in the contract sum. And Corstone admitted *multiple* times at trial that it failed to provide change orders or construction notice prior to engaging in that work. RP 966-67 (Corstone CEO's testimony); *see also*, RP 1457-60 (Corstone superintendent admitting that work had been done for "several months" before Corstone submitted change orders to Sherlock). Thus, Sherlock was deprived of its contractual right to review the proposed work, assess alternative measures that might have mitigated the increased cost of the work, and approve the work before it was completed.

In an unpublished decision, Division I held that the trial court should have dismissed Corstone's claims for additional payment as matter of law under CR 50. The undisputed evidence

showed that Corstone ignored the mandatory change order procedures before undertaking work, which it had to do to seek an increase to the Contract Sum. Corstone moved for reconsideration, raising new theories that constitute this petition for review, including its primary argument that the Contract did not contain a waiver provision, which is false as a matter of fact and law. Division I denied reconsideration, and this petition follows.

C. ARGUMENT

(1) Review Is Not Warranted Under RAP 13.4(b)(1) or (2); Division I's Unpublished Opinion Applied Settled Precedent Thoroughly Established by This Court

This Court has addressed the issue of construction change order procedures three times since 2003, holding each time that written notice provisions in a construction contract are *mandatory* and that actual notice of such a claim is insufficient unless there is clear evidence of a waiver. *See NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d 854, 857, 870-

71, 426 P.3d 685 (2018) (no exception to contract's written notice of claim requirements); *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 773, 174 P.3d 54 (2007) (equivocal conduct could not impliedly waive contract's claim procedures); *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 377, 391, 78 P.3d 161 (2003) (actual notice did not excuse compliance with contractual claim procedures).

Of these, the most analogous to this case is *Mike M. Johnson*; Division I properly applied this Court's decision. That contract also included "mandatory notice, protest, and formal claim procedures for claims of additional compensation, time extensions, and changed conditions." 150 Wn.2d at 379. This Court held that a contractor had no right to recover as a matter of law because it failed to follow the mandatory change order procedures, even though it provided actual notice. There is no "actual notice" exception and that notice requirements would "be enforced absent either a waiver by the benefiting party or an agreement between the parties to modify the contract." *Id.* at

385.

The Court of Appeals has been applying this universal principle in Washington for decades. *See Clevco, Inc. v. Mun. of Metro. Seattle*, 59 Wn. App. 536, 542, 799 P.2d 1183 (1990), *review denied*, 117 Wn.2d 1006 (1991) ("failure to comply with the requirements of the change order provision is fatal to a later claim for compensation based on extra work") (cited with approval in *Mike M. Johnson*). Division I properly distinguished the arguments Corstone makes in ways that conform to long-standing precedent

For example, Corstone argues that Sherlock knew excavation was more difficult due to delays, but it does not matter if the parties knew conditions related to the project had changed. *Sime Const. Co., Inc. v. Washington Pub. Power Supply Sys.*, 28 Wn. App. 10, 13, 621 P.2d 1299 (1980), *review denied*, 95 Wn.2d 1012 (1981) (change orders are mandatory even where all parties knew that key drawings were delayed, which would increase project costs); *Hensel Phelps Const. Co. v.*

King County, 57 Wn. App. 170, 178, 787 P.2d 58 (1990) (subcontractor could not seek more compensation due to failure to provide timely notice, even though general contractor unilaterally accelerated the work schedule increasing expenses).

And contrary to Corstone's arguments that geotechnical engineers reported on soil work, an architect or consultant cannot alter the construction contract or approve increases to a negotiated contract sum. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995) ("[A]n architect and its sub-consultants are not a general agent of his or her employer and have no implied authority to make a new contract or alter an existing one for the employer.").

The Court of Appeals consistently applies these established principles. For example, while this case was pending, Division I decided *Cascade Civil Constr., LLC v. Jackson Dean Constr., Inc.*, 28 Wn. App. 2d 1022, 2023 WL 6210985 (2023) (unpublished), which has strikingly similar facts. That private construction contract also included work for

"dewatering" and soil "excavation." *Id.* at *1. After the project was temporarily delayed, the contractor claimed the delay "created a dramatically different set of work" due to the water table and wet soil. *Id.* at *1. The contractor was also "directed...to make a deeper excavation under one of the buildings, pursuant to a design change from the project architect." *Id.* at *2. Just like this case, the contractor waited until *after* the work was substantially completed to send change orders requesting increases to the contract sum. *Id.* at *2-3.

