No. _____

Case #: 1036582

Court of Appeals No. 84584-5

SUPREME COURT
OF STATE OF WASHINGTON

CR CONSTRUCTION, LLC, a Washington limited liability company,

Plaintiff,

v.

CORSTONE CONTRACTORS LLC, a Washington limited liability company,

Petitioner,

v.

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

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

IDENTITY OF PETITIONER, CITATION TO COURT OF APPEALS DECISION & INTRODUCTION

Appellant Corstone Contractors, LLC seeks review of a Court of Appeals decision overturning a jury's just and reasonable verdict: ***Corstone Contractors, LLC v. Sherlock Invs. – Duvall, LLC***, Court of Appeals No. 84584-5-I (Aug. 5, 2024), *recon. de* (Dec. 28, 2024). *See* App. A. The decision misapplies the standard of review and rewrites the parties' contract, adding provisions they never agreed upon. It then misapplies this Court's decision in ***Mike M. Johnson***, *infra*, to its rewritten contract, in direct conflict with this Court of Appeals' own prior decision in ***Shepler Const., Inc.***, *infra*. While it accepted an *amicus* brief supporting Corstone's motion for reconsideration, it nonetheless denied reconsideration without further comment. *See* App. A.

This Court should grant review under RAP 13.4(b)(1), (2) & (4) to restore the jury's fair verdict.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly deny Sherlock's CR 50 motion due to disputed issues of material fact, where ample evidence at trial supported Corstone's claims, as the jury correctly found?

2. Does ***Mike M. Johnson, Inc. v. Spokane Cnty.***, 150 Wn.2d 375, 78 P.3d 161 (2003) apply where, as here, this private contract does not contain notice provisions similar to those in public works contracts?

3. That is, is ***Johnson*** distinguishable for the same reasons the same Court of Appeals distinguished it in ***Shepler Const., Inc. v. Leonard***, 175 Wn. App. 239, 306 P.3d 988 (2013)?

4. May an appellate court just disagree with a jury verdict and remand for more fact finding? If so, who would do that?

5. Did the trial court properly exercise its discretion to deny Sherlock a specific offset, where the jury had already rejected Sherlock's request for any offset?

STATEMENT OF THE CASE

The facts are fully set forth in the Brief of Appellant, with citations to the record. This is a summary.

A. Sherlock retained Corstone as General Contractor on the Project, but Sherlock's owner (David Beal) became Administrative Architect.

In February 2018, Sherlock retained Corstone to serve as General Contractor for a self-storage facility in Duvall, Washington (the "Project").[1] During negotiations, Sherlock demanded that its owner, David Beal, serve as the Project's Architect for Construction Administration, rather than the Architect who stamped the drawings, Jackson Main Architecture P.S.[2] Beal so acted, accepting the contractual duty to review Corstone's Change Orders (CO) and Payment Applications (PA).[3]

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[1] RP 583; CP 366, 377-445; Ex 4.
[2] RP 624-25; CP 367, 447-50.
[3] RP 625; CP 367, 447-48.

B. A month after Corstone and subcontractor CR started work on the Project, Sherlock suspended construction under a Stop Work Notice lasting nearly four months.

Corstone and its subcontractors commenced work in March 2018, contemplating a one-year Project to March 7, 2019.[4] Roughly one month later, Sherlock suspended Corstone's work on the Project for convenience: Sherlock's financing had fallen through.[5] Upon receiving Sherlock's Stop Work Notice on April 13, 2018, Corstone sent Sherlock a confirming letter[6] quoting the "Suspension By the Owner for Convenience" provision in the Contract.[7] Sherlock never objected to this letter.[8]

Over three months later (July 19, 2018) Sherlock advised Corstone that its loan would be finalized the next

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[4] RP 1528; CP 367; Ex 85.

[5] RP 700, 1528; CP 367; Exs 18, 85.

[6] RP 703, 1528; CP 367, 452-53; Exs 18, 85.

[7] RP 863-65; CP 367-68, 452-53; Ex 18 (quoting Ex 4 (§ 14.3 at p.35)).

[8] CP 368.

day and that it had otherwise obtained all permits for the Project.[9] Corstone immediately took steps to mobilize its subcontractors, recommencing the work within about 20 days, by August 6, 2018 – as quickly as it could.[10] The total work stoppage under this Stop Work Notice was thus 115 days (roughly four months).[11]

C. The Stop Work Notice pushed CR's dirt work into the wet months, increasing costs for additional work Sherlock's expert Geotech required, as Sherlock well knew.

When Sherlock suspended the work, Corstone Subcontractor CR was performing earthwork, including excavation, export, and import of soils.[12] When CR entered its subcontract in March 2018, it could not know that Sherlock would suspend its work in April 2018.[13] But due

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[9] RP 745-47, 877, 1120; CP 368, 455-56; Ex 2009.
[10] RP 878, 1121, 1756; CP 368.
[11] RP 1528; CP 368.
[12] RP 456-59, 683; CP 369.
[13] RP 1047; CP 369.

to Sherlock's work stoppage for almost four months, the earthwork CR had planned to perform in the dry summer months was shifted into the wet winter months.[14] As a result, more soil was unsuitable, necessitating additional excavation, export, and import.[15]

Sherlock's consultant, Geotech Consultants, Inc., was onsite reviewing excavation and determining the suitability (and unsuitability) of soils throughout the Project.[16] Geotech had the expertise and in fact directed Corstone and CR as to which soils needed to be exported and imported, directives with which Corstone and CR were required to comply.[17] Additional exports and imports due to the changed timeline thus had nothing to do with

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[14] RP 639, 643-46, 723-25, 876; CP 369; Exs 2, 85.

[15] *Id.*

[16] *See, e.g.*, RP 479-81, 496-97, 538-40, 549-50, 586, 639, 647-49, 838-44, 1094-95, 1132-51, 1544-45, 1811-122, 1817-20; 1918; CP 369-70; Exs 2, 3, 45, 53, 67, 69, 77, 80, 87, 93, 212.

[17] RP 604-05, 608, 643, 659-62, 838-39, 1544-45; CP 369-70; Exs 2, 3.

Corstone's means and methods of performing work, but rather followed Geotech's directions.[18]

Indeed, Sherlock had received an engineering report in December 2016, before the Project began, based on David Beal's own site plan.[19] This report repeatedly recommended to Sherlock and Beal that the earthwork be performed in the warmer and drier months.[20]

And even beyond that, Geotech sent daily reports to Sherlock discussing unsuitable soils and Corstone and CR's increased import/export work.[21] Sherlock was thus well aware of work being done.[22] And *many* discussions were had with Administrative Architect Beal on site.[23]

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[18] *Id*.

[19] RP 585-87, 605-06, 608; CP 329-36; Ex 2.

[20] RP 642-43; CP 332; Ex 2 (§ 5.2.6).

[21] *See, e.g.*, RP 530-31, 539-40, 548-49, 838-44, 1132-51, 1811-12, 1817-18, 1918; CP 370, 462-81, 483; Exs 2, 3, 45, 53, 67, 69, 77, 80, 87, 93, 212.

[22] *Id*.

