

No. DA 21-0516

IN THE

Supreme Court of the State of Montana

THERMAL DESIGN, INC., a Nebraska Corporation,

Plaintiff, Counterclaim Defendant, and Appellee,

v.

MARK DUFFY, an individual; PAM DUFFY, an individual; CENTRAL COPTERS, INC., a
Montana corporation,*Defendants, Counterclaim Plaintiffs, and Appellants,*STEVE THORSON, an individual, d/b/a TNT BUILDING SYSTEMS, a general partnership;
TRAVIS THORSON, an individual, d/b/a TNT BUILDING SYSTEMS, a general
partnership;*Defendants, Crossclaim Defendants, and Appellees.*ON APPEAL FROM THE MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY, HON. PETER B. OHMAN
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STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by:
 - (a) refusing to excuse a juror for cause with no evidence he had currently pending business with counsel for Appellee Thermal Design;
 - or (b) limiting the scope of *voir dire* about another juror's familial relationship with the trial judge where there was no objection.

2. Whether the district court erred by foreclosing Thermal Design's construction lien where:
 - (a) Thermal Design supplied insulation pursuant to an agreement between Appellant Central Copters and Appellee TNT Building Systems for construction of a steel building;
 - (b) Appellants Mark and Pam Duffy, the owners of the real property, agreed to the building before construction began; and
 - (c) the jury found that the insulation system was specifically fabricated for installation in the building and the insulation was not readily resaleable in the ordinary course of Thermal Design's business.

3. Whether substantial evidence supports the jury's finding that TNT acted as Central Copters' agent in contracting with Thermal Design for insulation, particularly where there was written proof of the agency.

4. Whether the jury's special verdict was inconsistent where Montana law allows both an agent and principal to be liable for breach of contract.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of a jury verdict and subsequent foreclosure proceedings in an otherwise routine construction dispute that has been litigated for nearly seven years.

Landowners Mark and Pam Duffy leased their real property to Central Copters, a company both formed and controlled by them. Central Copters admittedly engaged TNT Building Systems—an assumed business name used by Steve Thorson and his son, Travis—to build a steel building on the land.¹ TNT, in turn, engaged Thermal Design to supply insulation after receiving an e-mail from Mark Duffy that read, in part, “please confirm that you have ordered the insulation for the building from the source you have.” After a dispute with Duffy, TNT eventually walked off the job and Thermal Design was never paid. Thermal Design thus filed a construction lien against the Duffys' land

¹ The Thorsons were named individually in the lawsuit and proceeded *pro se*. This brief generally references the Thorsons as TNT.

and Central Copters' building and a breach of contract claim against both TNT and Central Copters, and prevailed at trial.

Seeking to undo that result, the Duffys and Central Copters now attack many of the district court's rulings, as well as the jury verdict itself. Every issue they raise, from *voir dire* to application of Montana's statutory construction lien scheme, is relatively straightforward, both factually and legally. To reverse, this Court would have to overrule decades of well-established law, view the evidence in the light most favorable to the losing party, and craft a new rule under which an unpaid subcontractor cannot file a construction lien unless it contracts directly with the landowner.

B. Course of Proceedings and Disposition Below

In May 2015, Thermal Design filed a complaint to foreclose its construction lien against the Duffys and Central Copters. Dkt. 1; Ex. 9.² The complaint also asserted claims against other defendants, including TNT, Steel Concepts, LLC, and Steve Larson. *Id.* Central Copters filed an answer denying liability, Dkt. 8, while the Duffys filed

² Citations to entries in the district court's docket use the docket number. Citations to "Ex." refer to trial exhibits. Citations to "Trans." refer to the trial transcript.

counterclaims against Thermal Design for declaratory judgment, breach of warranty and trespass, as well as cross-claims against TNT for breach of contract, negligence and indemnity, Dkt. 7, at 13-18. After the district court set aside TNT's initial default, TNT also denied liability and asserted a cross-claim against the Duffys for breach of contract. Dkt. 20.

Over the next five years, both the claims and parties evolved. Thermal Design voluntarily dismissed Steel Concepts and Larson, Dkt. 94, and the remaining parties proceeded to trial on somewhat revised claims in March 2020. Throughout the five-day trial, the district court consistently expressed its frustration with the Duffys' and Central Copters' changing theories and the parties' collective inability to propose a verdict form adequately addressing the issues. *See, e.g.*, Trans. 497:17-498:14; 735:13-24. At the end of trial, the court remained dissatisfied with the parties' proposed special verdict forms and thus crafted its own. Trans. 1110:22-1111:2.

Using the court's special verdict form, the jury made a host of findings, nearly all in Thermal Design's favor. First, it concluded that Thermal Design's insulation system was specifically fabricated for use in Central Copters' building and was not readily resaleable in the

ordinary course of Thermal Design's business. Dkt. 264, ¶¶ 1-2. Next, it found that TNT breached its contract with Thermal Design, but that TNT acted as Central Copters' agent in entering the contract and that Central Copters was also liable for breach. *Id.*, ¶¶ 3-5. For TNT's and Central Copters' breach of contract, the jury determined that Thermal Design's damages were \$31,266.12. *Id.*, ¶ 6. The only question on which the jury found against Thermal Design related to unjust enrichment, concluding that the Duffys and Central Copters were not unjustly enriched by Thermal Design supplying the insulation system. *Id.*, ¶¶ 11-12.

On the cross-claims between TNT and Central Copters, the jury concluded that both parties breached the agreement under which TNT was to erect a building on the Duffys' property. *Id.*, ¶¶ 7, 9. The jury found that that TNT incurred \$23,753.88 in damages from Central Copters' breach, while Central Copters was not damaged at all. *Id.*, ¶ 8, 10.

Lastly, the jury rejected the Duffys' and Central Copters' claims for trespass. It found that neither Thermal Design nor TNT should pay for storing the insulation system in Central Copters' building. *Id.*, ¶¶ 13-16.

The parties then filed a series of post-trial motions, on which the district court ruled over the ensuing 18 months. To start, the court denied the Duffys' and Central Copters' Rule 50 and Rule 59 motion by failing to rule on it within 60 days. Dkt. 278. The court then issued a detailed order regarding the foreclosure of Thermal Design's construction lien, relying in part on the jury's findings as to the validity of the lien, in part on the court's finding as a matter of law that the contract between Central Copters and TNT for erection of the building was a real estate improvement contract under which Thermal Design furnished the insulation, and in part on the court's post-trial, foreclosure-specific findings. Dkt. 294. Ultimately, the court held that Thermal Design had a valid construction lien attaching to both the Duffys' real property and Central Copters' building, and that the lien should be foreclosed. *Id.*

Simultaneously, the district court issued two separate orders, one awarding Thermal Design its costs and one awarding Thermal Design consequential damages from TNT, as well as pre-judgment interest. Dkts. 295-96. More than a year later, the court also issued an order awarding Thermal Design its attorneys' fees. Dkt. 361. None of those three orders has been independently challenged on appeal.