Division I affirmed dismissing the contractor's claims for additional payment as a matter of law, relying on *Mike M. Johnson* for the rule that "Washington decisions enforce notice and claim procedures in construction contracts." *Id.* at *4. Highlighting that Sherlock's dispute never should have gone to a jury, Division I reiterated that a "dispute concerning the effect of the change order, notice of claim, and dispute provisions presents a question of contract interpretation" which "is a question of law." *Id.* at *4.

Division I also applied these settled rules here. Corstone did not comply with the Contract's mandatory notice provisions. Corstone admitted that it learned about allegedly unsuitable soils and unilaterally instructed CR to proceed with additional work months before submitting a change order to Sherlock. *See*, *e.g.*, ex. 61 (email telling CR to "proceed" with increased work). CR commenced this soil excavation and completed the work in January 2019. *Only after the work was complete* did Corstone send a written change order seeking additional payment. *E.g.*, ex. 100.

Division I correctly held that the trial court should have dismissed Corstone's claims for additional payment as a matter of law, given these undisputed facts. That holding created no conflicts in law.

Now Corstone cites *Shepler Construction Inc. v. Leonard*, 175 Wn. App. 239, 306 P.3d 988 (2013), a case it cited *for the first time on reconsideration* and without ever discussing its facts, to argue some conflict exists between Division I's opinion

and the well-settled law referenced above. *Shepler* does not apply.

Shepler dealt with a joint waiver of a provision in a contract that required arbitration. *Both parties* litigated the case for seven years before one party made an argument that the matter should have been arbitrated first, according to the parties' contract. *Id.* at 242-43. Under those facts, Division I found the failure of both parties to arbitrate first did not require dismissing the ongoing lawsuit.

Shepler did not address a request to increase the contract sum, which requires a written change order *prior to* work being performed. *E.g.*, *Mike M. Johnson*, 150 Wn.2d at 377. Unlike the parties in *Shepler*, Sherlock did not waive the requirement that Corstone submit change orders before performing work. It rejected the belated change orders from the start. *See* exs. 2012, 3127, 3130 (rejecting belated change orders 27, 33, 34, 61, 74, and 75). Sherlock maintained its defenses in its answer, and then sought summary judgment dismissal and CR 50 dismissal

arguing Corstone waived a right to pursue a claim for an increased Contact Sum under the Contract. This case is simply not *Shepler* – it is no wonder Corstone continues to omit the facts of that case in its petition for review.

Division I's decision does not alter or change the law. It creates no conflict among authorities. There is no need for this Court to grant review of an unpublished opinion in this settled area of law when it has done so three times in the last 23 years to clarify the law to the point that it is consistently applied in appellate courts to this day. Review is not warranted. RAP 13.4(b)(1), (2).

(2) Granting Review Would Unsettle Commonsense Precedent and Create Bad Public Policy

Moreover, granting review could result in bad policy. Corstone invites this Court to make bad law, and its invitation should be rejected.

Enforcing formal change order procedures in construction contracts makes sense. Hiring a contractor to remodel a

bathroom in one's home for $20,000 does not permit the contractor to undertake a million-dollar renovation and then demand $1 million payment *after* the work is completed. The owner must be given the chance to make an informed choice among alternatives when faced with a cost overrun *before* those costs are incurred. *See, e.g.*, *Sime*, 28 Wn. App. at 15 (had required notice been given the owner, general contractor, and other interested parties "could have balanced the desirability of [pushing forward with the work] against those costs in determining economic feasibility.").

This case shows precisely why this rule exists. Project managers testified that Corstone's excavation plan created *more unsuitable soils* on site and alternatives such as a crane would have "saved a lot of export" and "a lot of money." RP 543-62. Corstone's own project manager testified that he always scrutinized his subcontractors' change orders ahead of time to ensure they were "legitimate" and necessary. RP 1130-31. Corstone denied Sherlock that opportunity.

The soundness of the rule established in cases like *Mike M. Johnson* surfaced elsewhere during this very project. In another instance Corstone submitted a timely change order, informing Sherlock that an electrical system should be installed and offering to perform the work for $119,000. RP 1461-62; Ex. 3176. Sherlock believed the bid was too high and hired another contractor who did the work for $46,000. *Id.* Sherlock was only able to mitigate this cost because Corstone provided written notice and submitted a change order for approval *before* undertaking the work, as required under the parties' Contract. *Id.* Put another way, because Corstone complied with its contractual notice obligation in that instance, Sherlock saved at least $73,000.

