No. C046055

COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

PRESTON PIPELINES, INC.,
Plaintiff and Respondent,

vs.

JCW-CYPRESS HOME GROUP, et al.,
Defendant and Appellant,

ROSS F. CARROLL, INC.,
Defendant, Cross-Complainant, and Respondent,

RESPONDENT'S BRIEF

On Appeal from the Superior Court of San Joaquin County
Case No. CV015722
Honorable Elizabeth Humphreys

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INTRODUCTION

This case is about a real estate developer who does not like to pay his bills. Developer John C. Williams hired contractor Ross F. Carroll, Inc.[1] to work on one of his projects – a two-subdivision development in the City of Manteca with common underground water and sewer systems. He then failed to pay city developer's fees on multiple occasions (RT 256:4-25; 940:26-941:5), failed to pay a property owner before he ordered work to begin on his property (RT 298:13-16), failed to pay his engineers (RT 289:6-11), failed to pay RCI for extra work caused by his own defective plans (RT 283:18-20), and then flatly refused to pay RCI the balance due on the contract price – after expressly promising payment on two different occasions. (RT 356:3-19.)[2]

The trial court found that the companies through which John Williams operated (which the parties have called JCW-Dutra and Bella Vista): (1) repeatedly delayed and obstructed RCI's progress on the job; and (2) demanded and obtained extra work from RCI not called for by the parties' contracts. It made similar findings with respect to RCI's

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[1] Ross F. Carroll, Inc. will be referred to as "RCI."

[2] The record on appeal consists of an Appellants' Appendix in Lieu of Clerk's Transcript ("AA"), a Reporter's Transcript ("RT"), and consecutively numbered trial exhibits ("Ex.").

subcontractor, Preston Pipelines, Inc.[3] (AA 596-602.) The court awarded RCI and Preston damages, interest, costs, and attorney fees against the Williams companies and JCW-Dutra's payment bond surety, American Motorists Insurance Company.[4] (AA 682-686.)

As RCI will show, appellants' challenge to the judgment routinely relies on arguments not made or preserved in the trial court and disregards applicable standards of review. Many of appellants' so-called legal arguments are in reality disguised quarrels with express or implied findings or discretionary rulings. These procedural defaults aside, this appeal raises only three straightforward issues:

1. *Did the trial court abuse its discretion by allowing RCI to amend its cross-complaint to conform to proof during trial to add claims for breach of contract and quantum meruit against Bella Vista?*

RCI's original and first amended cross-complaints included claims for breach of contract and quantum meruit against JCW-Dutra, which had paid virtually all contractor's bills for the entire project, but not Bella Vista. (AA 77-150.) After appellants demanded allocation of RCI's damages

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[3] Preston Pipelines, Inc. will be referred to as "Preston."

[4] American Motorists Insurance Company will be referred to as "American Motorists."

between the two Williams companies, RCI successfully sought to amend its cross-complaint to conform to proof by adding identical claims against Bella Vista. (AA 424-440; RT 1562:13-14.) The trial court's finding that Bella Vista would suffer no prejudice from the amendment is supported by the following factors: (1) Bella Vista chose to appear generally in response to RCI's cross-complaint by answering its allegations (AA 230-235); (2) Bella Vista and JCW-Dutra presented a complete defense on the merits to RCI's claims through joint counsel who maintained throughout the action that RCI and Preston were solely responsible for any delay or extra cost (RT 1561:3-7); and (3) Bella Vista failed to object to RCI's evidence showing that it was responsible for RCI's damages (RT 1174:16-1175:1). Appellants have not even attempted to demonstrate abuse of discretion in these circumstances; they clearly cannot do so.

2. *Is RCI barred from recovering damages for delay and extra work because it failed to send appellants contemporaneous invoices as contemplated by the construction contracts?*

The trial court found that appellants had delayed RCI's work and caused it to incur extra expense not called for by the parties' original contracts. (AA 600:12-13; 601:2-26; 684:8-685:11.) Under established California law, RCI is entitled to recover damages for these injuries because: (1) the contract does not forbid RCI's recovery, and, indeed,

expressly invites it; (2) recovery is supported by fully executed contractual amendments; and (3) appellants are barred by waiver/estoppel from relying on the terms of the contract.

3. *Is there substantial evidence of the existence and terms of the American Motorist Payment Bond?*

Contrary to appellants' assertions that RCI never proved the existence or terms of the payment bond, *the record reveals that a copy of the payment bond was admitted in evidence as Trial Exhibit No. 19 – without any objection by appellants*. (RT 924:20-28.)

STATEMENT OF FACTS

On this appeal, appellants have professed not to challenge any of the court's express or implied factual findings and have not provided a statement of relevant facts as required by Rule 14(a)(2)(C) of the California Rules of Court. Rather, they assert only what they call "prejudicial legal errors committed by the court at the end of, and post, trial." (Appellants' Opening Brief ("AOB"), p. 12.)

In accordance with the standard of review, RCI will summarize the facts in a manner most favorable to the judgment. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *City of Merced v. American Motorists Ins. Co.* (2005) 126 Cal.App.4th 1316, 1322-1323.)

1. The Williams Companies' Two-Subdivision Residential Construction Project.

Central Valley developer John C. Williams built two adjacent residential subdivisions in the City of Manteca. Williams was the principal and controlling owner and operator of the two business entities who participated in the development: Bella Vista by Paramont LLC, a limited liability company, and JCW Cypress Home Group, LP (sometimes referred to as "JCW-Dutra," after the name of the property), a limited partnership. JCW-Dutra was 100% owned by Williams, members of his family, or businesses controlled by him. (RT 781:19-24.) Bella Vista was majority-owned and controlled by Williams, and co-owned by a minority investor, Denny Brooks, Inc. (RT 781-782.)

Williams was required by the City of Manteca to install offsite improvements, including water lines, drains, and storm and sewer systems to serve the single-family homes in both of the subdivisions he proposed to erect. The City was both the governmental authority in charge of the project and the owner of the sewer and storm improvements. (RT 1056-1058.)

Williams decided to put the offsite construction work out for bid as a single unit, combined with onsite underground work and streets and sidewalks. (RT 328-329.) After soliciting and examining bids from

various contractors, Williams awarded the project to RCI, a family firm controlled by its former president, the late Ross F. Carroll. (RT 240:10-16; 246:27-247:4.) Mr. Carroll played an overall supervisory role on the project. His son, Sean Carroll, an RCI vice president, performed day-to-day management functions. (RT 240:17-241:14.)[5] RCI, in turn, subcontracted the offsite underground portion of the work to Preston. (AA 22-38.)

Williams managed the common offsite and designated onsite work for both subdivisions as one project. (RT 326:20-331:11; Ex. 200.) As a matter of financial management, JCW-Dutra wrote all but one of the checks for RCI's work, with John Williams personally signing each check. (RT 780:3-11.)

John Williams' decision to develop both subdivisions as a single unit as to which JCW-Dutra bore substantially all project expenses was the subject of the following uncontested trial court finding:

> "*All the parties routinely treated the work for Dutra and Bella Vista as one global project. The projects were*

[5] Sean Carroll was Vice President of RCI at the time it performed the project. By the time of the trial, Mr. Carroll had become RCI's President following the untimely death of his father, Ross Carroll, in an airplane accident. (RT 313:24-27.)

routinely billed together and Dutra paid the progress billings even when the work billed for was on the Bella Vista project."

(AA 599:1-3; emphasis added.)

2. <u>The Construction Contracts and Subcontracts</u>.

RCI entered into virtually identical contracts with each of the Williams entities, Bella Vista and JCW-Dutra. Both contracts were signed on April 10th, 2000. (AA 545-1 to 545-21 [Bella Vista contract]; 545-22 to 545-39 [JCW-Dutra contract].) The Bella Vista contract was in the original amount of $3,506,987.00 (AA 545-1); the JCW-Dutra contract was in the slightly lesser amount of $3,373,380.00 (545-22). Both contracts were expressly governed by an attached RCI-prepared bid and schedule. RCI's bids were based on three sets of improvement plans and specifications for the entire two-subdivision project supplied to RCI by John Williams. (RT 328:11-329:15.) The contractual provisions that pertain to the issues on appeal will be discussed below.

RCI entered into two subcontracts with Preston incorporating its bids for the underground utility work. The first contract, for Bella Vista Nos. 1 & 2 covering certain described sewer and waterwork, was in the original amount of $266,805.00. (AA 13-19.) The second, identified as Dutra Farms, included an additional $575,400.00 worth of work. (AA 22-33.)

3. The Williams Companies Cause Delay and Extra Work , Fail to Make Retention Payments, and Take Unearned Discounts.

After hearing the testimony of 10 percipient and 3 expert witnesses and considering 204 documentary exhibits in the course of an eight-day trial, the court resolved the factual disputes substantially in RCI's favor. (AA 596-602; 659-661.) A Statement of Decision was issued and modified based on objections and requests filed by the parties. Following modification, the two operative documents are now the Clarified Statement of Decision (AA 596-602), filed July 29, 2003, and the Corrections to Clarified Statement of Decision and Ruling Re Objections to Statement of Decision (AA 659-661), filed December 16, 2003.

Appellants did not request any findings. Nor have they contested on appeal any of the court's express or implied findings. (AOB 12.) Because appellants do not acknowledge or summarize the court's findings or the evidence supporting them, RCI will do so briefly with an emphasis on those facts most central to the appellate issues raised.

a. Withholding of Retention

During the course of construction work, John Williams was not critical of RCI. Indeed, as to the work of RCI's subcontractor Preston, Williams was effusive in his praise, remarking at a project meeting in the fall of 2001 in the presence of representatives of RCI and Preston that Preston had done a very good job on the project. (RT 433:6-14.)