Finally, on October 4, 2021, the district court entered its judgment, decree of foreclosure and order of sale. Dkt. 368. Consistent with the jury's special verdict and the court's prior orders, the judgment awarded Thermal Design: (1) \$31,266.12 jointly and severally against the Duffys, Central Copters and TNT; (2) \$29,899.38 in pre-judgment interest through March 13, 2020 against Central Copters and TNT, which continues to accrue at \$15.42 per day; (3) \$5,050.20 in costs; (4) \$32,449.30 in consequential damages against TNT; (5) \$16,298.59 in attorneys' fees against TNT; (5) \$125,003.16 in attorneys' fees against the Duffys and Central Copters; (6) post-judgment interest; and (7) foreclosure of its construction lien. *Id.* at 3-7. The judgment also awarded TNT \$23,753.88 against Central Copters, along with post-judgment interest. *Id.* at 4. This appeal followed.

STATEMENT OF THE FACTS

A. The Real Estate Improvement Contract

TNT is a father-son business with some 20 years' experience erecting pre-engineered steel buildings. Trans. 151:11-152:17. Essentially, the steel buildings are kits, like large-scale versions of toy erector sets. *Id.* at 152:18-154:15. Various companies engineer and manufacture the buildings based on specifications from their customers

and then ship them in pieces with instructions and everything needed to assemble them. *Id.* In terms of complexity, the buildings run the gamut from small garages that can be assembled in a matter of days to large commercial buildings that take months to erect. *Id.* at 160:7-161:20.

In the spring of 2014, Mark Duffy called TNT about erecting a steel building Duffy had previously ordered from a company called R&M Steel. *Id.* at 165:3-167:2. The building was to serve as a commercial helicopter hangar for Central Copters, which leases the underlying real property from the Duffys. Accordingly, it was relatively large—80-feet wide by 250-feet long and more than 20-feet tall. Trans. 174:15-177:20, 457:18-22, 505:21-506:1; Ex. 1; Exs. BBB5-6.

Although Duffy has taken shifting positions about whether he engaged TNT personally or in his capacity as the owner of Central Copters, there is no dispute that TNT was hired for the job.³ Steve Thorson sent Duffy an e-mail on June 6, 2014, bidding a flat fee of \$70,000 to erect the building, explaining that TNT would markup any

³ The Duffys and Central Copter contended in the final pretrial order that “the Duffys hired the Thorsons and/or TNT,” but Duffy testified at trial that he was acting solely as an officer of Central Copters. *Compare* Ex. 150, ¶ 6 *with* Trans. 504:22-506:21.

subcontractor invoices by ten percent as a general contractor fee.

Trans. 375:15-376:8; Ex. 50. While neither Duffy nor Central Copters signed the bid, Duffy testified at trial that the parties had an agreement which is encapsulated by Thorson's June 6 e-mail. Trans. 519:9-520:4, 679:5-18. Likewise, the Duffys' and Central Copters' counsel stipulated that Central Copters hired TNT to erect the building. *Id.* at 1088:15-1089:6.

B. Initial Stages of the Building Project

The starting point for assembling a pre-engineered steel building is bolting columns to anchor bolts embedded in a concrete foundation. Trans. 158:2-23. Thus, before construction can begin, the foundation must be poured and cured so it will not crack. *Id.* Here, getting the building site to that stage took awhile.

Mark Duffy ordered the building from R&M Steel in the fall of 2013, but was in no real hurry for it to arrive. *Id.* at 671:16-25, 723:3-18. In the meantime, Duffy handled the site prep work—things like removing topsoil, digging footings for the concrete, and leveling the site. *Id.* at 206:2-207:5, 521:20-22. Duffy, however, was having a hard time finding someone to pour concrete until TNT stepped in. *Id.* at 521:9-19.

As it was originally designed, the R&M Steel package included an elaborate below frost-line foundation. *Id.* at 191:14-192:3. TNT told Duffy that the foundation could be reengineered to save considerable money, so Duffy gave TNT permission to engage C&H Engineering to do so. *Id.*; *see also* Trans. 721:4-722:7. TNT also got concrete bids and hired Kruse Enterprises to pour the foundation. *Id.* at 191:14-195:11, 521:9-19; Ex. 127. Although Duffy equivocated somewhat about the value TNT added, *id.* at 721:4-722:7, TNT engaged both C&H and Kruse directly and passed through those costs on its own invoices with a ten percent markup, which Central Copters paid without complaint. *Id.* at 195:12-205:8, 522:1-23; Ex. U; Ex. V.

Meanwhile, R&M Steel delivered the building in late August 2014. Trans. 578:23-579:6; Ex. 70; *see also* Ex. 52. It arrived in eight semi-loads, which TNT unloaded over the course of two days. Trans. 182:21-183:14, 689:2-19. During the next few weeks, Kruse poured the foundation, completing its work sometime around mid-September. *Id.* at 272:9-19, 579:11-19; Ex. 70. The relationship between TNT and Central Copters deteriorated significantly from there.

C. The Insulation Order from Thermal Design

During TNT's first meeting with Duffy, the topic of insulation came up. Trans. 165:23-167:2. Duffy did not want the same kind of insulation in his current hangar, so TNT showed him alternatives it had used in other buildings. *Id.* Of those, Duffy was concerned that spray foam would be too expensive but was interested in the Simple Saver System manufactured by Thermal Design. *Id.* at 167:3-169:13.

At base, the Simple Saver System is the insulation corollary to a pre-engineered steel building. *Id.* at 917:10-918:1. It is a patented insulation system for the walls, roof, or both of a steel building, which is itself pre-engineered to fit the specific building and then made into a kit with all the necessary parts to install it. *Id.*; *see also* Trans., 906:8-12; Ex. 139. Among other advantages, the Simple Saver System reduces the compression of the insulation to maintain its R-value, minimizes condensation problems, and contains OSHA-complaint fall protection. Trans. 918:2-924:14; Ex. 139.

After Duffy expressed interest in the Simple Saver System, TNT supplied him literature about it, but Duffy did not make any immediate decisions. Trans. 167:3-169:22. Insulation was indisputably an outstanding issue at that point in the project though. In the past, Duffy

had ordered five steel buildings, all of which came with insulation. *Id.* at 674:24-675:10. For this project, however, R&M Steel's quote indicated that the insulation was "by others," meaning that it still needed to be ordered. *Id.* at 332:16-334:15, 436:25-437:10; Ex. XIV. Duffy was happy to delegate that task, explaining that TNT "had a bee in their bonnet about the insulation," and he "didn't care," so his attitude was, "You want to deal with it? If you're excited about it, go ahead. Get me a quote." Trans. 686:2-21.