Division I properly construed the Contract as a whole and applied the bright-line rule established by this Court that prior written notice is a prerequisite to any claim for increased payment when required by contract. This case does not meet the RAP 13.4(b)(1), (2), or (4) criteria for review because Division

I's unpublished opinion creates no conflicts and furthers good public policy.

(3) Corstone Raises Arguments It Failed to Raise Below, Thereby Waiving Review, Which Still Do Not Change the Outcome

Beyond failing to meet the mandatory criteria of RAP 13.4(b), review is particularly inappropriate because Corstone argues novel theories it failed to appropriately raise in Division I until a motion for reconsideration, theories that do not change the outcome of this case.

(a) Corstone's Petition Relies on Arguments It Did Not Timely Raise Below

Corstone argued for the first time in its motion for reconsideration that "nothing in [the Contract] makes failure to give [prior] notice [that Corstone intended to seek an increase of the Contract Sum] a waiver." Corstone mot. at 5. It continues to rely on this argument in its petition for review, arguing that an alleged lack of waiver provision separates this case from *Mike M. Johnson*, warranting review. This is not true as a matter of

fact and law. But Corstone's failure to timely raise this issue is fatal on its own and should prevent Supreme Court review.

Washington has a strong public policy in favor "of finality of judicial decisions." *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). In furtherance of that policy, a motion for reconsideration does not allow a party "to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). This Court will ordinarily refuse to decide "issues and theories not appropriately raised before the Court of Appeals." *Peoples Nat. Bank of Washington v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973); *see also, Douglas v. Freeman*, 117 Wn.2d 242, 257, 814 P.2d 1160 (1991) (accord).

In Division I, Sherlock succinctly argued in its opening brief that Corstone's failure to submit a change order before performing the soil work, waived its right to increase the contract price as a matter of law, in accordance with precedent.

Appellant's br. at 17 ("According to the Contract, '[f]ailure to provide prompt notice as required [by the contract] shall constitute a waiver by Contractor of any adjustment of the Contract Sum or Contract Time for such condition.' *Id.* at §3.7.4."). In response, Corstone failed to make the argument it now raises on reconsideration that the waiver provision of "§3.7.4 Concealed or Unknown Conditions" (which covers "subsurface" conditions) does not apply in this case. Corstone never cited §3.7.4 in its Court of Appeals brief; the words "concealed," "unknown," and "subsurface" appear *nowhere* in Corstone's responsive brief.

Corstone did not even dispute that *Mike M. Johnson*, and cases like it apply to this case. As Division I noted, "Corstone fails to respond directly to Sherlock's argument that a contractor who fails to follow contractual notice provisions is barred from seeking additional compensation." Op. at 12. Corstone never cited *Shepler* or otherwise made the arguments it raised for the first time on reconsideration. This alone is reason to deny review

because Corstone did not "appropriately raise" the arguments it now champions until after it lost on appeal. *Peoples Nat. Bank of Washington*, 82 Wn.2d at 830; *Wilcox*, 130 Wn. App. at 241.

In effect, Corstone's belated arguments are issues raised for the first time on appeal, which this Court customarily does not review under RAP 2.5. Division I was correct not to bite on Corstone's belated arguments. Nor should this Court reward Corstone for gambling on a favorable decision, only to raise new theories and arguments after it lost on appeal. The Court should deny review.

But even if this Court entertained Corstone's late arguments, they do not change the outcome as a matter of fact and law.

(b) Interpreting Contracts Is a Matter of Law for Courts Not a Jury, and Division I's Ruling Is Factually Correct

Corstone's argument that the contract does not contain a waiver provision rests on a false premise. The parties' Contract contains an applicable wavier provision. The Contract provides

that the parties negotiated a Contract Sum and if Corstone wished to change the Contract Sum, written notice as provided in the Contract "*shall be given before* proceeding to execute the Work." Ex. 4 §15.1.4 (emphasis added). "Except as otherwise agreed, all changes to the Work *shall comply* with section 7.2 Change Orders. Nothing herein shall limit Contractor's *obligation* to give timely notice as stated in these General Conditions." *Id.* (emphasis added).[1] Section 3.7.4 includes the waiver language Corstone wrongfully claims is missing from the Contract: "*Failure to provide prompt notice as required herein* [*i.e.*, by the Contract] *shall constitute a waiver by Contractor of any adjustment of the Contract Sum or Contract Time for such condition*." *Id.* (emphasis added).