But when it came time for payment, Williams experienced a sudden and radical shift in attitude. After holding back 10% of the original contract price pending completion of RCI's work, Williams committed to paying RCI this retention in two meetings in late 2001. (RT 356:3-19.) He later reneged, forcing RCI to sue for the retention, and then claimed several hundred thousand dollars in off-sets because of lender-imposed penalties he allegedly paid and expenses he supposedly incurred as a result of RCI-caused delays. (RT 23:14-26:2.) The court rejected Williams' assertions. (AA 601:6-26; 684:8-685:7.)

b. Causes of Delay and Extra Cost

The court found that delays and extra costs experienced by RCI and Preston were the responsibility of the Williams companies, JCW-Dutra and Bella Vista. (AA 600:12-13; AA 685:10-11.) In contrast, neither RCI nor Preston caused any substantial delay or additional cost. (AA 685:11-12.) The court's findings were supported by abundant evidence.

Despite their expressed desire to start work on the project in January 2000, John Williams and his companies failed to complete necessary preconstruction requirements of the project until, at the earliest, June 9, 2000. (AA 597:9-11.) They then caused further delays, disrupted RCI's work, and produced extra expense throughout the project and until its completion. Williams-attributed causes of delay and extra cost included:

(1) Failure to pay inspection fees, which resulted at one point in a shut-down of the project by the City of Manteca (RT 92:18-27; 941:6-13; Ex. 201);

(2) Failure to secure approved plans (RT 92:18-27; 940:13-23);

(3) Failure to execute construction contracts and procure necessary financing (RT 487:10-16; 939:19-940:9; Ex. 32);

(4) Persistent failures to provide proper documentation and to satisfy other conditions precedent to active work on the project (Exs. 43, 57, 200-203);

(5) Williams' plans for the offsite water line, which was a critical path item that had to be finished before other project work could be done, were defective and had to be redone. (AA 597:27-598:3; RT 93:21-28; 942:12-943:1; Exs. 44, 450-451.);

(6) The Williams companies, acting through their representative Harold Callahan, demanded that RCI replace its normal concrete subcontractor with someone hand-picked by Williams, allegedly because of scheduling concerns. The Williams-selected subcontractor made a mistake in the pouring of the concrete and charged more, resulting in additional project delay and cost. (RT 872:14-874:24; Ex. 225, p. 2.);

(7) Williams failed to relocate utility poles, interrupting RCI's paving operations. This also resulted in delay and extra costs. (RT 879:11-883:4.)

The list goes on.

All parties hired experts to analyze delays and project costs. RCI and Preston's experts, whose testimony was accepted by the court, testified in detail about owner-caused delays of numerous kinds. (Exs. 220-221, RT 555-569; 936-937; 939-941.) The court rejected the Williams expert testimony, finding it inconsistent with the facts. (AA 599:23-28.) In contrast, RCI's and Preston's witnesses were found to be credible and their

testimony consistent with the City of Manteca's neutral third-party evidence. (AA 600:2-4.)[6]

c. Unearned Discounts and Payment Failures.

It is an indisputable matter of arithmetic that the Williams entities deducted one percent (1%) discounts for prompt payment when their payments were outside the 10-day contract period allowed for such treatment. The trial court so found. (AA 559:12-15.)

4. This Lawsuit Was Brought and Prosecuted to Judgment.

Following JCW-Dutra and Bella Vista's refusal to pay for the work they authorized, Preston initiated this lawsuit. It sued RCI, Bella Vista, and JCW-Dutra for breach of contract, foreclosure of mechanics lien, and quantum meruit. (AA 1.)

RCI initially cross-complained against JCW-Dutra and American Motorists, its payment bond surety, for breach of contract, common counts, foreclosure on mechanics lien, and collection on the payment bond. RCI amended its cross-complaint once as a matter of course before the answer was filed. (AA 113-123.) With the court's permission, it later amended its cross-complaint to conform to proof at trial to include claims for breach of contract and quantum meruit against Bella Vista that were substantially

[6] The court expressly found RCI's and Preston's percipient witnesses to be credible. Under the doctrine of implied findings, it likewise endorsed their expert testimony. (AA 599:23-600:15.)

identical to the ones it had made against JCW-Dutra. (AA 424-440; RT 1562:13-14.)

JCW-Dutra and Bella Vista also cross-complained against Preston for indemnity, declaratory relief, and damages for general negligence, alleging that it (or RCI) was responsible for any delay or damage asserted. (AA 250-256.) Finally, American Motorists answered and cross-complained against JCW-Dutra, John C. Williams and his wife Louise E. Williams, J. C. Williams Company, and W.R.I. Development Loans II LLC. (AA 174-215.)

The trial court awarded damages to Preston against RCI, JCW-Dutra and Bella Vista in the amount of $397,732.51 plus interest. (AA 683:13-16.) It made the same award against American Motorists as surety. (AA 684:5-7.) In addition, RCI recovered $747,833.75 plus interest from JCW-Dutra, as well as an identical sum from American Motorists. (AA 684:11-15.) Finally, RCI recovered separately from Bella Vista the principal sum of $375,598.38 plus interest. (AA 685:3-7.) All of Bella Vista's and JCW-Dutra's prayers for relief in their cross-complaint were denied. (AA 685:8-25.)

DISCUSSION

I. APPELLANTS FAIL TO DEMONSTRATE AN ABUSE OF THE TRIAL COURT'S DISCRETION TO PERMIT AMENDED PLEADINGS TO CONFORM TO PROOF AT TRIAL.

Despite their different legal labels, appellants' first four issues on appeal (AOB 7-8) and first three legal arguments (Sections VI, VII, and VIII at AOB 18-40) raise but a single common question:

> *Did the trial court abuse its discretion in permitting RCI to amend its cross-complaint to conform to proof at trial by adding breach of contract and quantum meruit claims against Bella Vista? Otherwise stated, has Bella Vista shown that it was actually prejudiced by the court's ruling?*

RCI respectfully submits the answer to this question must be "No." As RCI will show below, trial courts enjoy broad discretion in allowing amendments to conform to proof at trial in order that suits may be resolved fully and on the merits. Numerous factors, nowhere addressed by appellants, support the exercise of discretion in RCI's favor in this case.

A. Contrary to Appellants' Contention, Lack of Prejudice, Not Alter Ego, Was the Basis of the Trial Court's Ruling and Is the Sole Issue on Appeal.

Unable to confront the trial court's ruling under the appropriate abuse-of-discretion standard of review, appellants posit an issue they would rather argue – the lack of evidence of an alter ego relationship between the Williams companies sufficient to permit piercing the corporate veil. As RCI will show, this is a non-issue – a mere straw-figure erected by appellants to evade the real question: their own global failure to demonstrate *actual prejudice*.

Because the court's rulings and reasoning are critical to appellants' challenge to the judgment, RCI will summarize the history of RCI's motion and then review appellants' arguments.

Background to the Court's Ruling: Appellants' Shift In Position from A Single Project to A Two-Project Approach to Financial Management. As RCI has observed, JCW-Dutra and Bella Vista were brand new, immediately adjacent real estate subdivisions that shared a common offsite water and sewer system. The trial court found that all parties treated the work as "one global" project with JCW-Dutra paying virtually all the contractor's bills. No dispute arose between the parties until RCI's work had been completed. (AA 599:1-3; 8.)

Shortly before trial, appellants demanded from RCI a Bill of Particulars itemizing RCI's damage claim. When RCI responded, appellants wrote to RCI's counsel, threatening to make a motion in limine

to exclude *all* of RCI's evidence because RCI had not broken down its damages between JCW-Dutra and Bella Vista. (AA 425.) Confronting appellants' shift in position from a one-project to a two-project approach, RCI complied by amending its Bill of Particulars to include an allocation of its damage claims by subdivision and using the amended bill as its damages study at trial.[7] (Ex. 225; AA 422:21-423:5.)

RCI's Motion to Amend to Conform to Proof. RCI's motion to amend was filed and served by hand on February 4, 2000, in the middle of trial and during the presentation of evidence. (AA 491-492.) At appellants' request, the motion was argued two days later on February 6, just after the parties rested and the day before final arguments were presented. (RT 1555:20-23.)

RCI's motion sought to add two causes of action against Bella Vista – one for breach of contract and a second for quantum meruit – and to claim a larger sum in damages from all appellants.[8] (AA 411-412.) The motion was supported by a declaration from RCI's attorney, James Kroll, who explained RCI's initial decision to sue JCW-Dutra only and its

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[7] The record suggests a reason for John Williams' change of position and insistence on allocated damages: By the time of trial, Williams had been sued by Bella Vista's minority owner, Denny Brooks, Inc., apparently for breach of fiduciary duty involving misallocation of funds. (RT 781-782; 1572:12-25.)

[8] Appellants have not contested on appeal the court's decision allowing RCI to claim a larger sum in damages.

subsequent decision to add Bella Vista, noting the Williams' companies' shift from a one-project to a two-project view. (AA 420:25-423:5.) Mr. Kroll also observed that there would be no prejudice to Bella Vista because it was already a defendant on Preston's complaint, which sought several hundred thousand dollars in damages and depended upon the same facts as RCI's claims. (AA 423:13-17; see AA 155-167; 250-256 [Preston's pleadings]; AA 683:10-684:2 [judgment by court against Bella Vista/JCW-Dutra in favor of Preston for $550,000+ damages].)

Appellants' Opposition. Appellants' attorney Donald Drummond candidly acknowledged the court's "discretion to permit amendments of complaints right through up to the time of judgment, particularly where issues have been litigated that go to the merits of the new proposed [c]omplaint." (RT 1556:5-13.) Despite his admission, he maintained that Bella Vista could not be added as a party to the cross-complaint because "it is simply not a party to the original Cross-Complaint." (RT 1556:17-19.)[9]

In response to questioning by the court, appellants' counsel Mr. Drummond grudgingly acknowledged that Bella Vista was a party to the action. When the court pointedly inquired how Bella Vista could possibly be prejudiced by allowing the amendment, counsel observed that Bella

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[9] As RCI will show, this was incorrect. Bella Vista became a party to the original cross-complaint by answering it. See Section I(C)(1) below.