So, TNT did. Within weeks of being engaged to work on the Central Copters project, TNT exchanged e-mails with Thermal Design and obtained an initial estimate. Ex. 53, at 1-8; Ex. 53A; *see also* Trans. 235:5-237:17, 798:25-799:13. It also shared the estimate with Duffy. Trans. 190:15-191:6. Thus, when Duffy sent Steve Thorson an e-mail on August 15, 2014 that read, in part, "please confirm that you have ordered the insulation for the building from the source you have," TNT understood the e-mail to refer to the Simple Saver System because that was the only insulation for which TNT had offered to assume responsibility. Trans. 187:3-17, 189:6-25; Ex. 52.

Due to timing issues—it made no sense to have the insulation on site and in the way while erecting the steel structure—TNT did not act

immediately after receiving Duffy's August 15 e-mail. *Id.* at 188:1-189:5. But by early October, TNT reconnected with Thermal Design and provided the plans for the steel building, which Thermal Design needed to revise and finalize its quote. *Id.* at 796:4-801:20; Ex. 53, at 8-16; Ex. 65. Thermal Design's final price ended up being a bit lower than its initial estimate, and TNT completed the necessary paperwork to finalize the order about a week later. Trans. 242:3-255:17; Ex. 53, at 8-25; Exs. 66-67.

Thermal Design's engineering department then used the building plans to design a custom-made Simple Saver System specific to the Central Copters hangar. Trans. 929:2-932:5, 937:19-939:23. Basically, Thermal Design's engineers use CAD software to determine a huge range of variables, from strap spacings to fastener points to fabric sizes, all designed to minimize seams. *Id.*; *see also* Ex. 60. Thermal Design fabricates portions of the system in its own production facility, including the critical step of welding huge pieces of fabric together. Trans. 929:2-936:4. It then places those parts on pallets for shipping to the customer, together with instructions. *Id.* at 943:12-949:18; Ex. 13A. Thermal Design contracts out the fiberglass insulation portion of the system to its exclusive supplier, Johns Manville Corporation, which

custom makes the insulation to fit the specific building, specially fabricating any pieces that are not a standard width, and then ships that portion of the system directly to the customer. *Id.* at 929:2-936:4, 949:2-950:9.

After it was manufactured, the Simple Saver System for Central Copters' project was sent to Belgrade in three shipments—two shipments from Johns Manville and one shipment of three pallets from Thermal Design. *Id.* at 562:19-565:19; Ex. 63. It arrived in late October and early November 2014 and is still in Central Copters' possession. *Id.* at 562:19-566:9.

D. TNT's Dispute with Duffy and Central Copters

On October 15, 2014, TNT sent Central Copters an invoice for \$62,520, which was comprised of a \$25,000 charge labeled "1st labor deposit" and a \$37,520 charge for the Simple Saver System.⁴ Trans. 209:14-212:3; Ex. 77. TNT firmly believed that the invoice accurately

⁴ The charge for the Simple Saver System represented a 20 percent markup of Thermal Design's \$31,266.12 invoice, which Steve Thorson testified was commercially appropriate. Trans. 336:17-337:17. Whether TNT was entitled to the markup is irrelevant for purposes of this appeal as it relates to Thermal Design. Both the jury verdict and judgment awarded Thermal Design its invoice amount with no markup, Dkts. 264, 368, and the Duffys and Central Copters have not separately challenged the damages amount.

reflected its labor to date and should be paid. *Id.* at 210:19-215:7; Exs. XI, XII, XIII. Duffy apparently disagreed.

When Central Copters had not paid the invoice by November 13, Steve Thorson stopped by Duffy's office. *Id.* at 264:16-9. Suffice it to say the meeting did not go well. Duffy sent Thorson an e-mail later that evening expressing his disappointment with TNT's professionalism and progress on the project. Ex. 55. The e-mail did not take any issue with TNT's actual order of the insulation though. *Id.* Rather, it promised to pay TNT in a timely manner once TNT provided progress and completion dates:

Now you wish to be paid for the insulation that is stored on the property (not installed in the building), and you have included an invoice for your labor to date. I fully intend to pay you in a timely manner, but I need you to "outline the scope of the project with dates describing progress and completion of the project."

Id. (emphasis omitted). But Steve Thorson reacted angrily to Duffy's resistance to TNT's invoice, and TNT walked off the job for good.

Trans. 422:13-424:3, 443:14-444:5. A week later, Duffy sent Thorson another e-mail formally terminating their relationship. Ex. 56.

In early December, Central Copters contacted Thermal Design about TNT abandoning the project and Thermal Design tried to help

Central Copters find a new installer. Ex. 57A; Ex. 59; Trans. 810:3-812:13. Initially, Central Copters offered to pay Thermal Design directly for the insulation. Exs. 57, 57A; Trans. 812:18-813:24. Within a few days, however, Central Copters changed its mind and claimed that the insulation was TNT's problem to deal with. Ex. 59, at 1. To date, Thermal Design has never been paid by either TNT or Central Copters. Trans. 978:21-979:3; Ex. 68.

STATEMENT OF THE STANDARD OF REVIEW

The district court's denial of a challenge for cause during *voir dire* is reviewed for clear abuse of discretion. *Williams v. Rigler*, 234 Mont. 161, 163, 761 P.2d 833, 834 (1988). Similarly, "[a]bsent an abuse of discretion . . . the trial court has great latitude in controlling *voir dire*." *State v. LaMere*, 190 Mont. 332, 339, 621 P.2d 462, 466 (1980).

This Court reviews the district court's grant or denial of judgment as a matter of law de novo. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 18, 336 Mont. 105, 152 P.3d 727. It reviews a jury's verdict to determine whether substantial evidence exists to support the verdict. *Wise v. Ford Motor Co.*, 284 Mont. 336, 339, 943 P.2d 1310, 1312 (1997). "In [the Court's] examination, [it] review[s] the facts in the light most favorable to the prevailing party. If conflicting evidence exists, the

credibility and weight given to the evidence is in the jury's province and [the Court] will not disturb the jury's findings unless they are inherently impossible to believe." *Id.*

The use of a special verdict form is a discretionary trial court ruling, which this Court reviews for abuse of discretion. *Ele v. Ehnes*, 2003 MT 131, ¶ 18, 316 Mont. 69, 68 P.3d 835.

SUMMARY OF THE ARGUMENT

Voir Dire. The district court did not abuse its discretion by refusing to excuse a juror for cause merely because the juror *considered* himself a current client of a former partner of Thermal Design's trial counsel, who worked on but never appeared in the case. Excusal is mandated only where a juror has currently pending business with a party's counsel; the juror's subjective believe that he is a current client is not enough. The court gave the Duffys and Central Copters every opportunity to develop the record to support their challenge for cause, but they failed to do so.