Corstone claims §3.7.4 does not apply. For support of that assertion in the record, Corstone cites a single page of *argument*

[1] As discussed below, these obligations impose conditions precedent to seeking an increase of the Contract Sum, even without §3.7.4's waiver language.

in an opposition filing. CP 2873. But argument from counsel is not evidence.

In reality, §3.7.4 specifically addresses conditions at the site that are "*subsurface* or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents." (emphasis added). The suitability of the soil and the soil excavation work that would need to be completed a "subsurface" condition as shown by the *evidence* in the case. Ex. 2 (reports describing soil suitability as a subsurface condition); Ex. 3 (accord).

This case is deceivingly simple, and Division I got it correct. The parties agreed to one Contract Sum. Corstone performed what it considered additional work based on changed *subsurface* conditions that it argued warranted an increase in that sum. But Corstone failed to submit itemized change orders *before undertaking work* for which it later sought increased payment, a requirement under the contract, thereby waiving its claims.

Division I's unpublished decision is common sense and based on proper reading of the contract *as a whole*. *See In re Marriage of Zier*, 136 Wn. App. 40, 45, 147 P.3d 624 (2006) (Washington courts must "read contracts as a whole" when interpreting them); *Hendricks v. Dahlgren*, 52 Wn.2d 108, 110, 323 P.2d 658 (1958) ("The meaning of a contract may frequently be determined by a resort to the doctrine of probability—by answering the question, What is the common sense of it?"); *Mikusch v. Beeman*, 110 Wash. 658, 661, 188 P. 780 (1920) (whether a contract contains "conditions precedent to the right to enforce performance is to be determined by the intention of the parties, derived from the contract itself, and by application of common sense to each particular case").

Importantly, the interpretation of contracts is a matter for the Court, *not a jury*. RCW 4.44.080; *see also, State v. Richards*, 97 Wash. 587, 592, 167 P. 47 (1917) ("The interpretation to be given written instruments, whether the procedure is on the civil or criminal side of the court, is a matter of law for the court, and

not a matter of fact for the jury."); *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013) ("Contract interpretation is a matter of law."); *Cascade*, 2023 WL 6210985, *4 (2023) (a "dispute concerning the effect of the change order, notice of claim, and dispute provisions presents a question of contract interpretation" which "is a question of law.").

Division I properly interpreted the contract as requiring prior written change orders, based on the plain language of the parties' clear contract. Corstone is simply wrong in fact to argue that the Contract did not contain an applicable waiver condition, a point it did not even contest in its appellate briefing.

(c) Even If the Express Waiver Provision Did Not Apply, Corstone Would Still Lose as a Matter of Law Because the Contract Requires Formal Change Orders as a Condition Precedent to Raising the Contract Sum

Even if the waiver provision in §3.7.4 did not apply to Corstone's claims for increased payment for changed subsurface conditions, *which it does*, Corstone's arguments would still fail.

In essence, Division I interpreted the Contract as a whole to conclude that prior written notice via a change order is a *condition precedent* to a claim for increased payment under the Contract. *See, e.g.*, Op. at 11 ("the contract established the procedure Corstone *had to* follow if it wanted to increase the contract sum") (emphasis added). This is fully consistent with case law and principles of contract interpretation in Washington.

"A condition precedent is an event that must occur before there is a right to immediate performance of a contract." *U.S. Bank Nat'l Ass'n as Tr. for Truman 2016 SC6 Title Tr. v. Roosild*, 17 Wn. App. 2d 589, 599, 487 P.3d 212 (2021). "If the condition does not occur, the parties are excused from performance." *Id.* "Whether a contract provision is a condition precedent or a contractual promise depends on the intent of the parties, to be determined from a fair and reasonable construction of the language used in light of all the surrounding circumstances." *Id.*

Here, the Contract establishes that prior written notice is a condition precedent of increasing the Contract Sum. The parties

agreed in their contract that if Corstone wished to change the Contract Sum, written notice as provided in the Contract "*shall be given before* proceeding to execute the Work." Ex. 4 §15.1.4 (emphasis added). The court in *U.S. Bank* interpreted a similar clause in a contract dispute and concluded as a matter of law that the phrase: "Lender *shall* give notice to Borrower *prior to* acceleration" denoted a condition precedent, not just a contractual promise. 17 Wn. App. 2d at 600 (emphasis in original). This makes sense because the "use of 'shall' in contracts" denotes mandatory, not permissive, requirements. *E.g.*, *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 289, 654 P.2d 712 (1982). "Before" also maintains its plain language meaning of "in advance." Before, *Merriam-Webster.com*, Merriam-Webster, 2023.