[23] *See, e.g.*, RP 531, 612-18, 624-25, 1157-58, 1344-45, 1806-07, 1825-26; CP 370.

D. Sherlock's Owner – Administrative Architect Beal – failed to comply with his contractual duty to review Corstone Payment Applications and to notify Corstone of any objections in writing.

As the Administrative Architect on the Project, Beal was required to review Corstone's Payment Applications (PA) and to notify it in writing of any withholding of certifications of payments, whether in whole or in part.[24] Beal's failure to comply with his contractual obligations in this regard created constant confusion and additional work to get Corstone's PAs properly processed.[25]

In May 2019, David Beal told Corstone that he was going to put COs 27, 33, and 34, "in a pile of change orders to fight over at the end of the Project."[26] Before Beal's statement, Corstone believed that all COs had been approved subject to further documentation because Beal

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[24] RP 624-25, 666, 1344-45; 1898; CP 371, 421; Ex 4 (§ 9.4.).

[25] *See, e.g.*, RP 624-25, 666, 1353-56; CP 371.

[26] RP 1353-54; CP 372.

had not notified Corstone otherwise in writing.[27] After Beal's statement, Corstone included reservation of rights language in every application and waiver submitted to Sherlock, stating that all items in dispute include "Delay days and cost resulting from suspension."[28]

From May 2019 through January 2020, Corstone submitted change order requests to Sherlock identifying delays due to increased scope of work directed by Sherlock's design team or related to deficient design work by the design team.[29] Although he sometimes made strikethroughs or added handwritten comments, Beal approved every CO with his "Authorized Signature."[30]

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[27] *Id.*; RP 1342-47; Ex 3078.

[28] *Id.*; Ex 3076.

[29] *See, e.g.*, RP 1597-99; CP 373, 531-49; Exs 3079, 3101, 3102, 3105, 3113-15, 3117, 3119-3123.

[30] *Id.*; *see also* Ex 3129.

E. Procedural History.

CR sued Corstone, Sherlock, and others on June 30, 2020.[31] Against Corstone, CR alleged breach of contract and sought foreclosure of its liens.[32] All defendants answered CR's Amended Complaint, denying its claims.[33] Sherlock brought cross-claims against Corstone, which Corstone denied.[34] Corstone also asserted cross-claims against Sherlock for breach of contract, unjust enrichment, quantum meruit, and foreclosure of liens.[35]

1. The trial court denied Sherlock's CR 50 motion due to genuine issues of material fact properly submitted to the jury.

At trial, Sherlock brought a CR 50 Motion to Dismiss all Corstone's claims.[36] It argued that Corstone did not give

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[31] CP 1-5.
[32] CP 3-4, 12-16.
[33] CP 17-22, 23-29, 67-78.
[34] CP 6-11, 36, 66, 84-89.
[35] CP 42, 66.
[36] CP 2826-45.

proper written notices and waived its claims, while also asserting that equitable claims are unavailable because the parties were in a contractual relationship.[37] Corstone responded in detail that it had presented ample evidence at trial supporting all its claims.[38] The trial court denied Sherlock's motion.[39]

2. After many days of trial, the Jury awarded Corstone $1,288,620.64

The jury returned a verdict against Sherlock and in favor of Corstone, awarding Corstone the full $1,288,620.24.[40] It also awarded CR $364,524.70.[41] The jury rejected Sherlock's breach of contract claim against Corstone, awarding it no damages.[42]

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[37] CP 2826-27.
[38] CP 2869-87.
[39] CP 2995; RP 1744.
[40] CP 3054.
[41] *Id.*
[42] *Id.*

3. The Court of Appeals reversed the jury's verdict, adding language to the contract and disregarding both the standard of review and its own precedent.

But the Court of Appeals reversed the jury's verdict, holding that the trial court should have granted Sherlock's CR 50 motion. App. A at 7-14. The appellate court acknowledged that such motions rarely should be granted only when, "after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party." ***Mancini v. City of Tacoma***, 196 Wn.2d 864, 877, 479 P.3d 656 (2021) (cleaned up) (quoting ***H.B.H. v. State***, 192 Wn.2d 154, 162, 429 P.3d 484 (2018)). App. A at 7. Yet rather than viewing the evidence in the light most favorable to the verdict, the court simply cherry-picked from this lengthy record some scant evidence favorable to Sherlock. *See* App. A at 11-12. It thus substituted its own judgment for

that of the jury, contrary to many decisions, including this Court's recent ***Coogan v. Borg-Warner Morse Tec Inc.***, 197 Wn.2d 790, 799, 490 P.3d 200 (2021).

In addressing Sherlock's CR 50 motion – which simply regurgitated its earlier summary judgment motion that the trial court had denied due to genuine issues of material fact (*see* BR 24-27) – the trial court refused to reconsider its earlier decision: genuine issues of material fact required a jury trial, so the trial court gave those issues to the jury. RP 2215, 2238-39. Sherlock never challenged that ruling on appeal. BA 2-4.

Thus, the jury was properly tasked not simply with saying whether the contract required notice, but rather whether Sherlock waived its right to rely on those notice provisions by demanding that the work proceed apace, yet failing in its duty (as the Administrative Architect) to dispute the approved Change Orders in writing. For instance, Sherlock and Beal failed to dispute CO 27 in writing, as the

contract required. RP 912-14, 1161-63; CP 371, 421. As a result, the April and May 29 lien releases did not note any disputes about the existing change orders. Rather, Sherlock and Corstone were in ongoing discussions regarding them. Only when Beal said he would put COs 27, 33, and 34, "in a pile of change orders to fight over at the end of the Project" did he give Corstone *any* (if insufficient) notice that Sherlock was disputing some costs associated with the import/export earthwork. RP 1353-54; CP 372.

Similarly, Sherlock well knew that moving the dirt work into the wet months would necessitate extra work, based on its pre-construction geotechnical reports (RP 642-43; CP 329-32; Exs 2, 3); Beal's extensive expertise (CP 339; RP 1825); its expert Geotech's daily reports (CP 462-81); and Beal's onsite meetings to discuss the extra costs (CP 370). Its Geotech directed all additional excavation, import, and export work CR performed (CP 369-70) as Beal and Sherlock knew (CP 483-86). In short,

Sherlock *required* Corstone to perform the extra work for which it is here trying to avoid payment.

Nonetheless, the Court of Appeals reversed. It misapplied this Court's decision in ***Johnson***, *supra*, where that public-works contract contained provisions nothing like the provisions in this contract. Indeed, *thi*s Court of Appeals distinguished ***Johnson*** on precisely this basis in ***Shepler***, but ignored that precedent. It thus substituted its own interpretation of the contract for that of the jury, which was fully instructed on the rules and requirements for interpreting contracts. *See, e.g.*, BR 28-32.

The bottom line for the jury was whether Sherlock proved that Corstone waived its claim for an increase in the contract price. CP 2981. But to even reach that defense, it first had to find that Sherlock had breached the contract, that Corstone had performed or offered to perform its contractual obligations, and that Corstone was damaged. *Id*. And to reject Sherlock's breach of contract claim (CP

3054) the jury had to find that Corstone *did not* breach the contract, that Sherlock *had not* performed or offered to perform, or that Sherlock was not damaged – or some combination of these. CP 2984. The only way the appellate court could properly reverse under CR 50 would be to find *no evidence* supporting the jury's myriad possible and necessary findings. But it failed to even conduct that analysis, instead substituting its own version and interpretation of the contract for the one the jury properly interpreted.