Likewise, the district court did not abuse its discretion by limiting the scope of *voir dire* into the fact that another juror was the trial judge's stepdaughter. The Duffys and Central Copters did not seek to excuse the juror for cause and a juror's familial relationship with the

judge does not warrant automatic excusal even in a criminal trial. Additionally, the Duffys and Central Copters failed to object, either when the court limited *voir dire* or when they exercised a preemptory challenge.

Lien Foreclosure. There are three issues regarding foreclosure of Thermal Design's lien.

First, the district court correctly found as a matter of law that Thermal Design furnished the Simple Saver System under a real estate improvement contract. The Duffys and Central Copters are flatly wrong that the requisite real estate improvement contract could only be the contract between Thermal Design and TNT for insulation. For decades, Montana law has held that for a construction lien to exist, it is not necessary that the real estate improvement contract be made between the owner and a materialman. Rather, if a real estate improvement contract exists between the owner and someone else—typically a contractor—a subcontractor may validly claim a lien on the owner's property by furnishing material for the contractor. Here, the real estate improvement contract was the contract between TNT and Central Copters to erect the hangar.

Second, the district court also correctly held that Thermal Design's lien attaches to both Central Copters' building and the Duffys' real property. Montana Code Annotated section 71-3-525 is dispositive. Under the statute's first prong, the lien attaches to Central Copters' building because the improvement—the steel building—was to leased premises. Under the second prong, the lien also attaches to the Duffys' real property because the Duffys, as the lessor, agreed to the improvement before it began.

Third, the Duffys and Central Copters waived any argument that Thermal Design was not the fabricator of the Simple Saver System by failing to object to the relevant portions of the special verdict form. Even if they had objected, the record is replete with evidence supporting the jury's findings that the Simple Saver System was specifically fabricated for installation in Central Copters' building and that the Simple Saver System was not readily resaleable in the ordinary course of Thermal Design's business.

Agency. The Duffys' and Central Copters' agency arguments are entirely misplaced. Factually, they simply recite the evidence they believe would have supported a jury finding that no agency relationship existed between TNT and Central Copters. But they refuse to

acknowledge either the appropriate standard of review or the wealth of evidence supporting the jury's actual finding—that the agency relationship did exist. Legally, they insist that the district court wrongly allowed proof of agency via verbal testimony while ignoring that Mark Duffy authorized TNT *in writing* to purchase insulation from Thermal Design on Central Copters' behalf.

Jury Verdict. The jury's verdict was a special verdict under Rule 49(a), not a general verdict with answers to written questions under Rule 49(b), and the Duffys and Central Copters offer no argument or authority to the contrary. Accordingly, they cannot invoke Rule 49(b)(3) to argue that the verdict was inconsistent.

Regardless, none of their specific arguments have merit. First, the jury was not required to decide the scope of Thermal Design's lien and the district court's conclusion that it attached to the Duffys' property was substantively correct. Second, the Duffys and Central Copters waived any objection to the verdict form on the issue of whether Thermal Design was the fabricator of the Simple Saver System and there is no requirement that the language in a verdict form precisely mirror the jury instructions anyway. Finally, black letter agency law allows both an agent and principal to be liable for breach of the same

contract under the circumstances presented here. The Duffys' and Central Copters' argument to the contrary is legally baseless and undermined by their own recitation of the facts.

ARGUMENT

I. The District Court Acted Well-Within Its Discretion in All Aspects of Jury Selection.

The Duffys and Central Copters argue that two of the district court's decisions during jury selection warrant automatic reversal. First, they contest the court's denial of a challenge for cause where a prospective juror stated that a former law partner of Thermal Design's counsel was his attorney. Appellant's Br., 9-12. Second, they claim that the court inappropriately limited *voir dire* regarding a prospective juror's familial relationship with the judge. *Id.* at 13. Neither the record nor the law supports reversal in either instance.

A. There Is No Evidence that a Prospective Juror Had Current Business with an Attorney Representing Thermal Design.

For purposes of challenging jurors for cause, Montana law creates a sharp divide between jurors who have an active attorney-client relationship with one of the party's lawyers and those who do not. To be sure, if there is truly an ongoing attorney-client relationship, the juror should be excused. *See, e.g., Reff-Conlin's Inc. v. Fireman's Fund*

Ins. Co., 2002 MT 60, ¶¶ 25-26, 309 Mont. 142, 45 P.3d 863. On the other hand, the fact that a juror *considers* himself a current client of a party’s counsel is not enough to second guess the denial of a challenge for cause. *See Williams*, 234 Mont. at 163-64, 761 P.2d at 834-35. The correct inquiry turns on whether the juror has “present business pending” with the lawyer. *Id.* If he does not, a district court does not abuse its discretion by denying a challenge for cause notwithstanding that the juror believes himself to be a current client. *Id.*

Here, the Duffys and Central Copters insist that the district court should have granted their challenge for cause of prospective juror Claire Daines because he stated during *voir dire* that he considered Rick Landers—a former partner of Thermal Design’s trial counsel—to be his attorney. Appellant’s Br., 9-12. But they largely ignore the correct legal standard and their own failure to develop the evidence necessary to support their challenge.

It is true that Thermal Design’s trial counsel, Mark Evans, was a partner with Landers at Axilon Law Group until August 31, 2019 and remained affiliated with the firm for the remainder of the case. Trans. 26:14-27:15; Dkt. 285, at 15. It is also true that Landers billed time to this case even though he never appeared as counsel of record. *See, e.g.*,

Dkt. 303, at Ex. A. And there is no dispute that Daines stated during *voir dire* that Landers was his attorney even though he had “never used [Evans] for representation.” Trans. 26:14-27:2. But none of those facts answer the dispositive question—whether Daines had current business pending with Landers, regardless of the fact that he *considered* himself a current client. *See Williams*, 234 Mont. at 163-64.

On that point, the Duffys and Central Copters had every opportunity to develop the record. After Daines unequivocally stated that he did not believe that his relationship with Landers would influence his view of the evidence, Trans. 27:3-6, the Duffys and Central Copters moved to strike on the basis that “the relationship with the Plaintiff’s law firm” was “a little too close for [their counsel’s] comfort.” *Id.* at 27:7-18. Noting that counsel’s comfort was not a statutory basis for removing a juror, the district court encouraged the Duffys and Central Copters to follow up by asking Daines additional questions. *Id.* at 27:19-28:2. They did, asking only three. First, they inquired how Daines’ experience with Landers would affect his ability to hear evidence in the case. *Id.* at 28:3-18. He answered that it would not have any effect. *Id.* Next, they questioned whether Daines could put his feelings about his current attorney aside, to which he responded

that he did not know why his current attorney mattered—Landers never appeared at trial—and that while he respected Evans, he had never engaged with him “in a legal way.” *Id.* at 28:19-29:3. Finally, they asked whether Daines was “uncomfortable sitting and judging the issues in this case that are represented by Mr. Evans,” and he answered, “[n]o.” *Id.* at 29:4-10.