This condition precedent is emphasized throughout the Contract, as shown by its use of mandatory, temporal language. Corstone had a duty to "make reasonable best efforts to mutually agree upon the terms of any change to the Work *before the*

changed work is performed." *Id.* §7.3 (supplemental) (emphasis added). "Except as otherwise agreed, all changes to the Work *shall comply* with section 7.2 Change Orders. Nothing herein shall limit Contractor's *obligation* to give timely notice as stated in these General Conditions." *Id.* (emphasis added). "Failure to provide prompt notice as required [by the Contract] *shall* constitute a waiver by Contractor of any adjustment of the Contract Sum or Contract Time for such condition." *Id.* §3.7.4. Under the section of the Contract outlining the process for "CLAIMS AND DISPUTES," the Contract conditioned claims by the contractor on written notice "*before* proceeding to execute the Work." Ex. 4 §15.1.4.

Even absent the applicable waiver language of §3.7.4, Division I was correct to observe that the Contract established mandatory procedures for requesting a change to the contact sum.

Division I's conclusion that formal written change orders are a condition precedent is supported in other Contract

provisions that were not discussed by the parties or court below until reconsideration because Corstone failed to timely raise its arguments. For example, §1.1.2 states that "The Contract may be amended or modified only by a Modification." Ex. 4. And the Contract defines "Modification" as formal written notices or change orders:

> Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect.

Id. The Contract also places a duty on Corstone to review the contract documents and an ongoing duty to observe the field conditions and "promptly report" any issues to Sherlock. Ex. 4 (§§3.2.1-3.2.3). It mandates that if any changing field conditions require additional work, a formal change order process "shall" be followed:

> **§ 3.2.4**…If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor

shall make Claims as provided in Article 15.

Ex. 4.[2]

These provisions only bolster Division I's reasonable interpretation of the parties' contract. The Contract, including the Contract Sum, could only be amended or modified by written agreement or change order, which must be agreed upon before work is performed. §7.3 (supplemental). Corstone had a duty to observe and report conditions "for the purpose of facilitating coordination and construction by the Contractor," and if it sought "additional cost or time" it "shall make Claims as provided in Article 15," which Corstone admitted it did not do.

These facts are undisputed. Corstone also does not mention the testimony Division I considered, showing that all parties knew that prior change orders were conditions precedent and "had to" be followed under the Contract to claim an

[2] This is the same section of the Contract that contains the waiver in §3.7.4. Clearly, read as a whole, the Contract required Corstone to notify Sherlock via itemized change order if it sought increased payment based on unsuitable soils.

additional Contract Sum:

> Corstone's project manager, Sean Barquist, testified that he knew that to make a claim for an increase in the contract sum, written notice was required before executing the work. Barquist also testified that the work outlined on change order 27 had been completed when it was sent to Beal. Corstone's CEO and owner, Mark Tapert, testified that Corstone did not give written notice before CR's work started. Corstone President Jeff Jacka conceded that the contract established the procedure Corstone had to follow if it wanted to increase the contract sum.

Op. at 11; *see also*, appellant's br. at 13-14, 21 (quoting testimony).

Division I did not misinterpret or misapply anything about the clear *requirements* and *obligations* of the Contract. Its decision is consistent with Washington contract law, not to mention common sense. Review should be denied because Corstone fails to meet any criteria for review under RAP 13.4(b).

(4) Corstone Cannot Meet the RAP 13.4(b) Criteria Necessary to Review the Offset to Damages

Corstone also seeks review of Division I's application of

certain offsets to whatever damage award remains after remand.[3] In doing so, it not only fails to meet the RAP 13.4(b) criteria, but it continues its pattern of misrepresenting the facts and legal arguments made below.

Contrary to Corstone's argument, the "jury" did not "reject[]" Sherlock's request for offsets. Pet. at 2. Corstone admitted in its pretrial briefing that offsets would *not be addressed by the jury*, but rather "*by the Court.*" CP 2521

[3] Indeed, there is much left to do on remand, further complicating Supreme Court review in this matter. For example, Division I remanded to "reconsider" whether any party is entitled to fees under the lien statute in this breach of contract case, an error Sherlock raised on appeal. Op. at 20. It also remanded to reconsider the issue of the proper interest rate on whatever judgment remains, another error Sherlock raised at Division I. Op. at 20.