Vista might, for some unexplained reason, have chosen to use separate counsel to defend RCI's claim. (RT 1559:23-1560:5.) He further suggested that, in some way he could not describe, the defense of Bella Vista might well have been different. As the court quizzically remarked: "But you were already defending Bella Vista." (RT 1560:6-7.) Unable to address the court's observation, counsel mused in a fractured metaphor: "[W]e'd be going on unchartered [sic] waters." (RT 1560:13.)

In reply, RCI's attorney noted that RCI's claims were based on the same evidence as its claims against JCW-Dutra and that these claims had been fully defended on the merits by appellants' counsel. As a result, Bella Vista would experience absolutely no prejudice from its joinder as a cross-defendant on RCI's claims. (RT 1561:3-7.)

In its order granting the motion to amend, the court expressly found that *no prejudice* would accrue to Bella Vista:

> *"THE COURT: The Court is going to permit the amendment. The Court does not believe that there is any prejudice to Bella Vista. The Court believes that Bella Vista has been very adequately defended here in – in this litigation. Bella Vista is already a party to the action. It is not a new party. . . the Court finds no problem at all with allowing amendment to [conform to] proof . . ."*

(RT 1562:13-18, 22-23; emphasis added.)

At no time during oral or written argument on the motion did RCI's counsel suggest that RCI was relying upon alter ego or had pierced the corporate veil. As the arguments summarized above reveal, all parties – and the court – understood the issue to be the court's discretion to grant a motion for leave to amend to conform to proof in the absence of evidence of actual prejudice to the opposing party. Because the court found no such prejudice – and for that reason only – it granted the motion.

The Court Adheres to its Ruling After Reconsideration. The next day, February 7, 2003, attorney Michael Warda, appellants' co-counsel, was permitted by the court to seek reconsideration of the court's order granting RCI's motion to amend. Before Mr. Warda's argument began, the court declared that it was even more sure of its ruling than it had been the day before and cited five cases: *McClellan v. Northridge Parktown Owner's Assn*. (2000) 89 Cal.App.4th 746; *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772; *Farenbaugh & Son v. Belmont Construction, Inc*. (1987) 194 Cal.App.3d 1023; *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144; and *Mirabito v. San Francisco Dairy Co*. (1935) 8 Cal.App.2d 54. (RT 1566:15-25.)

In explaining its reference to the five cases, the trial court immediately acknowledged that they were obviously not on point because

they arose *on motions to add parties after judgment.* As the court described the cases, it was *not* citing them to support any finding of alter ego in this action. Rather, it was pointing to them solely in response to appellants' argument that Bella Vista had no opportunity to defend itself. The cases were merely illustrations – in the even more stringent postjudment context – of the kinds of parties who had enjoyed the opportunity to defend an action and could, therefore, be held liable on the judgment. (AA 1567:12-18.)

Because of appellants' total refusal to address what the court actually said, RCI will quote in full the court's remarks[10] immediately after it cited the five cases:

> ***"Now, the Court is fully aware that these cases are not directly on point to the situation before the Court, factually. They are a step beyond where we are. They are cases where a new party was named in the judgment.***
>
> And the issue here is not whether . . . the case is won by Mr. Kroll. He doesn't have to establish that to be able to amend . . . All he has to have done is put some evidence before the Court and then amend according to proof. And the

[10] The passage is quoted in full, but the paragraphing has been changed to reflect the different topics dealt with in the court's remarks.

Court believes that that was done. That's not a reflection on how this case will ultimately be decided, but merely the Court's determination on the right to amend.

And when the Court looked at these cases where essentially we're adding new parties after the judgment, and compared that with the situation here and compared that with the argument made by counsel that the entity did not have a sufficient opportunity to defend itself, the Court determined that the entity – that there were facts to establish sufficiently that it did. And, therefore, the amendment was correct. I mean, the amending of the complaint." (RT 1566:26-1567:20; emphasis added.)

As the emphasized portion of the court's remarks makes clear, it cited the five cases only to illustrate situations in which parties were held to have enjoyed the opportunity to defend themselves so as to be bound by a

judgment.[11] Appellants' suggestion that this was somehow a finding of alter ego is fanciful.

Bella Vista's Motion to Strike Evidence. Undaunted, Bella Vista's counsel then sought to resurrect the amendment issue by making a motion to strike all of the evidence against Bella Vista because of alleged defects in the Bills of Particulars. (AA 546-551.) RCI's written opposition to the motion to strike demonstrated that any alleged deficiencies in the Bill of Particulars had to be challenged by *motion before trial*. (AA 552-556.)

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[11] To use appellants' terms, the court was citing the cases solely on the *second or opportunity-to-litigate element* of the test for adding parties to judgments. (AOB 18, citing *Triplett v. Farmers Insurance Exchange* (1994) 24 Cal.App.4th 1415, 1421 [defendant may be added to a judgment upon a showing of: (1) alter ego; and (2) opportunity to litigate].) Even as to that test, however, appellants are incorrect. Alter ego is not always required to add a defendant to a judgment. Equitable reasons may be sufficient. (*Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 20-23.)

As the court stated, the cited cases deal with the opportunity-to-litigate issue. (*Farenbaugh*, supra, 194 Cal.App.3d at pp. 1029-1030 [opportunity to litigate shown by orders given to counsel]; *Dow Jones Co.*, supra, 151 Cal.App.3d at pp. 149-150 [no due process violation when new proposed judgment debtor enjoyed opportunity to litigate through another]; *NEC Electronics*, supra, 208 Cal.App.3d at p. 781 [finding no due process violation; describing opportunity to litigate]; *McClellan*, supra, 89 Cal.App.4th at pp. 752-753 [opportunity to litigate can be shown through financing, hiring counsel, controlling the course of a lawsuit]; *Mirabito*, supra, 8 Cal.App. 2d at pp. 58-61 [opportunity to litigate shown by service on and verification of answer by corporate secretary and financing of defense].)

The trial court included additional cases in its statement of decision (AA 660-661) which are also discussed by appellants. (AOB 28-29.) These cases were *not* cited in connection with the *motion to amend*. They were only cited following the court's "single project" finding, which appellants have not challenged on appeal. (AOB 12.)

Appellants were unable to dispute this indispensable requirement. Neither could they deny that their failure to object or move to exclude evidence when it was offered waived any right to do so thereafter. (RT 1553:20-25; Evid. Code, § 353(a).) The court implicitly denied the motion to strike evidence by failing to grant the relief sought by appellants and awarding judgment against Bella Vista.

In summary, the entirety of Section VI of Appellants' Opening Brief, which purports to establish alter ego, is entirely irrelevant to the issue on appeal. RCI will now turn to that issue.

B. Appellants' Failures to Acknowledge the Standard of Review and to Demonstrate Actual Prejudice In Their Opening Brief Have Waived Any Challenge to the Court's Order Allowing RCI to Amend.

Appellants generally claim an independent standard of review of *all* issues on appeal. (AOB 17-18.) To the contrary, as their own trial counsel understood in arguing the motion to amend in the trial court, the standard of review on a motion to amend to conform to proof requires appellants to show *an abuse of discretion*. (See RT 1556:6-13.)

Rules and Standards Governing Amendment of Pleadings at Trial. California trial courts enjoy discretion to grant leave to amend pleadings at all prejudgment stages of proceedings, including at trial. (Code Civ. Proc.,

§ 473(a)(1).) When there is no material variance between pleading and proof at trial, the court may order a pleading to be amended "upon such terms as may be just." (Code Civ. Proc., § 469.) No variance is deemed material unless it has "actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Id.)

It is an abuse of discretion to deny leave to amend to conform to proof where no actual prejudice is shown. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1618; *South Bay Bldg Entr. v. Riviera Lend-Lease* (1999) 72 Cal.App.4th 1111, 1124; *Walker v. Belvedere* (1993) 16 Cal.App.4th 1663, 1670.) "'Where a party is allowed to prove facts to establish one cause of action, an amendment which would allow the same facts to establish another cause of action is favored, and a trial court abuses its discretion by prohibiting such an amendment when it would not prejudice another party.'" (*County Sanitation Dist.*, supra, 127 Cal.App.4th at p. 1618.)

In order to establish prejudice to defeat a motion to amend, a party must identify specific additional evidence it could have presented and explain how that evidence would have changed the outcome. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 777 [no prejudice because defendant could not explain how different cross-examination would have impacted defense]; *Godfrey v. Irwin Steinpress* (1982) 128 Cal.App.3d 154, 174-175

[no prejudice because counsel could not state how defense would have been presented differently]; *Jones v. Sacramento Savings and Loan Association* (1967) 248 Cal.App.2d 522, 533 [no prejudice where "evidentiary inquiry" would have been the same].)

Appellants must shoulder the burden of positively demonstrating an abuse of discretion that produced a miscarriage of justice. A judgment on appeal is presumed correct; every inference is drawn in its favor; appellant must bear the burden of demonstrating prejudicial error. (Cal. Const. Art. VI, § 13; *Cucinella v. Weston* (1982) 42 Cal.2d 71, 82; *Pacific Gas & Electric Co. v. State Dept.* (2003) 112 Cal.App.4th 477, 490-491; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105.)

In defiance of the established rules and standards described above, appellants do not acknowledge the relevant standard of review or any of the relevant legal principles. Nor do they utter a single word in their opening brief about abuse of discretion or actual prejudice. They do not even supply a procedural history or a statement of pertinent facts that would permit consideration of these issues, as the California Rules of Court require. (Cal. Rules of Court, rule 14(a)(2).) Nor do they formulate a legal argument or support it with record citations and authority. (*Id.*, Rule 14 (a)(1)(B) & (C).). In accordance with the established practice of this

District, their argument should be deemed waived. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4.)