The jury justly required Sherlock to pay for the work it received, from which it continues to benefit. It correctly laid the blame for the increased costs on Sherlock. This Court should grant review to reverse this unjust appellate decision, which deprives Corstone of the fruits of its labor and a just jury verdict.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision conflicts with many decisions of this Court. RAP 13.4(b)(1).

The appellate decision acknowledges the correct standard of review for CR 50 motions (App. A at 7):

> Under CR 50(a)(1), a court may grant judgment as a matter of law on an issue if "there is no legally sufficient evidentiary basis for a reasonable jury to find [for the nonmoving party] ... with respect to that issue." "We review a trial court's decision on a CR 50 motion as a matter of law and 'apply the same standard as the trial court.'" [***Mancini***, 196 Wn.2d at 877 (citation omitted)]. A CR 50 motion for judgment as a matter of law "'should be granted only when, after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party.'" ***Mancini***, 196 Wn.2d at 877....[43]

But rather than follow this correct standard of review – by scouring the record for the evidence most *favorable* to

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[43] Futilely, the decision also notes that it may *affirm* the trial court on any supported basis. *Id*. (citing ***Washburn v. City of Federal Way***, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013)). Yet the appellate court did not *affirm* anything the judge or jury did.

the jury's verdict, of which there is *a great deal* – the decision instead arrogates the jury's authority to interpret the contract to the appellate court (*id*. at 7-8):

> We interpret a provision of a contract as a question of law. If the contract language is clear and unambiguous, we will enforce the contract as written. The primary objective in contract interpretation is to determine the intent of the parties. Washington follows the objective manifestation theory of contract interpretation, under which we try to arrive at the intent of the parties by focusing on the objective manifestations of the agreement rather than on the unexpressed subjective intent of the parties. We interpret contracts in a manner that will not render provisions in the contract meaningless. And we read the contract as a whole, avoiding interpretations that lead to absurd results. [Citations omitted.]

The *jury* was instructed to perform this analysis and it did so. *See* BR 28-32. But the appellate court rewrote the contract and imposed its own interpretation.

An appellate court may not reweigh the evidence – selecting *only* evidence *unfavorable* to the verdict (*see* App. A at 11-12) – and then substitute its own interpretation of its rewritten contract for that of the jury, an analysis that

flies in the face of a great deal of this Court's precedent. *See, e.g.*, ***Mancini***, 196 Wn.2d at 877; ***H.B.H.***, 192 Wn.2d at 162; ***Schmidt v. Coogan***, 162 Wn.2d 488, 491-93, 173 P.3d 273 (2007); ***Goodman v. Goodman***, 128 Wn.2d 366, 371, 907 P.2d 290 (1995); ***Hizey v. Carpenter***, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). Rather, the "evidence must be considered in the light most favorable to the nonmoving party." ***Mancini***, 196 Wn.2d at 877 (citing ***Bender v. Seattle***, 99 Wn.2d 582, 587, 664 P.2d 492 (1983); ***Bertsch v. Brewer***, 97 Wn.2d 83, 90, 640 P.2d 711 (1982)).

Indeed, a "CR 50 ***motion must be denied*** if substantial evidence exists in the record to sustain the jury's verdict." ***Mancini***, 196 Wn.2d at 878 (emphasis added). That is what the trial court did. The appellate court failed to follow this Court's controlling authority.

In creating this conflict with this Court's precedents, the appellate court did two more unprecedented things. First, it rewrote this private contract to fit the Public Works

model addressed in ***Johnson***. While the appellate decision quotes this contract (App. A at 9-11) it fails to *ever* compare its language to that in ***Johnson***. As further discussed *infra*, they are nothing alike, raising a conflict with the appellate court's own analysis in ***Shepler***.

Second, its analysis conflicts with this Court's blackletter law that courts may not rewrite contracts in the guise of interpreting them. *See, e.g.*, ***Tadych v. Noble Ridge Constr., Inc.***, 200 Wn.2d 635, 648, 519 P.3d 199 (2022) (Gonzalez, J., dissenting) (courts may not, "under the guise of interpretation, rewrite a contract which the parties have deliberately made for themselves") (quoting ***City of Seattle v. Kuney***, 50 Wn.2d 299, 302, 311 P.2d 420 (1957)); ***Little Mt. Estates Tenants Ass'n v. Little Mt. Estates MHC, LLC***, 169 Wn.2d 265, 269 n.3, 236 P.3d 193 (2010) (same) (citations omitted); ***Hearst Commc'ns, Inc. v. Seattle Times Co.***, 154 Wn.2d 493, 511, 115 P.3d 262 (2005) (citing ***Findlay v. United Pac. Ins. Co.***, 129 Wn.2d

368, 380, 917 P.2d 116 (1996) (same)); ***Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.***, 144 Wn.2d 130, 137, 26 P.3d 910 (2001) (same); ***Seattle Prof'l Eng'g Emples. Ass'n v. The Boeing Co.***, 139 Wn.2d 824, 833, 991 P.2d 1126 (2000) (same); ***Berg v. Hudesman***, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (same); ***Wagner v. Wagner***, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (same); ***Clements v. Olsen***, 46 Wn.2d 445, 448, 282 P.2d 266 (1955) (same); ***Chaffee v. Chaffee***, 19 Wn.2d 607, 626, 145 P.2d 244 (1943) (same)).

This partial list includes some of this Court's most significant precedents. It should grant review to defend these foundational principles, both as to the correct standard of review and as to proper contract interpretation.

B. The decision conflicts with other appellate court decisions. RAP 13.4(b)(2).

As noted *supra*, this decision conflicts with this appellate court's own decision in ***Shepler***, which did it not

even mention. Undoubtedly, Sherlock will blame Corstone for the appellate court's failure to follow its own precedent, noting that Corstone did not address Sherlock's ***Johnson*** argument in its response brief. But as explained *supra*, the CR 50 standard of review *required* the appellate court to *look at the record*, seeking *evidence supporting the jury's interpretation of the contract*, not to reinterpret the contract based on the limited evidence favoring Sherlock, much less to rewrite the contract to facilitate "strictly" applying ***Johnson***, disregarding the jury's verdict. Under the correct standard of review, Sherlock's ***Johnson***-based argument (that the appellate court may simply ignore disputed issues of fact regarding Sherlock's notice and its waiver of contractual notice requirements) merits no response.

But since the appellate court chose an unprecedented course of analysis, Corstone distinguished ***Johnson*** in its Motion for Reconsideration. The appellate court called for a response – even accepting a highly

unusual *amicus* brief supporting Corstone's position – but then failed to withdraw its opinion, apply the correct standard of review, respect its own precedent, and reconsider its incorrect decision. All of this was error.