Even if Corstone received the relief it seeks from this Court, the jury's verdict would not simply be reinstated. Sherlock separately argued that Corstone waived and released claims and liens when it accepted payment and signed unconditional waivers and releases of claims. Appellant's br. at 22-27. Because it reversed the verdict on other grounds, Division I declined to reach that issue. Op. at 14 n.8. If this Court granted review that issue would need to be addressed. RAP 13.7(b).

(emphasis added). It told Sherlock and the trial court that it would "request that the Jury return a verdict in its favor for the unpaid contract balance of $1,288,620.24, *subject to adjustment by the Court* for…payments made by Sherlock to some of Corstone's subcontractors." CP 2521 (emphasis added).

Corstone provided evidence that it separately paid a subcontractor, thereby offsetting Corstone's damages, CP 3435-38, 3442, 3467, and Corstone offered no evidence in response. RP 3216-21 (arguing against the offsets on procedural grounds).

Division I created no conflicts in law in enforcing those offsets because "it is a basic principle of damages—both tort and contract—that there shall be no double recovery for the same injury." *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000); *see also*, *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957) ("if the defendant "relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery.").

This issue does not meet the RAP 13.4(b)(1) or (2) criteria nor does it have any bearing beyond these two private litigants, warranting review under RAP 13.4(b)(4). It is telling Corstone must misstate the facts and argument to try to twist this case into one that warrants Supreme Court review. It does not.

D. CONCLUSION

For these reasons, the Court should deny review.

This document contains 4,967 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 17th day of January 2025.

Respectfully submitted,

/s/ Aaron P. Orheim
Aaron P. Orheim
WSBA #47670
Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

George A. Mix
WSBA #32864
Joshua A. Grissom
WSBA #58864
Mix Sanders Thompson, PLLC
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101
(206) 521-5989

Mark A. Clausen
WSBA #15693
Clausen Law Firm, PLLC
9655 SE 36th Street, Suite 100
Mercer Island, WA 98040
(206) 223-0335

Attorneys for Respondent
Sherlock Investments
– Duvall, LLC

DECLARATION OF SERVICE

On said day below I electronically served via appellate portal a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 103658-2 to the following parties:

Kenneth W. Masters
Shelby R. Frost Lemmel
Masters Law Group
321 High School Road NE
D3-#362
Bainbridge Island, WA 98110

Sage A. Linn
Fifth Avenue Law Group PLLC
701 Fifth Avenue, Suite 2460
Seattle, WA 98104

David F. Betz
Ryan, Swanson & Cleveland, PLLC
401 Union Street, Suite 1500
Seattle, WA 98101-2668

George A. Mix
Joshua A. Grissom
Mix Sanders Thompson, PLLC
1601 Fifth Avenue, Suite 1800
Seattle, WA 98101

Mark A. Clausen
Clausen Law Firm PLLC
9655 SE 36th Street, Suite 100
Mercer Island, WA 98040

A. Shawn Hicks
Attorneys at Law
800 Fifth Avenue, Suite 3825
Seattle, WA 98104

Original electronically delivered via appellate portal to:
Supreme Court
Clerk's Office

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

DATED: January 17, 2025, at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

January 17, 2025 - 12:16 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,658-2
Appellate Court Case Title:	CR Construction, LLC v. Sherlock Investments - Duvall, LLC

The following documents have been uploaded:

- 1036582_Answer_Reply_20250117121557SC004154_7070.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- SLinn@fifthavenue-law.com
- betz@ryanlaw.com
- brad@tal-fitzlaw.com
- george@mixsanders.com
- jagriss@amazon.com
- kalli@mixsanders.com
- ken@appeal-law.com
- leyda@mixsanders.com
- lisav@clausenlawfirm.com
- matt@tal-fitzlaw.com
- mclausen@clausenlawfirm.com
- office@appeal-law.com
- phil@tal-fitzlaw.com
- scarpenter@fifthavenue-law.com
- shawnhicks@att.net
- shelby@appeal-law.com
- simmel@ryanlaw.com
- tharris@fifthavenue-law.com

Comments:

Answer to Petition for Review

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Aaron Paul Orheim - Email: Aaron@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C

Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20250117121557SC004154