Appellants may not cure their default by impermissibly advancing new arguments in a reply brief. RCI respectfully requests that this court disregard any such arguments. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1144.)

C. Appellants Suffered No Actual Prejudice And Can Show No Abuse of Discretion From the Court's Ruling Granting Leave to Amend.

Although RCI has no obligation to answer an abuse-of-discretion argument that appellants have chosen not to make, it is not hesitant to do so.

Appellants here suffered no conceivable prejudice from RCI's amendment because: (1) they were aware of Bella Vista's joint responsibility for the project from the outset of litigation and chose to inject Bella Vista into their joint defense of RCI's cross-complaint; (2) they came to trial fully prepared to present, and did in fact present, a complete defense on the merits to RCI's claims against Bella Vista; and (3) they have not – and cannot – show that their defense would have been materially different had Bella Vista been named a party to the RCI cross-complaint from the outset.

1. Appellants Themselves Voluntarily Chose to Make Bella Vista A Cross-Defendant to RCI's Claims By Answering RCI's Cross-Complaint.

Appellants' own pleadings reveal that Bella Vista and its lawyers came to trial prepared to defend on the merits any RCI claims against it arising from the single Williams project. *Bella Vista chose to answer RCI's first amended cross-complaint in conjunction with JCW-Dutra, even though RCI made no claims against Bella Vista in that cross-complaint.* (AA 230-235.) Bella Vista even asserted off-sets against RCI and prayed that RCI take nothing by its action. (AA 234:13-21.) Thus, Bella Vista, as a full joint participant in the Williams project, voluntarily injected itself into RCI's cross-action from the very beginning of litigation.

By answering RCI's cross-complaint, Bella Vista appeared generally and became a full-fledged party to the cross-complaint. (Code Civ. Proc., § 1014 ["A defendant appears in an action when the defendant answers . . ."]; *Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1146 ["A party may appear though he is not named in the complaint."]; see also *Hamilton v. Asbestos Corp. Ltd.* (2000) 22 Cal.4th 1127, 1147-1149 [defendant named in one consolidated action appeared in the other by actively defending both cases on the merits without objection].)

Thus, Bella Vista was a party to RCI's claims from the outset, and fully subject to a motion to amend. For example, in *Chitwood v. Country of Los Angeles* (1971) 14 Cal.App.3d 522, 527-529, the Court of Appeal found that a defendant who answered interrogatories had made a general appearance, and reversed the trial court's order denying plaintiff leave to amend to name that defendant in the complaint. The same principle applies here to support RCI's amendment adding claims against Bella Vista.

2. Bella Vista Presented a Complete Defense on the Merits Through Counsel of its Own Choice.

Bella Vista initially appeared in this action through Michael Warda of Warda & Yonano. (AA 42-46.) Three months before trial, Bella Vista associated Donald Drummond of Drummond & Associates. (AA 292-293.) At trial, Messrs. Warda and Drummond represented all three appellants: Bella Vista, JCW-Dutra, and American Motorists.[12] (AA 311; 350.)

As trial began, appellants' counsel Mr. Drummond informed the court that appellants' defense would be conducted jointly, and that trial could proceed in the presence of either himself or Mr. Warda because each

[12] Although American Motorists appeared and cross-complained with separate counsel, it apparently later dismissed its cross-complaint and substituted JCW-Dutra/Bella Vista counsel for its original attorneys. (AA 168, 174, 311, 350.)

of them represented both Williams companies (and, presumably, American Motorists as well). (RT 8:3-16.)

Although appellants' counsel advanced various technical legal defenses to the mechanics lien claims, they consistently maintained a single, common, and complete factual defense on the merits: RCI and Preston – and not appellants – had caused all project delays and extra costs. (RT 29:21-31:11 [appellants' opening statement]; AA 316:23-317:20; 356:24-359:14 [trial briefs].) As appellants admit in their opening brief: "The evidence presented at trial centered on the cause of, and assigning blame for, what indisputably were delays in completing the adjacent projects and waterline extension." (AOB 11.)

Appellants' joint defense was vigorously presented through the testimony of two experts, Harold Callahan and Thomas Reeves, together with percipient evidence from witnesses with knowledge of the project, including John Williams himself, plus voluminous documentary evidence. The gist throughout was that the Williams companies did nothing wrong. (RT 1239-1288; 1406-1449; 1455-1474.)

Actual prejudice means material impairment of a defendant's ability to mount a "defense on the merits." (Code Civ. Proc., § 469; *South Bay Bldg.*, supra, 72 Cal.App.4th at p. 1124.) Bella Vista fails to point to *any* evidence showing *any* actual prejudice. The court allowed its complete

defense to be fully presented, and permitted its two lawyers to argue any and all points they wished – sometimes multiple times. In the end, the court found that all delays and extra costs were the responsibility of Bella Vista and JCW-Dutra. (AA 598-600.

Appellants do not challenge *any* of the express or implied findings of the trial court. (AOB 12.) Nor do they state what evidence, if any, could have been presented on Bella Vista's behalf that conceivably might have altered the outcome. Nor do they offer any excuse for their failure to present such evidence in the trial court or to point to it in their opening brief in this court. They have none.

Appellants received notice of RCI's motion to amend to conform to proof by hand delivery on February 4, 2003 (AA 491), two days before all sides rested and three days before final argument. (RT 1553:20-25 [February 6, 2003: all parties rest]; 1573 [February 7: final argument begins].) Despite their notice of the motion two days before both sides rested, and their extensive arguments against it made both orally and in writing (see Section I(A) above), appellants failed at any time to:

- Offer any additional evidence on behalf of Bella Vista; or
- Make an offer of proof specifying what Bella Vista would prove if given another opportunity to do so; or

- Seek a continuance to marshal further evidence on Bella Vista's behalf.

Instead, appellants rested and were content to argue Bella Vista's case on the record before the court. Having so conducted themselves, they waived any right they may have had to present additional evidence. (Evid. Code, § 354; *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1337 ["The right to present further evidence is waived unless the plaintiff both requests leave to reopen and makes an offer of proof, describing the evidence and explaining how it would cure the deficiencies."]; *Tudor Ranches v. State Compensation Insurance Fund* (1998) 65 Cal.App.4th 1422, 1431-1434 [appellant made no effort to adduce foundational evidence either at trial or in an Evidence Code section 402 hearing].)[13]

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[13] Indeed, the very best Bella Vista could do, even as late as its motion for new trial, was to inject into the record a pile of standard-form lien releases and to assert that they somehow barred RCI's claim. (AA 722-741.) The release forms do not aid its cause. *First*, Bella Vista has waived any reliance on them on appeal by failing to cite or argue their contents in its opening brief. (*Save Sunset Strip v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1183, fn. 3; *Board of Administration v. Wilson*, supra, 52 Cal.App.4th at p. 1144.) *Second*, Bella Vista offers no excuse for its failure to offer the releases in evidence before it rested when it was fully aware of RCI's motion to amend. (*Alpert v. Villa Romano Homeowners Assn.*, supra, 81 Cal.App.4th at p. 1337.) *Third*, the release language clearly excepts all of the damages RCI recovered in this action. Nothing in the releases covers any "retention," any "extras" whether furnished before or after the release date, or any "contract rights . . . based upon . . . breach of the contract." (AA 723 [sample form].) Finally, the release does not affect the "right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services,

Finally, the court's order granting RCI's motion was consistent with sound judicial administration. Motions to amend to conform to proof function to prevent costly and unnecessary multiple trials of the same or similar issues. (See *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400-401; *Crome v. Allen* (1942) 52 Cal.App.2d 137, 140.) Yet that is precisely what Bella Vista seeks – the chance to retry a case against Bella Vista that it has once tried fully, on the merits, and through counsel of its own choice.

3. Appellants Failed to Object to RCI's Evidence That Bella Vista Was Responsible for Delay Damages and Extra Expenses – That Is, Until They Lost the Motion to Amend.

After demanding that RCI allocate its damages between Bella Vista and JCW-Dutra, Bella Vista and the other appellants watched and listened at trial as RCI outlined its case and presented its evidence of Bella-Vista-caused delay and damage. Here are some examples of the offers of proof and evidence Bella Vista's lawyers heard – and to which they made *no objection*:

a. RCI's Introductory Statement of Facts

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equipment, or material was not compensated by this progress payment." All of RCI's damages for delay and extra cost thus fall outside the Bella Vista release. (Ex. 225.)

This statement, which was served on Bella Vista's lawyers on January 21, 2003, before trial began, stated clearly RCI's claim for damages *against Bella Vista* as one of the two "Project Owners" who delayed the project and were liable in damages to RCI and Preston. (AA 305:2-308:17, especially 308:13-17.) After receipt of this statement, Bella Vista's lawyers made no motion in limine or other objection designed to exclude evidence of RCI's or Preston's damages suffered at the hands of Bella Vista. If the issue were perceived to be important, any prudent lawyer would have objected and sought to limit the admissibility of this evidence to claims made against JCW-Dutra. It was apparently not important to Bella Vista – at least at that time.

b. Exhibit No. 225 – RCI's Allocation of Damages Between Bella Vista and JCW-Dutra

Following appellants' announced intentions to object to unallocated damages (AA 425), RCI revised its Bill of Particulars to include a break-down of damages by subdivision into Dutra Farms Damages and Bella Vista Damages. The resulting damage study was introduced in evidence as Exhibit No. 225, *without any objection by appellants*. (RT 1174:16-1175:1.)