That is, having heard half the evidence, the trial court denied Sherlock's CR 50 motion and reaffirmed that *the issue was for the jury, where Corstone proffered ample evidence of notice to and waivers by Sherlock*, *raising genuine issues of material fact for the jury*. RP 1744; CP 2869-87. Instead of following this correct CR 50 analysis, the appellate decision purported to "strictly" apply ***Johnson***. Yet that contractual notice provision was different in every relevant respect from this contract's notice provisions. *See* ***Johnson***, 150 Wn.2d at 380:

> The formal claim procedures **required MMJ to submit a claim** to the project engineer in sufficient detail to enable the engineer to ascertain the basis and amount of the claim. At a minimum, **MMJ was required to submit 10 items of specific information to support a claim**, including a notarized statement to the project engineer swearing

> to the truth and veracity of the submitted claim (the "Final Contract Voucher Certification"). Under the contracts, **MMJ's failure to submit the required information with a final contract voucher certification was "a waiver of the claims by the Contractor**." Furthermore, **the contracts explicitly stated that "[f]ull compliance by the Contractor with the provisions of this section is a contractual condition precedent to the Contractor's right to seek judicial relief."** [Emphases added; citations omitted.]

Thus, the ***Johnson*** contract expressly required *the contractor* to submit detailed documentation and expressly stated that failure to do so *waived the claim* and *barred any recourse* to judicial relief. *Id.*

But *this contract* does not require *the contractor* to give notice before beginning the Work (Ex 4 at 36, 33):

> **§ 15.1.4 CLAIMS FOR ADDITIONAL COST**
>
> 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. . . .
>
> **§ 13.3 WRITTEN NOTICE**
>
> Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the

> corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.

Perhaps more importantly, nothing in these provisions makes failure to give notice a waiver. *Id.* The appellate court simply *added those terms to this contract*. As the myriad decisions of this Court cited *supra* make undeniably clear, that is not permitted. ***Johnson*** is not controlling under the terms of *this* contract.

And that is precisely why this same Court of Appeals correctly distinguished ***Johnson*** in ***Shepler***, 175 Wn. App. at 246-47 (emphases added):

> ***Johnson*** [is] distinguishable from the contract at issue here, because the contracts in [that case] explicitly provided that failure to follow dispute resolution procedures constituted a waiver of those claims. ***Mike M. Johnson***, 150 Wn.2d at 380 . . .
>
> . . . In contrast, **the contract here does not state that the Leonards' failure to follow the dispute resolution procedures expressly waives their right to pursue those claims in court**.

Under the *correct* CR 50 standard of review, the appellate court should not have taken the notice and waiver issues from the jury based on ***Johnson***'s inapposite contract terms. The decision directly conflicts with ***Shepler***.[44]

The appellate court did quote § 3.7.4, the "**Concealed or Unknown Conditions**" provision, which does have notice and waiver provisions. App. A at 10. But as Corstone repeatedly pointed out to the trial court, *Corstone never made any claims under that provision* because the dirt work was not in any sense concealed or unknown. CP 2873. Indeed, the *mountain of evidence* Corstone proffered regarding notice to Sherlock that these

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[44] As *Amici* noted to the appellate court, the contracts in every published opinion relying on ***Johnson***'s waiver analysis contained the strong waiver language cited there. *See* ***NOVA Contracting, Inc. v. City of Olympia***, 191 Wn.2d 854, 865, 426 P.3d 685 (2018); ***Am. Safety Cas. Ins. Co. v. City of Olympia***, 162 Wn.2d 762, 764, 773, 174 P.3d 54 (2007); ***C.A. Carey Corp. v. City of Snoqualmie***, 29 Wn. App. 2d 890, 898-99, 547 P.3d 247 (2024); ***Realm, Inc. v. City of Olympia***, 168 Wn. App. 1, 8-10, 277 P.3d 679 (2012). No published decisions are to the contrary.

conditions existed *prior to beginning the work* precluded any claim that they were "Concealed or Unknown." *See*, *e.g.*, BR 7-8. Sherlock's own Geotech undisputedly completed its independent investigation for all the wet-season dirt work later reflected in the Change Orders *before the work was performed at Sherlock's Geotech's direction*. CP 2873-74. The appellate decision disregards all this substantial evidence. This provision cannot apply under these facts – as ***the jury*** properly determined.

The decision also quotes the Notice of Claims provision (§ 15.1.2) which *conflicts with* § 15.1.4 – which says that *someone* must provide written notice to *someone* "before proceeding to execute the Work" – while § 15.1.2 says that the Contractor must initiate "Claims" "within ten (10) days ***after*** *occurrence of the event giving rise to such Claim*, or within 21 days ***after*** *the claimant first recognizes the condition giving rise to the Claim*, ***whichever is later***." App. A at 9-10. It is not possible to comply with both

provisions under the "strict" ***Johnson*** interpretation this Court applies. But neither the Claims for Additional Cost provision (§15.1.4) nor the Written Notice provision (§ 13.3) required *the contractor* to give any notice – a *fact* the appellate court casually dismisses.

The decision also quotes the supplemental conditions provision, but that section simply requires the owner and the contractor to confer and "make reasonable best efforts to mutually agree" on any changes before the work is performed. App. A at 10-11. There is *ample evidence* in this record that Sherlock's Geotech was on site *ordering* Corstone to do the dirt work on Sherlock's behalf, that it provided *daily* updates on the work to Sherlock, and that *many* on-site discussions were held *with Architect Beal*, the owner.[45] The ***jury*** got this decision right.

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[45] *See, e.g.*, BR 7-8 (citing RP 530-31, 539-40, 548-49, 612-18, 624-25, 838-44, 1132-51, 1157-58, 1344-45, 1806-07, 1811-12, 1817-18, 1825-26, 1918; CP 370, 462-81; Exs 2, 3, 45, 53, 67, 69, 77, 80, 87, 93, 212).

The appellate court also overlooked that the ***jury*** was tasked with determining whether any alleged Corstone breach was ***material***. CP 2977. "Materiality is a question of fact unless reasonable minds could reach only one conclusion." ***McCarthy v. Clark Cnty.***, 193 Wn. App. 314, 330, 376 P.3d 1127 (2016). Thus, *Sherlock had the burden to prove its affirmative defense that Corstone waived any claim for an increase in the contract price*. CP 2981. The appellate decision ignores these burdens and overturns a perfectly just verdict by taking the evidence in the light most favorable to Sherlock. App. A at 11-14.

The ***jury*** properly *found* that Corstone fully complied with this entire contract, including these provisions. When (as here) contract interpretation turns on extrinsic evidence from which more than one reasonable inference may be drawn, interpretation is a question of fact, not of law. *See, e.g.*, ***SAS America, Inc. v. Inada***, 71 Wn. App. 261, 266, 857 P.2d 1047 (1993); RESTATEMENT (SECOND) OF

CONTRACTS § 212(2) (1981). Courts may not substitute their own interpretation for that of the jury.

This Court should grant review to restore this jury's just verdict, which simply requires Sherlock to pay for the Work its Geotech *required* Corstone to perform and whose benefit Sherlock continues to enjoy to this day.

C. This appeal raises unprecedented issues of substantial public interest that this Court should determine. RAP 13.4(b)(4).

The decision's second and third holdings are simply unprecedented. App. A at 14-20. As to the "delay day" damages, the decision cites no case permitting it to reweigh the evidence the jury considered, find it insufficient, and *remand for additional factfinding*. It does not appear that *any* appellate court has *ever* done this. It is unclear *how* such factfinding could be done, or *by whom*.