The district court never instructed the Duffys or Central Copters to move on or precluded them from further delving into the details of Daines’ relationship with Landers. They simply chose to stop their inquiry. The court certainly had no duty to ask Daines additional questions on the Duffys’ and Central Copters’ behalf. *See, e.g., Illinois v. Bowman*, 758 N.E.2d 408, 419-20 (Ill. App. Ct. 2001) (even in a criminal trial where “[t]he primary responsibility for initiating and conducting *voir dire* lies with the trial court,” the court has no *sua sponte* duty to ask a prospective juror more questions where defense counsel was offered the opportunity to pose additional questions and declined). So, as it stood when the Duffys and Central Copters renewed their challenge for cause, the record revealed only that Daines subjectively believed Landers to be his attorney and thought he could be unbiased. There was no evidence whatsoever that Daines had currently pending

business with Landers. Thus, under *Williams*, the court had discretion to refuse to dismiss Daines for cause, particularly where it afforded the Duffys and Central Copters the opportunity to further develop the record if they wished.

B. The District Court Appropriately Exercised Its Discretion to Control the Scope of *Voir Dire* and the Duffys and Central Copters Waived Any Objection.

Fairly characterized, the Duffys' and Central Copters' second jury selection argument is that the district court improperly limited the scope of their *voir dire* into the fact that prospective juror Chere LeClair was the judge's stepdaughter. *See* Appellant's Br., 13. But they frame the issue differently, incorrectly claiming that they are entitled to a new trial because they were "forced to use a preemptory challenge" on LeClair. *Id.*

Unlike with Daines, the Duffys and Central Copters never challenged LeClair for cause. Trans. 22:13-62:23. Consequently, the automatic reversal rule from *Reff-Conlin's* does not even arguably apply. *See Reff-Conlin's*, ¶ 28. In fact, their failure to challenge LeClair for cause means that they have waived any argument that the court inappropriately forced them to use a preemptory challenge. *See State v. Gunderson*, 2010 MT 166, ¶¶ 97-102, 357 Mont. 142, 237 P.3d 74.

Applying the correct standard, it is well-established that “absent an abuse of discretion . . . the trial judge has great latitude in controlling *voir dire*” and that “[t]his Court will not presume prejudice” with respect to *voir dire* restrictions. *LaMere*, 190 Mont. at 338-39, 621 P.2d at 465-66. The Duffys and Central Copters have not come close to demonstrating prejudice. Foremost, their brief does not even argue prejudice; they simply presume that the court’s refusal to let them question LeClair about her familial relationship with the judge warrants automatic reversal. *See, e.g., Schaubel v. Iversen*, 257 Mont. 164, 166, 848 P.2d 489, 490 (1993) (issue deemed waived if not raised or argued in appeal brief).

Nor would the record support such any such argument. The Duffys and Central Copters knew full well from LeClair’s juror questionnaire that she was Judge Brown’s stepdaughter. Yet, they did not object to court limiting the scope of *voir dire* on that topic, either when the court informed them that knowing the judge had no impact on the case and asked them to move on or when they voluntarily used a preemptory challenge on LeClair. Trans. 35:10-36:6, 74:16-23; *see also, e.g., Emmons v. Indiana*, 492 N.E.2d 303, 304 n.1 (Ind. 1986) (acceptance of the jury, as evidenced by the defendant’s failure to object

to the *voir dire* procedures employed by the trial court, supports an inference of waiver). Moreover, a juror's familial relationship with the trial judge is not enough, even in a criminal trial, to warrant automatic disqualification. *See State v. Hendricks*, 171 Mont. 7, 11, 555 P.2d 743, 746 (1976).

Thus, under any view of the record, the district court did not abuse its discretion. The Duffys and Central Copters were not erroneously forced to use a preemptory challenge on LeClair. They never challenged her for cause in the first place, and they have not even argued, much less demonstrated, prejudice from the limited scope of *voir dire*.

II. Both the District Court's and the Jury's Findings Regarding Thermal Design's Construction Lien Were Correct.

Turning to the merits, the Duffys and Central Copters attack the foreclosure of Thermal Design's construction lien on multiple grounds. Frankly, some of their arguments are difficult to follow. They are scattered in different sections of their brief, some criticizing the court's findings, some contesting the jury's findings, and some insisting the jury's verdict was inconsistent, all while lumping everything under a heading characterizing every alleged error as one of the district court's

“erroneous legal rulings.” *See* Appellant’s Br., 14. In reality, the analysis is not nearly so convoluted. The district court’s post-trial foreclosure order, Dkt. 294, offers a good roadmap.

A. The District Court Correctly Found that Thermal Design Furnished the Simple Saver System Pursuant to a Real Estate Improvement Contract.

Under Montana’s construction lien statutes, “[a] person who furnishes services or materials pursuant to a real estate improvement contract may claim a construction lien . . . to secure the payment of the person’s contract price.” § 71-3-523, MCA. A real estate improvement contract is defined in § 71-3-522(6), MCA and broadly includes “an agreement to perform services, including labor, or to furnish materials for the purpose of producing a change in the physical condition of the real estate.”

Before closing arguments, the district court ruled as a matter of law that the agreement between Central Copters and TNT for construction of the steel building was a real estate improvement contract and that Thermal Design furnished the Simple Saver System pursuant to that contract. Trans. 1111:18-1114:15; *see also* Dkt. 294, at 6. The Duffys and Central Copters take issue with that ruling, asserting that the district court focused on the wrong contract. Boiled

down, they urge that Thermal Design's lien must necessarily be premised on the contract it executed with TNT for insulation, and that the building agreement between Central Copters and TNT is irrelevant. Appellant's Br., 14-18. Not only does their position fundamentally misunderstand Montana's construction lien statutes, adopting their reasoning would effectively strip subcontractors of lien protection unless they contract directly with the owner on every project.

Since at least 1940, this Court has held that "it is not necessary that the contract be made between the owner and the materialman or person furnishing labor" for a construction lien to exist. *Morin Lumber Co. v. Person*, 110 Mont. 114, 99 P.2d 206, 207 (1940). "If that were so, our mechanic's lien law would be of little value to those performing labor or furnishing materials." *Id.* "The correct rule" requires only that there be an agreement between the owner and *someone* (the contractor) for the improvement of the property; if so, a subcontractor may validly claim a lien on the owner's property by furnishing material for the contractor:

[t]he right to a mechanic's lien is not confined to persons contracting directly with the owner of the property, or performing labor or furnishing material with the actual knowledge of the owner, but extends to persons who do work and furnish

materials under contract with, or employment by, the contractor. It is sufficient if there is a contract between the owner and some one for the improvement of the property; claimant is a laborer, materialman, or subcontractor under contract with, or employment by the contractor; and he does work or furnishes material for the contractor in pursuance of the latter's agreement with the owner. However, to be entitled to a lien, a claimant must connect himself with the owner in some way, directly or indirectly, by some link of a contractual nature; as in all cases, the owner must have contracted with some one for the improvement of the property or at least must have authorized, requested, knowingly permitted or consented to such improvement.