Exhibit No. 225 includes a sheet entitled Allocation that contains columns for each of 12 damage items claimed in the Bill of Particulars. The columns show dollar separate numbers for D/F-S/W (JCW-Dutra), B/V 1 & 2, B/V Unit #4 (Bella Vista). There is also a detailed Bella/Dutra EWO (extra work order) log that takes 100 extra expense items and allocates them by contract to JCW-Dutra or Bella Vista.

c. Sean Carroll's Testimony About Bella Vista-Caused Damage

Sean Carroll testified in detail about RCI's damage allocation between Bella Vista and JCW-Dutra, which he had prepared for inclusion in Exhibit No. 225. He also discussed how he had broken down RCI's damages between the two subdivisions. (E.g., RT 1100:26-28; 1106:10-12; 1106:24-27; 1111:18-27; 1113:2-8; see generally 1098-1124.)

Appellants made *no objection* to any of Sean Carroll's testimony about damages allocated to Bella Vista. In his cross-examination of Mr. Carroll, appellants' counsel used the term "owner" to refer jointly to Bella Vista and JCW-Dutra and asked no questions about the distinct damage claims allocated in Mr. Carroll's testimony. (RT 1146-1167.)

In his argument on the motion to amend, Bella Vista's attorney Mr. Drummond admitted he became aware of RCI's damage claims against Bella Vista "*when Mr. Carroll was on the stand a week ago*" (RT 1569:3-6;

emphasis added), but could not explain appellants' total failure to object at that time.

Even apart from its obvious relevance in demonstrating no actual prejudice, a party's failure to object to the admission of evidence when it is offered waives any right to challenge its inadmissibility in later stages of proceedings. (Evid. Code, § 353 (a); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1611 [appeal]; *Moesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 865 [objection to evidence on correct grounds for the first time in motion for new trial was too late].) It constitutes another reason to reject appellants' claim.

D. Appellants' Due Process and Irregularity Contentions Are Vapid and Do Not Overcome the Court's Discretion to Grant a Motion to Amend to Conform to Proof.

1. Bella Vista Received Due Process.

Constitutional due process requires that a party be given adequate notice of legal proceedings to permit appearance and a full and fair opportunity to be heard. (*Boddie v. Connecticut* (1971) 401 U.S. 371, 378; *In re Jesusa* (2004) 32 Cal.4th 588, 601.) Bella Vista received abundant due process.

For all the reasons discussed in Section I (C) above, Bella Vista: (1) was a party to a lawsuit who voluntarily chose to answer and oppose RCI's

claims on the merits; (2) had a full and fair opportunity to submit evidence as well as oral and written legal argument at all stages in these proceedings on all points in controversy; and (3) took full advantage of that opportunity through its own counsel. This more than satisfies due process.

2. Appellants Are Not Entitled to a New Trial.

Like their due process argument, appellants' new trial argument is not a model of clarity. Initially, it appears to be directed solely or primarily against Preston. As such, RCI need not address it.

To the extent RCI is mentioned, the argument merely repeats alleged due process concerns (AOB 38), which have already been addressed in the previous section. To the extent the argument adds a citation to *Trafton v. Youngblood* (1968) 69 Cal.2d 17, that case is wholly different from this one and does not affect its outcome for multiple reasons.

First, in *Trafton* the trial judge exercised his broad discretion by *denying* leave to amend and the Supreme Court found no abuse of discretion. Here, in contrast, the trial judge *granted* leave to amend and appellants do not even mention the abuse-of-discretion standard of review, let alone carry their burden of demonstrating abuse.

Second, in *Trafton* defendant sought to amend only after receiving an adverse decision on the merits, thus attempting to get a second bite at the apple based on a theory defendant never presented at trial. Here RCI

moved *before* the close of evidence, allowing appellants an opportunity to offer whatever further proof they might have. Not surprisingly, given the comprehensive defense they had already presented, appellants had nothing further to offer.

Third, there was obvious prejudice to the plaintiff in *Trafton*, who would have been forced to endure a second trial on the value of his lawyer's services – an issue not litigated in the first trial. Plaintiff might well have had additional evidence to present on such an issue, possibly including expert testimony as to the value of legal services, that he was not obliged to present during trial. Here, in contrast, appellants vigorously litigated the only factual defense they had – that they were not the cause of any delay or extra work. That defense was simply not credible. They have no right to try the same defense a second time because they were dissatisfied with the first outcome.

In summary, none of appellants' arguments even attempts to demonstrate what the law requires for reversal – actual prejudice. Indeed, appellants' failure even to articulate in the trial court a possible ground of prejudice preordained the granting of RCI's motion. (*Walker v. Belvedere*, supra, 16 Cal.App.4th at p. 1670 ["The 'court *must* permit an amendment to conform to proof offered by plaintiff where no prejudice results to defendant.'"].)

II. APPELLANTS' CONTENTION THAT RCI'S DAMAGE AWARD WAS IN DEROGATION OF THE CONSTRUCTION CONTRACTS IS BARRED ON MULTIPLE LEGAL GROUNDS.

In Section X of their brief,[14] appellants contend that the trial court committed legal error in awarding damages to RCI in contravention of Section 3 of the construction contracts. That section required the contractor to invoice the owner on a monthly basis for work completed and provided for an interest rate of 18% on amounts paid late. (AOB 49; AA 545-7 and 545-28.)

Appellants' no-invoice argument should be rejected for three independent reasons: (1) procedural default; (2) lack of substantive merit; and (3) an overriding failure to demonstrate prejudicial error in the award of damages and interest to RCI.

A. Appellants Are Barred From Advancing the No-Invoice Argument by Procedural Default.

Appellants raised their argument that the invoice clause barred RCI's claim for the first time in *counsel's declaration* in support of a motion for new trial. (AA 717-718; see AA 354:19-356:6 [Appellants' trial

[14] Section IX of appellants' opening brief is directed solely at Preston. RCI adopts Preston's respondent's brief to the extent any response on its part is called for on any point or argument.

brief does not mention the no-invoice clause as a defense to RCI's claims.].) This court should not consider the argument for the following reasons, each of which constitutes a procedural default on appellants' part:

1. The Incompetent Attorney Declaration

An attorney's declaration, which was devoid of citation to legal authority, was an improper way to raise a significant legal argument that could rightly be disregarded by the trial court. (*Schaefer v. Manufacturers Bank* (1980) 104 Cal.App.3d 70, 76 [attorney argument in declaration disregarded]; *Cowles Magazines & Broadcasting, Inc. v. Elysium* (1967) 255 Cal.App.2d 731, 734 [same].)

2. Failure to Raise the Argument During Trial

By inexcusably failing to raise their no-invoice argument before the close of the evidence, appellants prevented RCI from presenting evidence on the *interpretation* of the invoice clause – *a factual matter in dispute* between the parties. As a result, they have waived the right to present the argument for the first time on appeal. (*Children's Hospital & Medical Center v. Belshe* (2002) 97 Cal.App.4th 740, 776; *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920 ["But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing

party should not be required to defend against it on appeal."]; *North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 29.)

3. Failure to Object to Any of the Extrinsic Evidence

Appellants complain that the trial court considered extrinsic evidence when the parties' written contracts made such evidence inadmissible. (AOB 51-54.) But they neglect to inform this court that *they failed to object to any of this evidence* on the grounds they now assert when it was offered in the trial court. This is a procedural default which precludes appellants from challenging the evidence on appeal.

Unless an agreement is reasonably susceptible to only a single interpretation, which this one is not (see Section II(B)(1) below), a party must object to extrinsic evidence or waive any objection to that evidence on appeal. (Evid. Code, § 354 (a); *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23; *French v. Brinkman* (1963) 60 Cal.2d 547, 553; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.)

4. Failure to Consider Express and Implied Findings or to Analyze the Evidence Supporting Recovery

Appellants did not request findings on *any* issue. Nor did they point out any ambiguity or omission in the statement of decision.[15] In these circumstances, the Court of Appeal will *imply* any finding necessary to support the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134, construing Code Civ. Proc., § 634; *City of Coachella v. Riverside City Airport Land* (1989) 210 Cal.App.3d 1277, 1292 ["Having failed to specify that the statement of decision should address the issue of laches, [the defendant] is deemed to have waived its right to object to the failure of the statement of decision to do so."]; *Atari Inc. v. State Board of Equalization* (1985) 170 Cal.App.3d 665, 674-675 ["Failure to request findings on specific issues results in a waiver as to those issues."].)

The substantial evidence rule "applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a non-jury trial." (*Lenk v. Total Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) "Where findings of fact are challenged on a civil appeal . . . the power of an appellate court begins and ends with a

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[15] Instead, they objected to the court's decision as to RCI on some of the same legal grounds they raise on appeal. (AA 610-613.)

determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below." (*Id.*)

In order to challenge an express or implied factual finding, the contesting party must set forth in his brief *all the material evidence on the point* and not merely his own evidence. Unless the material evidence is stated completely and fairly, the allegation of error is deemed to be waived. (*Ferraris v. Alexander* (2005) 125 Cal.App.4th 1417, 1440, citing *Foreman & Clark Corp v. Fallon* (1971) 3 Cal.3d 875, 881.)

Appellants here do not bother to analyze *any* of the express or implied findings or *any* of the evidence showing contractual modification, ambiguity of contract terms, or waiver and estoppel respecting their no-invoice claims. (See Section II(B) below.) By failing to acknowledge or discuss the evidence, appellants are in procedural default and have waived any claims of error.

B. Substantial Evidence Supports the Judgment on Theories of Contract Ambiguity, Executed Contract Modification, and Waiver/Estoppel.

Appellants' no-invoice argument is premised on an assumption that RCI's failure to send them a bill is somehow an absolute bar to any relief under Section 3 of the contracts. True to form, appellants cite no

competent authority in support of their Draconian proposition. Nor has RCI's research located any such authority.