The decision cites only ***Tincani v. Inland Empire Zoological Soc'y***, 124 Wn.2d 121, 131, 875 P.2d 621 (1994) (quoting ***Washburn v. Beatt Equip. Co.***, 120

Wn.2d 246, 261, 840 P.2d 860 (1992)). App. A at 15. Neither case permits this sort of analysis. In fact, ***Washburn*** actually says this (120 Wn.2d at 261):

> The determinative issue is whether there was evidence or reasonable inferences arising therefrom ***to sustain*** a verdict in plaintiff's favor. ***The evidence must be considered in a light most favorable to plaintiff***. ***Shelby v. Keck***, 85 Wn.2d 911, 913, 541 P.2d 365 (1975). [Emphases added.]

In overlooking that second sentence, the decision failed to view the evidence in the light most *favorable* to Corstone. ***Washburn*** correctly holds that the question there "was a jury question." 120 Wn.2d at 261. That is true here too.

Similarly, the decision apparently holds that even though the jury and the trial court found no sufficient evidence to support the $130,000 Forge offset, vague testimony from Aaron Beal and a few tardy documents "should have been sufficient to include this amount in the trial court's offset order." App. A at 19. The decision thus *reweighs* evidence rejected by both the jury and the trial

judge, substituting its own finding for theirs. Again, this Court should address this unprecedented analysis.

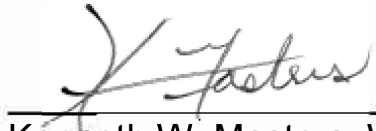
CONCLUSION

This Court should grant review.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains **4,983** words.

RESPECTFULLY SUBMITTED this 27th day of November 2024.

MASTERS LAW GROUP, P.L.L.C.



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APPENDIX A

Date	Description	Pages
8/5/2024	***Corstone Contractors, LLC*** ***v.*** ***Sherlock Invs. – Duvall, LLC*** Court of Appeals No. 84584-5-I	1-21

FILED
8/5/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CR CONSTRUCTION, LLC, a Washington limited liability company, Plaintiff, v. CORSTONE CONTRACTORS LLC, a Washington limited liability company, Respondent, SHERLOCK INVESTMENTS - DUVALL, LLC, a Washington limited liability company, Appellant, THE HANOVER INSURANCE COMPANY, bond no. BL21050154; ALASKA USA FEDERAL CREDIT UNION, and MERCHANTS BONDING COMPANY (MUTUAL), Defendants.	No. 84584-5-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — In this breach of contract case between a property owner, Sherlock Investments Duvall, LLC (Sherlock), and a general contractor, Corstone Contractors LLC (Corstone), Sherlock appeals multiple decisions by the trial court and a jury verdict

in favor of Corstone. We reverse the trial court's order denying Sherlock's CR 50 motion, order on judgment and offset, and order awarding Corstone attorney fees. We remand for further fact finding on whether Corstone had a right to delay day damages, and for further consideration of attorney fees.

I

In 2018, Sherlock hired Corstone as the general contractor to construct a multistory self-storage facility (project) in Duvall, Washington.[1] As general contractor, Corstone was in charge of contracting with subcontractors. Corstone contracted with CR Construction, LLC (CR), to, among other things, conduct excavation work on the project.

David Beal, Sherlock's founder, had contracted with several subcontractors before Corstone became the general contractor. Beal acted as contract administrator for the project and was responsible for approving pay applications and approving or disapproving change orders.[2] Beal visited the job site regularly.

Work on the project began in March 2018. Under the primary contract the project had to be completed within 365 days. But in April 2018 Sherlock issued a stop work order because of issues with financing. Corstone notified all subcontractors to stop work by end of day April 13, 2018.

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[1] The contract consisted of a standard form agreement between owner and contractor (A101-2007), general conditions of the contract for construction (A201-2007), Corstone's February 23, 2018, bid proposal letter, and February 26, 2018, supplemental conditions to construction contract which modified the general conditions A201-2007.

[2] A change order "is a written instrument prepared by the Contractor and signed by the Contractor and Owner, and may be signed by the Architect at the Owner's discretion, stating their agreement upon the following:

.1 The change in the work

.2 The amount of the adjustment, if any, in the Contract Sum; and

.3 The extent of the adjustment, if any, in the Contract Time.

Before work stopped, CR was on-site cleaning up garbage, removing a house and shop that was on the property, removing concrete, preparing a gravel construction entrance, and excavating and flattening the soil for pile work. Once Sherlock issued the stop work order, CR had to prepare the site for weather problems to make sure that no water left the site, including a requirement from the City to create a dispersal trench for groundwater. This essentially turned a portion of the job site into a pond.

On July 19, Sherlock notified Corstone that it had obtained all required permits, the loan was executed, and the project could be resumed. Corstone's project manager created a new construction schedule. None of the subcontractors indicated any issues resuming the work or requiring more time or money to complete the work. The project officially resumed on August 6, 2018. The amended completion date was June 16, 2019.

In August 2018, Corstone submitted change order 11 to Sherlock for CR's remobilization costs. The change order included no additional days to be added to the contract time. Sherlock paid these costs. As of that time, Corstone did not have concerns with meeting the project's schedule.

Because the project resumed in the wetter fall and winter months, the suitability of the on-site soil decreased. This created complications for placing foundations and slabs and for access to the job site.

Sherlock's consultant, Geotech Consultants, Inc. (GCI), was often on-site reviewing the work and submitting daily reports to Sherlock and Corstone. The geotechnical engineer performed inspections of the soil and directed the contractors on what to do with the soil.

In fall 2018, as CR continued to work on-site, it submitted several change orders to Corstone. This included CR's change order 11 to extend the construction road at Corstone's direction. CR's project manager, Rocky Morgan, testified that he opposed Corstone's plan to extend the road because the heavy machinery would destroy the sub base and end up costing more than using a small crane to move materials into the area.

Corstone and CR were communicating about potential issues with the on-site soil. CR gave Corstone two options, one was to export the wet and unsuitable soil and import good material, or two, wait until summer to let the soil dry. CR submitted proposed change order 16 to Corstone with cost estimates for option one. In December, CR asked for approval to begin the import/export work on change order 16. Corstone told CR to proceed.

In January 2019, Sherlock sent a letter to Corstone providing written notice of its concerns that Corstone was failing to supply sufficient resources to keep the project on schedule. This was not the first time Sherlock had notified Corstone that it was concerned with the pace of the work.

In February 2019, Corstone submitted change order 27 to Sherlock for CR's work. This change order stated, "Import/Export ongoing, this is not final Total or complete" and had a total of $138,578.18. When Sherlock received this change order, Beal responded, "? Please explain."

Corstone revised change order 27 on March 6, 2019, to include and specify CR's change orders 11, 16, and 16b, for the export and import of materials but also stated the work was ongoing and this was not a final total. The total cost increased to

$227,533.92. The change order also included a "General Condition fee for add days due to scope change" of $8,876.76.