Id. (quoting 40 C.J. 139). “The rationale behind this rule is that by virtue of the contract between the contractor and the owner, there is an implied agency between the two, giving the contractor the authority to contract with materialmen for the purchase of necessary materials.”

Glacier State Elec. Supply Co. v. Hoyt, 152 Mont. 415, 419, 451 P.2d 90, 91-92 (1969). It is also consistent with Montana's policy of liberally construing lien statutes to carry out their intended purpose. *See Fausett v. Blanchard*, 154 Mont. 301, 307 463 P.2d 319, 322 (1969).

Simply put, *Morin Lumber* forecloses the Duffys' and Central Copters' argument that the real estate improvement contract underlying Thermal Design's lien had to be “the one Thermal executed for furnishing insulation.” *See* Appellant's Br., 15, 17. Appropriately

applying the *Morin Lumber* rule, it is undisputed that Central Copters had an agreement with TNT to erect the hangar, which meets the statutory definition of a real estate improvement contract. *See* § 71-3-522(6), MCA. Mark Duffy testified that the agreement existed, and the Duffys' and Central Copters' counsel stipulated that it existed too. Trans. 679:5-18, 1088:15-1089:6. It is equally indisputable that TNT engaged Thermal Design to furnish the Simple Saver System *for the hangar*. Trans. 242:3-255:17; Ex. 53, at 8-25; Exs. 66-67. Accordingly, under *Morin Lumber*, Thermal Design was entitled to file a construction lien as a matter of law, just as the district court held.

B. The District Court Correctly Found that Thermal Design's Lien Attached to the Duffys' Real Property.

The Duffys and Central Copters next take issue with the district court's determination that Thermal Design's lien extends not only to Central Copters' hangar, but also to the Duffys' real property. Appellant's Br., 17-24; *see* Dkt. 294, at 7-8. Their argument on this point largely flows from their mistaken belief that the requisite real estate improvement contract could only be the agreement between Thermal Design and TNT for the Simple Saver System. They assert that for Thermal Design's lien to attach to the Duffys' property, Thermal Design had to prove: (1) the Duffys knew about and consented

to the agreement between Thermal Design and TNT; (2) both the Duffys and Central Copters owned the real property and entered into the contract to purchase insulation; or (3) Central Copters entered into the contract to buy insulation on the Duffys' behalf, either through an express contract or via piercing of the corporate veil. *Id.* at 19-20. All of that is wrong.

Montana Code Annotated section 71-3-525(3) spells out the applicable rule. Ordinarily, “[i]f the improvement is to leased premises, the lien attaches to the improvement and to the leasehold term.” § 71-3-525(3), MCA. With limited exceptions, “it does not attach to the lessor’s interest unless the lessor contracted for or agreed to the improvement before it was begun.” *Id.*

Initially, the Duffys and Central Copters contended in the pretrial order that “*Duffys* hired the Thorsons and/or TNT to erect a steel building . . .” Dkt. 181, at 41 (emphasis added). Based on that contention, the Duffys themselves would be parties to the real estate improvement contract and, as such, the lien would extend to their interest in the real estate under § 71-3-525(1), MCA. On the third day of trial, however, the Duffys changed their tune and began arguing that Central Copters was the Duffys’ lessee and the true contracting party.

Trans. 588:11-592:6. The district court agreed that their position conformed to the evidence, but also pointed out that a lease did not allow the Duffys to avoid the lien also attaching to their property *Id.* at 591:12-592:6,. Again, the court was correct.

Accepting that Central Copters was the Duffys' lessee and the only other party to the real estate improvement agreement with TNT, the first prong of § 71-3-525(3) provides that Thermal Design's lien attaches to Central Copters' building—which is the improvement—and to Central Copters' leasehold term. Applying the second prong, the question becomes whether the Duffys, as the lessor, contracted for or agreed to the improvement before it was begun. *See* § 71-3-525(3), MCA. The answer is overwhelming yes. Mark Duffy testified that he ordered the steel building, oversaw the site work, contacted TNT in the first instance, and hired TNT on Central Copters' behalf. Trans. 165:3-167:2, 206:2-207:5, 521:20-22, 671:16-25, 679:5-18, 723:3-18. He also asked Steve Thorson to confirm that he had ordered insulation for the building well before TNT began erecting it. Ex. 52. Given those facts, the Duffys cannot plausibly argue that they did not consent to the improvement before it had begun. Accordingly, the district court

properly found that Thermal Design's lien attached to both Central Copters' building and the Duffys' real property.

C. The Jury's Findings Regarding the Validity of Thermal Design's Lien Are Well Supported and the Duffys and Central Copters Waived Their Current Argument.

Because the Duffys and Central Copters stipulated at trial that Thermal Design's lien amount was not overstated, Trans. 729:5-731:2, 1015:16-1016:19, the final step of the construction lien analysis required only a determination of whether the lien was valid under § 71-3-524, MCA. For this case, Section 71-3-524 has two relevant prerequisites to establish a lien for furnishing materials.

First, the materials must have been "supplied with the intent that they be used in the course of construction of or incorporated into the improvement in connection with which the lien arises." § 71-3-524(1)(a)(i). On that point, the district court concluded that it is undisputed that Thermal Design supplied the Simple Saver System with the intent that it be used in the construction of Central Copters' building. Dkt. 294, at 8-9. The Duffys and Central Copters have not challenged that finding.

Second, because it is also undisputed that the Simple Saver System was never actually incorporated into the building, *id.*, the

materials must have been “specifically fabricated for incorporation into the improvement and not readily resaleable in the ordinary course of the fabricator’s business.” § 71-3-524(b)(ii), MCA. On that issue, the jury made two findings: (1) the Simple Saver System was specifically fabricated for installation in Central Copters’ building; and (2) the Simple Saver System was not readily resaleable in the ordinary course of Thermal Design’s business. Dkt. 264, ¶¶ 1-2.

The Duffys and Central Copters do not directly challenge the sufficiency of the evidence to support the jury’s findings. Instead, they take issue with the verdict form, criticizing the district court for inserting “Thermal Design” in place of the word fabricator and asserting that they had challenged whether Thermal Design was, in fact, the fabricator of the Simple Saver System as far back as summary judgment proceedings. Appellant’s Br., 32-33.