Contrary to appellants' assertions, the court's express and implied findings, undergirded by substantial evidence, support RCI's judgment based on any of three independent legal theories: (1) contractual ambiguity; *or* (2) contractual amendment; *or* (3) waiver/estoppel.

1. Ambiguities in the Billing and the Extra Work Clauses Justified the Admission and Consideration of Extrinsic Evidence to Interpret the Contracts.

Appellants assert that the trial court erred in awarding RCI "equitable relief" that conflicted with the terms of the written contracts, i.e., those governing invoices. (Section X, AOB 46-54.)[16]

Contrary to appellants' assertion, the invoice provision in Section 3 of the contracts is not free from ambiguity. That clause says only that: "Between the 20th and 25th day of each month after the start of work, contractor will invoice owner for the work completed that month, less the

[16] At the outset, the premise of the argument is not correct. RCI's monetary award was based alternatively on damages for breach of contract, open book account, and quantum meruit. (AA 684:9-15 [judgment]; 601:7-16 [Statement of Decision].) Only the last of these qualifies as equitable relief. (*Walton v. Walton* (1995) 31 Cal.App.4th 277, 289-290 [breach of contract claim is based on legal relief]; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 395, fn. 6 [quantum meruit is an equitable remedy].) Therefore, RCI's award can be upheld based on legal grounds without resort to equitable ones. (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1155 [general verdict rule].)

aggregate of work completed in previous billing periods." (AA 545-7; 545-28.) The clause does not define "work completed." Section 3 can be read to include only the specified work, not *extra* work. The "Scope" clause refers to the "*work described herein . . . in strict accordance with the contract documents*," i.e., the plans, specifications, and RCI's proposal that was attached to the contracts. (AA 545-1; 545-22 [Recitals B&D; Section 1]; see also Section 31 at 545-10 & 545-31.)

Extra work, in turn, is governed by Section 17, entitled "Change Orders and Extra Work," which contains two contradictory sentences. The first sentence says: "*Should the Owner direct any modification or addition to the work covered by this contract, the contract amount shall be adjusted accordingly*." (AA 545-9; 545-30; emphasis added.) As the trial court found, appellants did direct work in addition to what was covered by the contract, and did not pay for it. (AA 596-600.) This was a breach of contract by appellants for which RCI was properly awarded damages.

The second sentence of Section 17 provides that modifications or additions to the work are permitted "only when a contract change order has been signed by both the Owner and the Contractor." But the contract does not assign responsibility for insuring that a change order is issued and signed. If, as mandated by the first sentence, the owner is obligated to pay for *all* extra work it orders, it should issue and sign any change orders for

that work as a matter of course. In that event, RCI's damages award is consistent with, and supported by, Section 17.

To the extent another interpretation of Section 17 might assign responsibility for written change orders to the parties jointly or to RCI alone, the contract is ambiguous. Extrinsic evidence is properly admitted to interpret it. And the resulting interpretation is to be affirmed if it is supported by substantial evidence. (*Solis v. Kirkwood Resort* (2001) 94 Cal.App.4th 354, 360 [when there is an ambiguity in the contract, "the appellate court must defer to a trial court's assessment of the extrinsic evidence."]; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-913 ["Where the interpretation of the contract turns upon the credibility of conflicting extrinsic evidence which was properly admitted at trial, an appellate court will uphold any reasonable construction of the contract by the trial court," citing *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866].)

Even appellants concede that extrinsic evidence is admissible where contract documents are ambiguous. (AOB 52-53.) The contracts here are reasonably susceptible to the meaning RCI has posited, i.e., that appellants breached the contract by refusing to adjust the contract price and by failing to issue change orders in contravention of Section 17. Indeed, any other view would render the contract illusory and unconscionable. Appellants

could delay RCI's work and expand its scope as much as they pleased, and then simply refuse to issue change orders. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 923-924 [discretionary power of bank to establish charges must be exercised in good faith to prevent illusory and unconscionable obligation].) That is, of course, precisely what appellants did here.

It is not surprising that appellants are unable to cite even a single California case for the proposition that an owner can escape his obligation to pay for extra construction work that he directed because of a failure of paperwork.[17] There is no such case. Faced with ambiguous language, the court here properly looked to extrinsic evidence (admitted without any objection) to find appellants in breach of contract. Its express and implied findings in this regard were supported by the same evidence that revealed contractual amendments. (See Section II(B)(2) below.) They should be upheld.

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[17] The only cases appellants cite are landlord-tenant cases, both of which are inapposite because neither involved damage claims for: (1) owner-caused delays; or (2) an owner's orders for extra work duly carried out by a contractor. (*Witt v. Union Oil Co.* (1979) 99 Cal.App.3d 435 [hold-over tenancy without landlord's consent]; *Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605 [tenant makes repairs without notifying landlord or obtaining his consent].)

2. The Judgment Is Supported By Executed Amendments to the Contracts Providing For Additional Compensation For Extra Work.

A written contract can be amended by execution. "A contract in writing may be modified by an oral agreement *to the extent that the oral agreement is executed by the parties*." (Civ. Code, § 1698(b), emphasis added.) As the trial court found, that is precisely what RCI and appellants did on numerous occasions during the course of this project. (AA 596-600.)

Under established law, when a construction contractor completes extra work requested by the owner or made necessary by the owner's conduct that is beyond the scope of the contract, an amendment is executed. The contract is modified to that extent. As a result, the contractor is permitted to recover compensation for the additional work. (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 291 [oral agreement for extra work enforceable to avoid unjust enrichment]; *Peter Kiewit Sons' Co. v. Pasadena City Junior College* (1963) 59 Cal.2d 241, 246 [owner's defective plans created extra cost which was recoverable by contractor]; *D.L. Godbey & Sons Construction Co. v. Deane* (1952) 39 Cal.2d 429, 432-433 [executed oral agreement modification to a written contract was enforceable based on section 1698]; *Cavanagh v. Keplinger* (1928) 204 Cal. 19, 20.)

The fact that a written contract requires invoices or forbids modification except in writing does not preclude modification by an executed oral agreement. (*Arya Group, Inc. v. Cher* (2000) 77 Cal.App.4th 610, 614-615 [recovery allowed in quantum meruit for construction work based on oral agreement only, despite violation of statute requiring written agreement]; *Girard v. Ball* (1981) 125 Cal.App.3d 772, 785 [executed oral agreement enforced notwithstanding written construction contract providing that "all agreements must be made in writing," citing "commonly known custom and practice in the construction industry"]; *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 552 ["Where the terms of a written contract require that extra work be approved in writing, such provision may be altered or waived by an executed oral modification of the contract."]; *MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 669-670 ["[A]n executed oral agreement may alter a contract in writing even though, as here, the original contract provides that extra work must be approved in writing."]; *Ferelli v. Weaver* (1962) 210 Cal.App.2d 108, 115 [absent timely demand by owner to establish value of extras in advance, contractor was entitled to payment for extras under oral contract modification theory].)

The trial court implicitly found that the parties modified their contract when RCI complied with appellants' requests for additional work

above and beyond the call of contractual duty. (AA 596-600.) Appellants make no attempt to address the court's express and implied findings or the evidence supporting them. The following examples, among many others, reveal rock-solid evidentiary support for the court's judgment:

(1) *Defective Plans: Woodward Offsite Water Line.* The offsite waterline work was critical because it had to be approved by the City before the project as a whole could proceed. (AA 597:21-26.) *Appellants' plans for the Woodward offsite water line were so defective they were unbuildable*. They had to be modified. (AA 597:27-598:13.) Preparation of modified plans delayed the project by 99 days (RT 942:12-943:11; Exs. 220-221), and changed the scope of the paving and underground utility work. (AA 598:17-18.) As a result, appellants instructed RCI and Preston to perform extracontractual work. When RCI did as it was told, the contract was amended to allow compensation for the additional work. (AA 598:6-7.)

When Preston refused to commit to waterline completion before January 31, 2001, appellants nonetheless elected to have RCI and Preston continue the work, notwithstanding contract provisions that would have allowed appellants to replace RCI with someone else. (AA 598:4-13.) RCI's damages from this item alone were $214,915. (Ex. 225, Item No. 11.)

(2) *Owner-Approved Extra Work*. Appellants themselves approved or directed more than 20 items of extra work at a cost exceeding $200,000, ranging from landscaping and irrigation changes to modifications in electrical facilities, manholes, and fencing. (Ex. 225, Item Nos. 3-4 and Attachment; Exs. 45, 53.)

(3) *Other Delay Damages*. Appellants were responsible for approximately 150 days of delay in project completion from the October-November 2000 dates specified in the contracts (AA 545-14 and 545-35) to May 7, 2001, when the City gave its conditional approval. (AA 598:19-25; 600:12-14.) Delay was attributable to numerous owner-related causes, e.g., failure to pay city developer fees (resulting in a work shut-down by the City of Manteca), failure to obtain and provide signed plans, late production of contracts and securing of financing, failure to pay city permit fees, and many other items. (AA 596:27-597:20; see Exs. 220-221; see generally RT 930-950 [expert Rick Nedell's testimony analyzing delays].)

Based on the foregoing, RCI established by a preponderance of the evidence its claims for breach of contract, open book account, account stated, and quantum meruit against JCW-Dutra. (AA 601:7-8.) RCI also established by a preponderance of the evidence its claims for breach of contract and quantum meruit against Bella Vista. (AA 601:13-14.)