On March 7, 2019, Beal rejected this change order in its entirety, explaining, "I had not been notified or warned of any problems accountable for such a large change order." The work conducted by CR was subsequently divided into change orders 27, 33, and 34, and appeared on pay application 11.[3]

Corstone, citing several provisions in its subcontract with CR, did not pay CR for this work. In May 2019, CR sent a notice to its lender that it had not been paid for work done on the project.

Corstone's payment applications 1-18 were paid in full by Sherlock. There was a dispute over pay application 19 and Corstone revised it. Sherlock paid $354,819.86 for the original pay application 19 on January 24, 2020. Beal denied pay application 20 because it contained over $200,000 in denied change orders. Sherlock did not pay the remaining balance of revised pay application 19 or pay applications 20 and 21.

The project was completed with a temporary certificate of occupancy issued December 31, 2019, and a final certificate of occupancy issued February 13, 2020. That same day, Corstone submitted change order 92 to Sherlock requesting "general condition costs" for 179 delay days caused by the owner, citing section 3.10.4 of the contract. This was a $232,071.51 request. Sherlock denied the change order.

In March 2020, CR recorded a claim of lien. One month later, Corstone also recorded a claim of lien.

[3] While there are several versions of change order 33 in the record before this court, change order 34 is not in the record. Change order 34 is described from pay application 11 onwards as "Export/import at ramp" for $29,986.65. In pay application 21, it was reduced to $26,461.42.

In June 2020, CR sued Corstone and Sherlock for breach of contract and lien foreclosure.[4] Sherlock asserted cross-claims against Corstone for breach of contract. Corstone asserted counterclaims against CR, and cross-claims against Sherlock for breach of contract, foreclosure of lien, unjust enrichment, and quantum meruit.

Sherlock moved for partial summary judgment to dismiss Corstone's claims related to extra costs arising before May 31, 2019. The trial court denied the motion and the case proceeded to a jury trial.

At the close of Corstone's case, Sherlock moved for judgment as a matter of law under CR 50(a). The trial court granted Sherlock's CR 50 motion in part, dismissing Corstone's claims for unjust enrichment and quantum meruit, but otherwise denied the motion. Before the case was submitted to the jury, Sherlock asked the court to reconsider its CR 50 motion which the trial court denied.

The jury returned verdicts in favor of CR and Corstone: finding for CR in its breach of contract claim against Corstone with $364,524.70 in damages, and in favor of Corstone in its breach of contract claim against Sherlock with $1,288,620.24 in damages.

Following the trial, the trial court granted Sherlock an offset of the jury verdict by $194,476.26. The trial court also granted Corstone attorney fees under RCW 60.04.181 for $412,652.00 and $46,030.32 in costs.

Sherlock appeals.[5]

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[4] Other defendants to the suit included The Hanover Insurance Company, which issued a statutory contractor's registration bond for Corstone, and Alaska USA Federal Credit Union, Sherlock's construction loan lender. Another subcontractor was dismissed as a party by stipulation before trial.

[5] Corstone originally filed a cross-appeal, however, Corstone moved to dismiss its cross-appeal and it was dismissed without costs to any party by our court clerk on November 28, 2023.

II

Sherlock argues that the trial court erred by denying its CR 50 motion because the unambiguous contract should have been enforced as a matter of law and Corstone waived any right to an increase in the contract sum by not providing written notice before the work began. We agree.

Under CR 50(a)(1), a court may grant judgment as a matter of law on an issue if "there is no legally sufficient evidentiary basis for a reasonable jury to find [for the nonmoving party] . . . with respect to that issue." "We review a trial court's decision on a CR 50 motion as a matter of law and 'apply the same standard as the trial court.'" Mancini v. City of Tacoma, 196 Wn.2d 864, 877, 479 P.3d 656 (2021) (quoting Schmidt v. Coogan, 162 Wn.2d 488, 491, 173 P.3d 273 (2007)). A CR 50 motion for judgment as a matter of law "'should be granted only when, after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party.'" Mancini, 196 Wn.2d at 877 (quoting H.B.H. v. State, 192 Wn.2d 154, 162, 429 P.3d 484 (2018)). "'Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.'" Mancini, 196 Wn.2d at 877 (quoting Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001)). We may affirm the trial court's decision on any ground supported by the record. Washburn v. City of Federal Way, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013).

We interpret a provision of a contract as a question of law. Renfro v. Kaur, 156 Wn. App. 655, 661, 235 P.3d 800 (2010). If the contract language is clear and unambiguous, we will enforce the contract as written. RSD AAP, LLC v. Alyseka

Ocean, Inc., 190 Wn. App. 305, 316, 358 P.3d 483 (2015). The primary objective in contract interpretation is to determine the intent of the parties. Thomas Ctr. Owners Ass'n v. Robert E. Thomas Tr., 20 Wn. App. 2d 690, 699, 501 P.3d 608, review denied, 199 Wn.2d 1014, 508 P.3d 679 (2022). Washington follows the objective manifestation theory of contract interpretation, under which we try to arrive at the intent of the parties by focusing on the objective manifestations of the agreement rather than on the unexpressed subjective intent of the parties. Thomas Ctr., 20 Wn. App. 2d at 700. We interpret contracts in a manner that will not render provisions in the contract meaningless. GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074 (2014). And we read the contract as a whole, avoiding interpretations that lead to absurd results. Kelley v. Tonda, 198 Wn. App. 303, 316, 393 P.3d 824 (2017).

Washington law generally requires that contractors follow contractual notice provisions unless a party unequivocally waives those procedures. Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 386, 78 P.3d 161 (2003). In Mike M. Johnson, a contractor filed a complaint for additional compensation arising out of the contract. The county argued that the contractor failed to comply with the contractual protest and claim provisions. Mike M. Johnson, 150 Wn.2d at 384. The court held that an owner's having actual notice of a changed condition in the work is not an exception to compliance with mandatory contractual protest and claim provisions. Mike M. Johnson, 150 Wn.2d at 387-88, 391.

The rule of Mike M. Johnson has been extended beyond claims for payment for disputed work, to include claims for expectancy and consequential damages. NOVA Contracting, Inc. v. City of Olympia, 191 Wn.2d 854, 857, 426 P.3d 685 (2018). And our

Supreme Court has reiterated that "absent waiver, failure to comply with contractual procedures bars relief." Am. Safety Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 770, 174 P.3d 54 (2007) (citing Mike M. Johnson, 150 Wn.2d at 391).

In Sime Construction Co., Inc. v. Washington Public Power Supply System, 28 Wn. App. 10, 15, 621 P.2d 1299 (1980), our Supreme Court held that a subcontractor was obligated by its contract to give notice of a claim that changed work would increase the contract price. The court explained, had the subcontractor "given the 15-day notice required under the prime contract which would have outlined the additional cost of doing work out of sequence, [the owner and general contractor] could have balanced the desirability of the design improvement against those costs in determining economic feasibility." Sime Constr., 28 Wn. App. at 16.

Sherlock asserts that the contract required Corstone to provide written notice before executing the work to make a claim for an increase in the contract sum. Notice is addressed in three sections of the contract:

> **§15.1.4 CLAIMS FOR ADDITIONAL COST**
>
> 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. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

(Emphasis added.)