Regardless of whether the Duffys and Central Copters made that argument earlier in the case, they waived it at trial. Montana law is clear that “[t]he failure to object to a verdict form and/or jury instructions at trial results in the waiver to challenge them on appeal.” *Turk v. Turk*, 2008 MT 45, ¶ 16, 341 Mont. 386, 177 P.3d 1013. And general objections do not suffice. “Objections to jury instructions or

special verdict forms must be specific, and must state with particularity the grounds on which they are made.” *Id.* Likewise, objecting on one narrow ground does not preserve objections on other grounds. *See id.* at ¶ 18.

The Duffys and Central Copters objected to the district court’s special verdict form on only one very specific ground—they argued at some length that the form should have included a question asking whether Thermal Design had a real estate improvement contract with the Duffys and Central Copters. Trans. 1109:3-1111:13. They never objected in any fashion to the wording of Questions 1 or 2, which addressed the requirements of § 71-3-524. Nor did they otherwise argue that the verdict form should have included a question asking the jury whether Thermal Design was the fabricator of the Simple Saver System. *See id.* Under *Turk*, that failure results in an unequivocal waiver of their ability to challenge this issue on appeal.

Even if they somehow preserved their argument, however, this Court should still affirm. There was a wealth of evidence supporting both the jury’s findings. On the first question, Dan Harkins testified in detail about how Thermal Design engineers and fabricates the patented Simple Saver System, including how its subcontractor Johns Mansville

manufactures part of the system—fiberglass insulation pieces—to order. Trans. 929:2-950:9. The jury was perfectly free to credit that testimony over the Duffys' and Central Copters' evidence, especially where the Duffys' and Central Copters' expert testified that he had no familiarity with Thermal Design's process for producing the Simple Saver System.⁵ *See id.* at 624:16-18; *Wise*, 284 Mont. at 339, 943 P.2d at 1312. Similarly, Harkins testified about multiple reasons the Simple Saver System was not resaleable in the ordinary course of Thermal Design's business, from cost to logistics to liability to reputational concerns. Trans. 964:6-970:9. All that testimony was essentially uncontroverted and, again, the jury was free to credit it over any conflicting evidence.

* * *

⁵ Ignoring that the Simple Saver System comprises far more than just fiberglass insulation, the Duffys and Central Copters impliedly advocate for a bright-line rule under which a party may never be the fabricator for purposes of § 71-3-524 if the party obtains a portion of whatever it is supplying from a subcontractor. The Duffys and Central Copters offer no support for such a rule, likely because there is none. For example, consider a company that engineers and supplies a shed to be constructed on site by a general contractor during residential construction. The company almost surely would not machine all the nails itself and may order some of the lumber pre-cut from a timber company. Under the Duffys' and Central Copters' logic, the company could never file a lien for furnishing materials under Montana law.

In sum, this Court should affirm in all respects as to foreclosure of Thermal Design's construction lien. Under Montana law, Thermal Design furnished the Simple Saver System under a real estate improvement contract and the lien attached to both the Duffys' real property and Central Copters' building. The Duffys and Central Copters waived any challenge to the validity of the lien and, even if they had not, the jury's findings are supported by substantial evidence.

III. The Jury's Agency Finding Is Supported by Substantial Evidence and There Was No Legal Error.

On the special verdict form, the jury found that TNT was Central Copters' agent in entering the contract with Thermal Design for the Simple Saver System and that Central Copters breached the agreement. Dkt. 264, ¶¶ 4-5. Seeking to avoid liability for breach, Central Copters focuses on the agency finding, contesting both the sufficiency of the evidence and the manner of proof. Appellant's Br., 24-31. None of its arguments come close to warranting reversal.

A. The Evidence Supports the Jury's Agency Finding.

Central Copters begins by insisting that TNT contracted with Thermal Design for the insulation on its own behalf, rather than as Central Copters' agent. It recites all the evidence it deems favorable to that position, concluding that "[e]verything about Thorsons' actions

treated this insulation as bought on their account, which they would in turn resell to Central with a markup.” *Id.* at 24-26.

In doing so, Central Copters fails to even acknowledge the substantial evidence standard of review, much less the evidence *supporting* the jury’s agency finding. While there may have been enough evidence for the jury to side with Central Copters and find that no agency relationship existed, there was also a wealth of evidence in support of the jury’s agency finding. For instance: (1) Steve Thorson testified that TNT discussed insulation with Duffy, who expressed interest in the Simple Saver System, *see* Trans. 167:3-169:13; (2) Duffy admitted he authorized TNT to get an insulation quote, *see* Trans. 686:2-21; (3) TNT obtained a quote from Thermal Design and shared it with Duffy, *see* Trans. 190:15-191:6; (4) Duffy sent TNT an e-mail asking Steve Thorson to confirm he had ordered the insulation from his source, *see* Ex. 52; and (5) Central Copters did not initially reject the Simple Saver System, but instead promised to pay TNT in full before offering to pay Thermal Design directly, *see* Exs. 52, 55, 57, 57A; Trans. 812:18-813:24.

That evidence easily satisfies the sufficiency of the evidence standard. To reverse the jury’s agency finding, this Court would have

to inappropriately “second-guess or seek to replace the jury” by making its own determination about the credibility of witnesses and the persuasiveness of the evidence. *See Stubblefield v. Town of West Yellowstone*, 2013 MT 78, ¶ 19, 369 Mont. 322, 298 P.3d 419. Simply put, Central Copters’ factual argument is groundless.

B. Steve Thorson’s Testimony Was Permissible and the Record Contains Written Proof of Agency.

Next, Central Copters argues the district court erred by allowing verbal testimony regarding the agency relationship. Its specific theory is that the Uniform Commercial Code’s statute of frauds, § 30-2-201(1), MCA, required the contract for the Simple Saver System to be in writing, meaning that authority to enter the contract could likewise only be in writing under § 28-10-203, MCA. Appellant’s Br., 26-31.

This is another of Central Copters’ shifting theories. Before changing their minds during trial, one of the Duffys’ and Central Copters’ initial contentions in the final pretrial order was that “[t]he Uniform Commercial Code does not apply to this case.” Dkt. 181, at 52. That aside, it is dubious that the contract for the purchase of the Simple Saver System needed to be in writing anyhow.

Under *Glacier State Electric Supply*, the rationale for Montana’s construction lien scheme is “that by virtue of the contract between the

contractor and the owner, there is an implied agency between the two, giving the contractor the authority to contract with materialmen for the purchase of necessary materials.” 152 Mont. at 419, 451 P.2d at 91-92. An *implied* agency suggests just the opposite of Central Copters’ argument. If the contractor’s authorization to purchase materials were required to be in writing, the agency would be express, and an implied agency would be unnecessary.