RCI is entitled to the same judgment on *any one* of the theories just enumerated. (*Tavaglione v. Billings*, supra, 4 Cal.4th at p. 1155.) Appellants do not argue that open book account, account stated, or breach of express contract is foreclosed, except insofar as they maintain that the contracts here absolutely bar recovery. Appellants' argument on that ground is unavailing for the reasons discussed above. Moreover, appellants' suggestion that quantum meruit does not lie in these circumstances – in which the scope and extent of the changes support an inference that the contract was abandoned – are just plain wrong. (*Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 639-640 [quantum meruit recovery allowed based on abandonment of original contract because, as here, provision requiring written modification was constantly disregarded]; *Daugherty Co. v. Kimberly-Clark Corp*. (1971) 14 Cal.App.3d 151, 156; *B.C. Richter Contracting Co. v. Continental Casualty Co.* (1964) 230 Cal.App.2d 491, 501-502; *Opdyke & Butler v. Silver* (1952) 111 Cal.App.2d 912, 913-914, 918-919 [same effect].) In this case, the schedule changed by five months or more, the scope of the work grew, and the plans were defective. Having performed as appellants directed, RCI accepted their offer to modify the contract and is entitled to the just compensation the trial court awarded for its work,

whether in breach of express contract or breach of implied contract in quantum meruit.

3. Appellants Disregard the Trial Court's Express and Implied Findings of Waiver and Estoppel to Rely on the Invoice Clause.

Contractual provisions can be avoided by the doctrines of waiver and estoppel. (*Cavanagh v. Keplinger*, supra, 204 Cal. at p. 20; *Healy v. Brewster*, supra, 251 Cal.App.2d at p. 552; *MacIsaac & Menke, Inc. v. Cardox Corp*., supra, 193 Cal.App.2d at pp. 669-671; *Frank T. Hickey, Inc. v. L.A.J.C. Council* (1954) 128 Cal.App.2d 676, 681-682.) To the extent necessary to support the judgment, implied findings of waiver and estoppel can be applied to the court's findings and supporting evidence discussed in Sections II B(1) & (2) above.

a. Waiver

"Waiver refers to the act, or the consequences of the act, of one side. *Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only*. Waiver does not require any act or conduct by the other party. . . Thus, the pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right." (*DRG/Beverly Hills, Ltd. v. Chopstix*

Dim Sum Café & Takeout III, Ltd. (1994) 30 Cal.App.4th 54, 59; emphasis added.)

According to appellants, they had the right under the contracts to demand that RCI submit bills at the exact moment it was performing extra work or be barred from any compensation for its efforts. (Section X, AOB 46-54.) Even if they were correct, appellants voluntarily relinquished any right they may have had under the contract to have bills submitted for extra work by demanding that RCI perform the work and failing to request the invoices or issue the change orders they now contend were so vital.

"California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 33-34, quoting *Intel Corp v. Hartford Acc. & Indem. Co.* (9th Cir. 1991) 952 F.2d 1551, 1559.) The presence or absence of waiver is normally a question for the trier of fact, court or jury. (*Posner v. Grunwald-Marx Inc.* (1961) 56 Cal.2d 169, 189; *Longbeach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 171; *Glendale Fed. S & L Assn. v. Marina View Heights* (1977) 66 Cal.App.3d 101, 151-152.)

Appellants delayed work on the project by numerous breaches of contract. (AA 597-598.) With full knowledge of the invoice clause and their own default, appellants directed additional work to be done knowing that it was outside the scope of the contract and that it would delay the project. (AA 598-600; RT 782-784; RT 880-883; 895-896; RT 933-940 [engineering expert Richard Nedell]; Exs. 220-221.) In giving these directions, appellants made no demand on RCI for contemporaneous invoices. Based on this failure, the court impliedly found a waiver of any alleged contract right.

b. Estoppel

"Estoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts." (*DRG/Beverly Hills Ltd v. Chopstix Dim Sum Café & Takeout III Ltd.*, supra, 30 Cal.App.4th at p. 59.) Estoppel requires detrimental reliance in addition to conduct by the party to be estopped from inducing that reliance. (*Waller v. Truck Ins. Exchange, Inc.*, supra, 11 Cal.4th at p. 43.) Like waiver, estoppel is usually a "non-jury fact question." (*DRG/Beverly Hills Ltd v. Chopstix Dim Sum Café & Takeout III Ltd.*, supra, 30 Cal.App.4th at p. 61; *Glendale Fed. S & L Assn. v. Marina View Heights*, supra, 66 Cal.App.3d at pp. 151-152.)

The evidence supports an implied finding that RCI reasonably relied on appellants' directions to proceed with work by contributing its time, energy, money, and expertise to the project in ways that were not required by the original contracts. Having relied on appellants' statements and conduct to its detriment, RCI is entitled to claim an estoppel against appellants' belated insistence on the inconsequential technical detail of an invoice, especially when the contracts mandate owner payment for all extra work. (Section 17, AA 545-9; AA 545-30.)

C. Appellants Have Failed to Shoulder Their Burden of Showing Prejudicial Error In the Award of Damages or Interest.

Appellants must affirmatively demonstrate *prejudicial* error from their no-invoice argument in order to obtain reversal of the judgment. (Cal. Const., art. VI, § 13; *Denham v. Superior Court*, supra, 2 Cal.3d at p. 564; *City of Merced v. American Motorists Ins. Co.*, supra, 126 Cal.App.4th at pp. 1322-1323.) Appellants fail to cite any authority – or even to make any reasoned argument – demonstrating that a failure to submit a bill or change order for extra-contractual work unquestionably performed is anything more than a harmless technical oversight. Appellants do not and cannot show that RCI received any award of damages or interest to which it was not entitled.

Appellants' brief does not make a distinct argument assailing RCI's interest award in compliance with Rule 14(a). Therefore, any such argument has been waived. (*Opdyk v. California Horse Racing Bd.,* supra, 34 Cal.App.4th at p. 1830, fn. 4.) But to the extent appellants may be suggesting that it was somehow improper for the court to award interest at the stipulated contract rate of 18% in the absence of invoices, the record reveals that RCI conceded it was not entitled to interest for extra work claims preceding January 1, 2003.[18] (AA 650:22-25; RT 1030:7-10.) *At that time, JCW-Dutra and Bella Vista were given a precise and detailed "invoice" for amounts owed to RCI in the form of a Bill of Particulars.* (AA 422:17-19; Ex. 225, Item Nos. 5-6.) They nonetheless refused to pay. They were correctly held in breach of contract for their refusal. (AA 601:7-10; 684:9-25; 685:1-7.)

RCI was entitled to recover interest from the date it presented appellants with its detailed statement. The trial court had *discretion* to order prejudgment interest on contract causes of action under Civil Code section 3287(b), and to decide the date from which interest would run.[19]

---

[18] RCI did, of course, claim interest on the 10% retention held back by the Williams companies, since that fixed and liquidated sum was due upon completion of RCI's work. (Ex. 225; Civ. Code, § 3287(a).)

[19] Appellants have failed to show that discretion has in any way been abused and may not attempt do so in reply. (*Save Sunset Strip,* supra, 87 Cal.App.4th at p. 1183, fn. 3; *Board of Administration v. Wilson,* supra, 52

(*North Oakland Med. Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 829.) Discretionary interest applies to both breach of contract and quantum meruit claims, which sound in contract. (*George v. Double-D Foods, Inc.* (1984) 155 Cal.App.3d 36, 47-48.)

The rate of interest awarded depends on the nature of the claim on which a judgment is based. "Any legal rate stipulated by a contract remains chargeable after a breach thereof, until the contract is superseded by a verdict or other new obligation." (Civ. Code, § 3289(a); *Granite Construction Co. v. American Motorists Ins. Co.* (1994) 29 Cal.App.4th 658,670-671 [Third Appellate District: interest awarded against surety at contract rate of 18%]; *Ansco Const. Co. v. Ocean View Estates* (1959) 169 Cal.App.2d 235, 238-239 [plaintiff entitled to rate of prejudgment interest stipulated in contract even if damages were unliquidated].) The parties here agreed to 18%. (Section 3; AA 545-7; 545-28.) Because appellants make no comprehensible argument supported by authority challenging the calculation and award of interest, it should be upheld along with the remainder of the judgment.

Cal.App.4th at p. 1144.)

III. APPELLANTS' ASSERTIONS THAT RCI'S CLAIMS WERE BARRED AS A MATTER OF LAW BY WAIVER AND ESTOPPEL DISREGARD THE DOCTRINE OF IMPLIED FINDINGS AND THE SUBSTANTIAL EVIDENCE RULE.

In a challenge to the court's damages award against them, appellants argue in sections XI and XII of their brief that RCI is barred by waiver and estoppel from recovering: (1) any amount that it did not bill to Bella Vista; and (2) any reimbursement of discounts wrongfully taken by Bella Vista and JCW-Dutra in violation of the contract provision requiring timely payment as a condition of a discount. Appellants' argument should be rejected.

A. Appellants' New Waiver/Estoppel Defense Is Barred by Procedural Default.

1. Appellants Failed to Request Findings or Otherwise Raise Waiver/Estoppel at Trial.

Appellants did not raise at trial the defenses of waiver and estoppel they now assert. None of their submissions – which included a trial brief (AA 315-316), multiple objections to the statement of decision (AA 590-594, 608-613), and a motion for new trial (AA 622-625, 704-743) – requests any finding or determination on the issues of waiver and estoppel that appellants now raise on appeal.

A party's failure to request that a statement of decision include a particular issue, claim, or defense irrevocably waives any right to raise that issue on appeal. (*Atari, Inc. v. State Board of Equalization* (1985) 170 Cal.App.3d 665, 674-675; see also *City of Coachella v. Riverside City Airport Land* (1989) 210 Cal.App.3d 1277, 1292.) Obviously, if a party fails to request a finding on a contraverted issue, it deprives opposing parties of their opportunity to submit evidence and argument and the court of its prerogative to consider the evidence and to state its decision on the issues. (*Hellweg v. Cassidy* (1998) 61 Cal.App.4th 806, 809, citing *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) These rules bar appellants from raising the estoppel and waiver issues included in sections XI and XII in their brief.