> **§15.1.2 NOTICE OF CLAIMS**[6]
>
> Claims by Contractor must be initiated by written notice to the Owner with a copy sent to the Architect. Claims by either party must be initiated within ten (10) days after occurrence of the event giving rise to such Claim, or

[6] This language is taken from the February 26, 2018 supplemental conditions to construction contract, which modifies the original contract general conditions A201-2007.

> within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Contractor shall cooperate with the Owner and Architect to mitigate the alleged or potential damages, delay, or other adverse consequences arising out of the condition giving rise to the Claim. Claims by Owner shall be made in writing to Owner within a reasonable time. Contractor shall cooperate with the Owner and Architect to mitigate the alleged or potential damages, delay, or other adverse consequences arising out of the condition giving rise to the Claim. Claims by Owner shall be made to Contractor within a reasonable amount of time.

Written notice is outlined in a separate section:

> **§13.3 WRITTEN NOTICE**
>
> Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.

The contract also included another section that emphasized the importance of notice to Sherlock before work began:

> **§3.7.4 Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents, or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and before undertaking any additional Work, in no event later than ten (10) days after first observance of the conditions. Failure 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.

(Emphasis added.)

In the February 26, 2018, supplemental conditions, the original contract constructive change directives were deleted and the following language was adopted:

> CCD provisions are deleted. Except in case of emergency, Owner and Contractor shall confer and make reasonable best efforts to mutually agree upon the terms of any change to the Work before the changed work is performed. 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. If Contractor has given such timely notice, the Owner shall not retain a third party to perform the changed work in question.

(Emphasis added.)

Section 15.1.4 clearly called for written notice to be given before proceeding to execute the work in order to make a claim for an increase in the contract sum. But that is not what occurred.

CR submitted its change order 11 to Corstone on September 17, 2018, for work extending the construction road. This work was completed in October 2018. Corstone did not send a change order for this work to Sherlock until March 6, 2019.

Similarly, CR submitted its change order 16 to Corstone in December 2018 for import/export work and Corstone told CR to proceed. Corstone did not submit change order 27 to Sherlock until February 2019. Sherlock rejected change order 27 in its entirety.

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.

Thus, it is undisputed that Corstone submitted its change order to Sherlock only after permitting CR to complete a significant amount of the work. This did not comply with the procedures of section 15.1.4.

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. Instead, Corstone asserts that the jury was properly instructed on contractual issues and because Sherlock did not challenge the instructions, they are "the law of the case." Even accepting both points, Corstone does not rebut the argument that it failed to comply with the notice provisions. Absent evidence of compliance, its contract claims fail as a matter of law. See Mike M. Johnson, 150 Wn.2d at 391.

Corstone next argues that the contract did not require Corstone to give Sherlock notice and that the initial geotechnical reports and daily reports gave Sherlock ample written notice of the necessity of dirt work on-site. Corstone also asserts that Sherlock knew of this "extra work" because Beal had "on site meetings to discuss the extra costs" and it was "plainly known to Beal and Sherlock."

The contract is between Sherlock and Corstone with Corstone identified as "the Contractor." And the contract included significant soil work. Notice that specific work is occurring on-site is different from written notice of a claim to increase the contract sum. In addition, Beal's on-site meetings happened in March 2019 after Sherlock received the change order and after a significant portion of the work had been completed. Beal explained, "I see there may be soils happening I'm not aware of."

In any event, the law is clear: an owner having actual notice of a changed condition in the work is not an exception to compliance with contractual notice provisions. Mike M. Johnson, 150 Wn.2d at 391.

Corstone asserts that as soon as Sherlock stopped work, Corstone invoked section 14.3 of the contract, and that this was notice to Sherlock "that Corstone reserved its rights for additional contract time and compensation caused by Sherlock's suspension of the Project." That section provides:

> **§14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE**
>
> **§14.3.1** The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.
>
> **§14.3.2** The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent
>
> > **.1** that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
> >
> > **.2** that an equitable adjustment is made or denied under another provision of the Contract.

There are several problems with Corstone's argument. First, in August 2018, Corstone submitted change order 11 to Sherlock for remobilization costs after the work suspension and Sherlock paid for those costs. Other than the remobilization costs, at that time, none of the subcontractors conveyed to Corstone an escalation of costs because of the suspension.

Second, and more importantly, we read the contract as a whole. Kelley, 198 Wn. App. at 316. Section 14.3 must be read with section 15.1.4. Corstone could have made

a claim for additional cost under section 15.1.4 when CR submitted change order requests in fall 2018 and argued under section 14.3 that the additional cost was because of the suspension pushing the work into the wet rainy months. But Corstone did not do this.

Sherlock was not provided with notice that the cost of excavation work would escalate before the work commenced. While it might be obvious that those costs would increase in the rainy winter months compared to the dry summer months, the contract by its plain language required written notice before proceeding to execute the work. Notice would have given Sherlock the option to pause the work until the soil had dried, as CR's project manager suggested, or to approve the additional costs. Notice was only provided to Sherlock in February 2019 by change order 27 after a significant portion of the work was completed. This did not comply with section 15.1.4.[7]

We conclude that because strict compliance with notice and claim provisions is required, the evidence could not support a verdict for Corstone on this claim and it was error for the trial court to deny Sherlock's CR 50 motion.[8]

III

Sherlock argues that there was not substantial evidence supporting the jury's verdict for "delay day damages." We agree.

[7] In response to Sherlock's CR 50 motion, Corstone also argued that its claims arose out of "earthwork" that is excluded from the contractual notice provisions under exclusions to the contract for the import and export of unsuitable soils and over excavation. Even if Corstone is correct that the work was excluded from the contract, then both Article 7, change orders, and Article 15, notice of claims, of the contract would apply and Corstone would have been required to provide written notice before the work commenced.

[8] Because we agree with Sherlock that the trial court erred by denying its CR 50 motion, we do not reach Sherlock's alternate argument that Corstone waived and released claims and liens related to work that occurred before May 31, 2019.

"For a general verdict, '[t]he determinative issue is whether there was evidence or reasonable inferences arising therefrom to sustain a verdict in plaintiff's favor.'" Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 131, 875 P.2d 621 (1994) (quoting Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 261, 840 P.2d 860 (1992)).

Corstone submitted change order 92 on February 13, 2020, following completion of the project. Corstone requested an increase in the contract sum of $232,071.51 for additional general conditions arising from 179 delay days.[9] This amount was almost equal to the amount for general conditions in Corstone's bid.

The contract included the following provision for general condition rates.

> § 3.10.4 The addition or modification of the Work that involves any increase in the Cost of the Work shall also include reasonable General Condition costs and time extensions accordingly. General Condition rates of $1,108 / Calendar Day shall be added to the Change Order. Contractor shall be entitled to an increase in the Contract Sum for any additional general conditions and subcontractor costs incurred that result solely from delays to the project schedule caused by Owner, Architect, Architect's consultants, Landlord and Owner's separate contractors. As for delays resulting from any other causes, except for those caused by Contractor or its subcontractors, Contractor shall be entitled solely to additional time in the project schedule, provided that such delays result in impact to the critical path.