Appellants have also violated the established rule that theories and contentions not raised in the trial court may not be asserted for the first time on appeal. Because they are fact intensive and necessarily require presentation of evidence, waiver and estoppel cannot fairly be raised for the first time on appeal. (*Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 319 ["Questions of estoppel are questions of fact. We are precluded from considering these factual issues raised for the first time on appeal."].)

2. Appellants Have Failed to Set Forth the Evidence and Findings Pertaining to the So-Called Issues of Waiver and Estoppel.

Issues of waiver and estoppel are inherently fact-specific. (*Old Republic Insurance Co. v. FSR Brokerage* (2000) 80 Cal.App.4th 666, 678-679.) As a result, appellants are restricted to contending that no substantial evidence supports the trial court's express *and* implied findings. (*SFPP, L.P v. The Burlington Northern & Santa Fe Railway Co.* (2004) 121 Cal.App.4th 452, 462.) An appellant's failure to set forth *all* the evidence on a controverted issue waives its right to argue the issue on appeal. (*Ferraris v. Alexander* (2005) 125 Cal.App.4th 1417, 1440; see also *Toigo v. Town of Ross* (1998) 60 Cal.App.4th 309, 317.) Appellants here made no attempt to describe the entire body of evidence, resulting in waiver.

B. Substantial Evidence Supports the Trial Court's Implicit Rejection of the Newly-Minted Defenses of Waiver and Estoppel.

1. RCI Is Not Barred as a Matter of Law from Seeking Unbilled Amounts from Bella Vista.

Appellants maintain that RCI was not entitled to recover damages for delay and extra work because: (1) it did not bill appellants for that

work; and (2) "Sean Carroll testified at trial that RCI did not bill for the work and had no intention of doing so." (AOB 56.)

As RCI has explained in Section II above, it was not barred from pursuing damage claims for extra costs merely because it neglected to send bills contemporaneously with the work it did. Moreover, appellants do not reveal the full context of Sean Carroll's statement about RCI's intentions concerning suit. After promising at two different meetings that appellants would be paying the retention on the original contract price, John Williams reneged and refused to pay *any of it*. (RT 356:3-19.) Then his companies sued RCI. As Sean Carroll testified in response to questions by RCI's attorney:

> "Q. If I understand your testimony specifically on cross-examination . . ., the only item that you billed the owners for was the retention. Do I understand that correctly?
>
> A. Yes.
>
> Q. ***And why didn't you bill for the other items that you now seek to recover in this litigation*?**
>
> A. ***We were willing to absorb those costs until Mr. Williams sued us."*** (RT 1172:14-22; emphasis added.)

Based on Carroll's testimony, the trial court could have inferred that any intention on RCI's part to relinquish unbilled sums and damages was

conditioned on freedom from a lawsuit with appellants. When appellants chose to sue RCI, they breached the condition. The essential element of waiver – voluntary relinquishment of a known right – was thus not established as a matter of fact. (*Longbeach Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 171.)

By the same logic, appellants fail in their estoppel defense because they do not point to *any* evidence, let alone *uncontradicted evidence*, showing their *detrimental reliance* on any statement or conduct of RCI. Indeed, there is no evidence that Sean Carroll or anyone else at RCI ever told John Williams that delay damages and extra costs would not be sought. In the absence of uncontroverted evidence of conduct and detrimental reliance, which appellants themselves acknowledge is missing (AOB 55, fn. 13), the estoppel claim necessarily fails. (*Glendale Fed Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 151.)

2. <u>To the Extent Appellants Have Not Waived the Issue, RCI is Legally Permitted to Seek Reimbursement of Unearned Discounts Taken by JCW-Dutra and Bella Vista</u>.

As appellants acknowledge, Section 3 to the contracts provides that appellants are entitled to a one percent discount for payments made within ten days and one/half percent for payment within ten to twenty days. (AA

545-7; 545-28.) Bella Vista and JCW-Dutra routinely and wrongfully took the discounts even though they were not entitled to do so under the contract. (RT 1156:7-12.) Without benefit of any legal authority, appellants simply assert that RCI's "conduct and acquiescence" resulted in ***estoppel and waiver as a matter of law***.

Initially, appellants failed to request a finding on unearned discounts. It appears from the record that the court may have *denied* RCI's claim for unearned discounts. (Compare net award to RCI of $900,911.68, apparently based on damage claim of $918,978.47 against JCW-Dutra, less $18,066.79 in unearned discounts. (Ex. 225; AA 601:8-9; 684:11-12.).) Appellants' failure to request a finding deprived the court of the opportunity to clarify its finding and results in a waiver. (*Atari Inc. v. State Board of Equalization*, supra, 170 Cal.App.3d at pp. 674-675.)

As RCI has already pointed out, estoppel and waiver are classic issues of fact when evidence is equivocal and competing inferences are possible. (Section II(B)(3) above.) From the evidence, the court could have inferred that RCI did not intend to waive its right to recover unearned discounts simply because it accepted checks representing sums that were unquestionably due. (*Sellman v. Crosby* (1937) 20 Cal.App.2d 562, 565-566.) Nor do appellants point to any evidence of their detrimental reliance, which is a required element of estoppel (see Section II(B)(3)(b) above.)

Appellants certainly had no reasonable or legitimate expectation that they could get away with not paying amounts plainly due under the original contract.

IV. THERE IS SUBSTANTIAL EVIDENCE OF BOTH THE EXISTENCE AND TERMS OF THE PAYMENT BOND.

In addition to representing JCW-Dutra and Bella Vista on this appeal, the Williams company counsel also represent American Motors Insurance Company, the surety that issued a payment bond at the request of JCW-Dutra. In section XIV of the opening brief, American Motorists seeks reversal of the judgment against it on two grounds, claiming that: (1) RCI failed to *allege* the material terms of the surety contract or attach it to its cross-complaint; and (2) "no evidence of any surety bond/contracts was admitted into evidence." (AOB 59-60.) Both assertions are meritless and disingenuous.

It is far too late in the day to raise purported defects in pleadings. By failing to demur, move to strike, or otherwise challenge the sufficiency of RCI's pleadings in the trial court, appellants waived the right to do so on appeal. (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 48.) This argument is particularly disingenuous given that American Motorists itself admitted its suretyship and identified and attached a copy of its payment bond to its own cross-complaint. (AA 177:4-7 & 194-195.)

Moreover, it was unnecessary for RCI to introduce a copy of American Motorist's payment bond in evidence because such a copy had already been introduced by Preston as Exhibit 19. Exhibit 19 was received in evidence *without objection by appellants* as shown in the following passage in the reporter's transcript:

> ***"[Appellants' Counsel] MR. DRUMMOND: I just want to let the court know that I think I understand what I'm doing with respect to the exhibits that were not referred to but were in Mr. Naegele's binders. I have no objections to them.***
>
> ***THE COURT: Oh, all right. Thank you.***
>
> ***(Whereupon Plaintiff's Exhibit Numbers 1, 2, 4-24, 26-81 previously marked for Identification, was received in Evidence.)"***

(RT 924:20-28; emphasis added.)

Appellants' suggestion that no evidence of the bond was introduced at trial is not only demonstrably false, it is disingenuous in the extreme. On numerous occasions, American Motorists effectively conceded the existence and terms of the payment bond in pleadings, questioning, argument, and failures to object to questions assuming its existence. (AA 177-181 [American Motorists' Cross-Complaint identifies and attaches a copy of the payment bond thereby admitting its terms and existence]; 314:16-22 [trial brief describes bond]; 428:12-19 [appellants' attorney

refers to bond]; Exs. 223, 231, & 409 [re: claims and notice on bond]; see also RT 428:6-18, 1051:5-14.) Moreover, the covenants in the bond are *statutory* and require only that claimants be persons described in Civil Code section 3110, which includes unpaid "contractors" and "subcontractors." (Civ. Code, § 3226.) RCI and Preston clearly qualify. They are, therefore, entitled to recover on the bond. (*Washington International Ins. Co. v. Superior Court* (1998) 62 Cal.App.4th 981, 988-989 [statutory provisions are incorporated into surety bond].)

CONCLUSION

RCI and Preston performed exemplary work in building underground and street-level improvements for John Williams' two Manteca subdivisions. Even Mr. Williams so acknowledged. (RT 433:6-14.) Yet the work of these contractors has gone unpaid for *nearly five years* – long after Mr. Williams and his companies have sold their homes and made their profits. Both law and equity abhor this state of affairs. To rectify the situation, the judgment should be affirmed in its entirety.

Dated: July 21, 2005 LAW OFFICES OF TONY J. TANKE

By:_____
Tony J. Tanke,
Attorneys for Respondent Ross F. Carroll, Inc.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 13,986 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief. The entire brief is double spaced. The font is 13 point Times New Roman.

Dated: July 21, 2005 LAW OFFICES OF TONY J. TANKE

By:_____
Tony J. Tanke,
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PROOF OF SERVICE
STATE OF CALIFORNIA - COUNTY OF SAN DIEGO

I am employed in the City of Oceanside, County of San Diego, State of California. I am over the age of 18 and not a party to this action; my business address is: 322 Fowles Street, Oceanside, California, 92054.

On July 22, 2005, I served the document(s) described as: **RESPONDENT'S BRIEF** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[**X**] (**BY MAIL**) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (**BY FAX**) I transmitted, pursuant to Rules 2001 et seq., the above-described document(s) by facsimile machine (which complied with Rule 2003(3)), to the above-listed facsimile number(s). The transmission originated from facsimile phone number (309) 410-5695 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

[ ] (**BY PERSONAL SERVICE**) I caused to be delivered such envelope by hand to the offices of the addressee(s).

[ ] (**BY OVERNIGHT DELIVERY**) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on July 22, 2005, at Davis, California

[**X**] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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