(Emphasis added.) Thus, Corstone was only entitled to general condition rates solely from delays to the project schedule caused by Sherlock, and those rates "shall" be added to the change order. The use of "shall" is generally understood to be mandatory. Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 288-89, 654 P.2d 712 (1982) (holding that the phrase "shall be entitled" has been given mandatory meaning and aggregating

[9] General conditions are things like project supervision, temporary facilities, and clean up. Jacka testified that general conditions are "the cost that keeps the job churning along. It's everything from the job shack to the water cooler to the superintendent on site to the temporary toilet to power."

cases considering attorney fees clauses in contracts, constitutional or statutory language, and contracts).

Alternatively, Corstone would be entitled "solely to additional time" in the contract schedule for delays, except those caused by the contractor or subcontractor, resulting in impact to the critical path.

Corstone's only arguments on this issue are that the change orders summarized in change order 92 were approved by Beal and that Sherlock's suspension of work, a delay solely caused by Sherlock, pushed the dirt work into the wet winter months.

At trial, the burden was on Corstone to prove the general condition rates requested in change order 92 were from delays solely caused by Sherlock. After reviewing the evidence, we find some support for Corstone's claim and some conflicting evidence that does not support Corstone's claim.

Change order 92 was based on alleged delay days outlined in the following change orders: 22, 41, 51, 52, 55, 66, 70, 73, 77, 81, 83, 84, 86, 87, 88, 90, and 91.

First, the general condition rates in change order 92 are for work done between April 22, 2019 and January 31, 2020. It is not for the "dirt work" that CR completed. And Barquist, who created the change orders, testified that change order 92 did not include any delays for the work stoppage at the front end of the project.

Change order 22 did include a general condition fee for $739.73. But it did not include additional days that would be added to the contract time. Barquist testified that change order 22 "relates to revised drawings provided by owner." Even so, change order 22 was included starting in pay application 11 and paid in full before the disputed pay applications. Thus, there was no support in the record for adding an additional

delay day from change order 22 or additional general condition rates for that day in change order 92.

Barquist testified at trial that change order 70 was "initiated by David Beal." Change order 70 was signed by Beal and while it did not include an amount for general condition fees for additional days, it did state that the contract time would be adjusted by 14 days.

Change orders 87, 83, and 90, involved requests by the City. Barquist testified that for change order 83, Sherlock "hired the soldier pile portion of the work directly. We were required to for the staking for the City of Duvall, and the owners subcontracted. This is the process that took for the redesign and approval by the City of Duvall." For change order 90, Barquist testified that the City did not want the green power box to be visible from the road and Corstone "t[ook] direction" from Beal's design team.

Barquist testified that change order 73 impacted the critical path. But he did not testify that the delay, totaling 50 days, was solely caused by Sherlock. And under the contract, "delays resulting from any other causes" only permit Corstone to "additional time in the project schedule, provided that such delays result in impact to the critical path."

For change orders 51 and 52, general condition rates were included in the amount requested on the change order. But the lines were crossed out and, presumably, not approved by Beal. Barquist only testified about the number of additional days these change orders required and that Beal signed the change orders.

For the remaining change orders, Barquist did not testify about who caused the delay. Instead, Barquist testified about the number of additional days added to the

contract time and whether the change order was signed by Beal. Change orders 55 and 77 are not in the record before this court.

And—excluding change order 22 and change orders 51 and 52 where the amounts were crossed out—none of the other change orders included the total amount of general condition rates in the amount for the change order. As for a separate change order that requested an extension of the contract time, Barquist testified that it was not included in change order 92 because "[t]here's no dollar value associated with it." That change order also did not include the amount of general condition rates.

We conclude that many of Corstone's arguments for delay day general condition rates specifically caused by Sherlock were unsupported by substantial evidence. Thus, we vacate the verdict on the issue of change order 92 and remand for additional fact-finding on this portion of the claim.

IV

Sherlock argues that should the judgment stand in any fashion, we should find that the trial court erred by refusing to offset $130,000 in damages Sherlock paid directly to a subcontractor. We agree.

"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). When a party seeks an offset against a judgment, they must show that they paid in the manner alleged, and that they have a right to have the payment credited against the obligation embodied in the judgment. Maziarski v. Bair, 83 Wn. App. 835, 841, 924 P.2d 409 (1996). This court reviews a trial court's decision on offsets for abuse of discretion. Eagle Point, 102 Wn. App. at 701. A

court abuses its discretion if its decision is not based on tenable grounds or tenable reasons. Layne v. Hyde, 54 Wn. App. 125, 135, 773 P.2d 83 (1989).

In its trial brief, Corstone asserted 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, if the evidence is not excluded, payments made by Sherlock to some of Corstone's subcontractors." The jury awarded Corstone its requested damages of $1,288,620.24.

Following trial, Sherlock opposed Corstone's motion for entry of judgment and argued that they were entitled to offset the judgment by $331,129.61 because of Sherlock's payments to settle additional subcontractor claims before trial. The trial court ordered an offset amount of $194,476.26. It did not include "the $130,000 alleged to have been paid to Forge as the Court finds the documentation submitted in support of the request to be insufficient to support an offset."[10]

The evidence before the trial court about Forge included Sherlock's purchase of a $130,000 cashier's check on February 16, 2021; a sworn, recorded release of Forge's lien; and a stipulated dismissal signed by Corstone, Sherlock, and CR dismissing Forge as a party to the case. In addition, Aaron Beal, Sherlock's managing partner, testified at trial that Sherlock had paid a total of $331,129.61 to subcontractors including Forge.

This evidence should have been sufficient to include this amount in the trial court's offset order. We conclude the trial court abused its discretion by not offsetting

[10] Sherlock's brief only discusses the amount paid to Forge. The trial court also denied an offset for the amount paid to MOCON Fence Contractors. The amount Sherlock purportedly paid to MOCON was $6,653.35.

the judgment by this amount and, on remand, this amount should be subtracted from the judgment.

V

The trial court awarded Corstone attorney fees under RCW 60.04.181(3). RCW 60.04.181(3) permits the trial court to allow the prevailing party in the action to recover costs and fees. Because we reverse a portion of the judgment, and remand for further proceedings on a second portion of the judgment, on remand the trial court should reconsider whether either party is entitled to attorney fees and costs as the prevailing party under this statute.[11]

Both parties also request fees on appeal. Sherlock asserts that it is entitled to fees on appeal under both a mutuality of remedy theory and RAP 18.1. Corstone requests fees on appeal under RCW 60.04.181(3) and RAP 18.1. We decline to award fees to either party.

We reverse the trial court's order denying Sherlock's CR 50 motion, order on judgment and offset, and order awarding Corstone attorney fees. We remand for further fact finding on whether Corstone had a right to delay day damages, and for further consideration of attorney fees.

[11] Sherlock also argued the trial court erred by imposing the statutory interest rate for postjudgment interest instead of the percent revealed by the contract which states, "[p]ayments due and unpaid under the Contract Document shall bear interest at the rate of six (6%) simple interest per annum." Because we remand for additional findings from the trial court, we leave the issue of interest to the trial court.

Mann, J.

WE CONCUR:

Feldman, J.

Hazelrigg, ACJ

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **PETITION FOR REVIEW** on the 27th day of November 2024 as follows:

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