But that issue is something of a sideshow, as is Central Copters insistence that the district court misinterpreted the interplay between § 28-10-203 and § 30-2-201(3)(a), which allows an unwritten contract for the sale of goods of \$500 or more to be enforced if the goods are specially manufactured and not suitable for resale in the ordinary course of the seller’s business. *See* Appellant’s Br., 28-29. Even if Central Copters is correct that the statute of frauds applies, this Court “may uphold a judgment on any basis supported by the record,” and there is undeniably written proof of agency in the record. *See Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 72, 394 Mont. 135, 433 P.3d 1230 (when “the conclusion of the district court is correct, it is immaterial, for the purpose of affirmance on appeal, what reasons the district court gives for it[s] conclusion”).

On August 15, 2014, Duffy sent Steve Thorson an e-mail from his Central Copters e-mail address—with a signature block identifying him as a representative of Central Copters—that read, in part, “please confirm that you have ordered the insulation for the building from the source you have.” Ex. 52. Any common sense reading of that e-mail establishes that Central Copters authorized TNT to contract with Thermal Design for the insulation. In fact, Duffy’s use of the word “ordered,” in the past tense, conveys that Central Copters was seeking confirmation that TNT had already exercised its authority to procure the insulation.

Central Copters attempts to explain away the e-mail for two equally meritless reasons. First, it contends that the e-mail did not specifically mention Thermal and did not contain “terms about price, condition, or quality.”⁶ Appellant’s Br., 30. But the fact that Duffy did not expressly invoke Thermal’s name is hardly fatal. The e-mail’s use of the phrase “your source,” coupled with Steve Thorson’s testimony about introducing Duffy to the Simple Saver System—which is merely testimony about factual events, not an assertion by the agent that an

⁶ Presumably, Central Copters meant quantity, not quality.

agency relationship existed—is more than enough to support the jury’s agency finding. Also, the agency authorization itself was not a contract that needed to have specific terms like price or quantity. Section 28-10-203 contains no such requirements.

Second, Central Copters asserts that the e-mail cannot possibly constitute written authorization to incur \$37,250 in insulation given Central Copter’s subjective belief that insulation was part of TNT’s \$70,000 bid to erect the building. Appellant’s Br., 30. That argument is yet another invitation to substitute Central Copters’ interpretation of the evidence for the jury’s. The jury had no obligation to agree with Central Copters’ story and permissibly gave more weight to evidence indicating that Central Copters authorized TNT to purchase insulation from Thermal Design. At a minimum, that evidence includes the August 15 e-mail, Duffy’s November 13, 2014 e-mail indicating that he “fully intend[ed]” to pay TNT in a timely manner for its invoice that included the insulation charge, and Central Copters’ later offer—eventually rescinded—to pay Thermal Design directly for the insulation. *See Exs. 52, 55, 57, 57A; Trans. 812:18-813:24.*

Thus, even if written authorization of TNT’s authority to purchase the Simple Saver System on Central Copters’ behalf was required, it

existed and was presented to the jury in the form of Duffy's August 15 e-mail. Steve Thorson did not simply take the stand and testify that Central Copters authorized TNT to order insulation with no other proof. Duffy's August 15 e-mail alone is sufficient evidence on which to affirm the jury's agency and breach findings, as well as the court's judgment.

IV. Rule 49(b) Does Not Apply and the Jury's Verdict Was Not Inconsistent.

With no support and without developing any argument, the Duffys and Central Copters claim that the special verdict form was really a general verdict with answers to written questions under Montana Rule of Civil Procedure 49(b). Appellant's Br., 31. The reason appears to be that they want to invoke Rule 49(b)(3) to argue that the jury's verdict was inconsistent in an effort to obtain a new trial.

The Court should reject that argument for two independent reasons. First, the jury's verdict was a special verdict under Rule 49(a) and, second, there were no inconsistencies in the verdict.

A. The Verdict Was a Special Verdict.

This is not an issue on which the Court should linger long. It is waived because the Duffys and Central Copters failed to develop any supporting argument. *See Marx v. Belgrade Volunteer Firefighters Relief Ass'n*, 2008 MT 410, ¶ 13, 347 Mont. 256, 198 P.3d 247. And even

if it were not, the verdict form itself plainly demonstrates that it is a special verdict consistent with Rule 49(a). *See* Dkt. 264. It contains no general verdict and some issues—such as the scope of Thermal Design’s lien—were not even submitted to the jury. *See id.*; *see also* Mont. R. Civ. P. 39(a)(2). Thus, the Duffys’ and Central Copters’ invocation of Rule 49(b)(3) is misplaced. That rule simply does not apply to special verdicts under Rule 49(a).

B. The Jury’s Verdict Was Not Inconsistent.

Even if Rule 49(b)(3) applied, there is nothing inconsistent about the jury’s verdict. The Duffys and Central Copters make three incorrect arguments, which are mostly duplicative of issues discussed above.

First, they contend that the jury should have been allowed to decide whether Thermal Design’s lien should attach to the Duffys’ property as well as Central Copters’ building. Appellant’s Br., 32. But once a construction lien is established, its foreclosure is governed by rules of equity. *See Hostetter v. Inland Dev. Corp. of Mont.*, 172 Mont. 167, 175, 561 P.2d 1323, 1327-28 (1977). Thus, the district court did not err in deciding that issue post-trial, *see also* Mont. R. Civ. P. 39(a)(2), and for all the reasons discussed above, its substantive analysis was correct.

Second, the Duffys and Central Copters argue that the court should not have inserted Thermal Design for the word “fabricator” in Question 2 on the special verdict form and that the evidence established that Thermal Design did not fabricate the Simple Saver System. Appellant’s Br., 32. This issue is also discussed above. In short, the Duffys and Central Copters waived their argument by failing to object to the verdict form and the jury’s findings are supported by substantial evidence. Additionally, there is “no requirement that the language used in a verdict form must precisely mirror the terminology used in jury instructions.” *Ele*, ¶ 21.

Finally, the Duffys and Central Copters assert that it was inconsistent for the jury to find both (1) that TNT breached the insulation contract with Thermal Design, and (2) that TNT acted as Central Copters’ agent and that Central Copters also breached the contract. Appellant’s Br., 33-37. Basically, they argue that if TNT was the breaching party, it could not have been Central Copters agent unless Central Copters authorized TNT to breach the agreement. *Id.* at 34. That simply is not true. The Duffys’ and Central Copters’ position is belied by fundamental agency law.

There are multiple legal theories under which both an agent and a principal can breach the same contract. Specifically, when the principal is either undisclosed or disclosed, but unidentified, the agent becomes a party to the contract. *Empire Office Machines, Inc. v. Aspen Trails Assocs. LLC*, 2014 MT 94, ¶¶ 14-18, 374 Mont. 421, 322 P.3d 424 (adopting rules from Restatement (Third) of Agency). Likewise, “[a] person who assumes to act as an agent is responsible to third persons as a principal for acts in the course of the agency” when, “with the agent’s consent, credit is given to the agent personally in a transaction.” § 28-10-702(1), MCA; *see also* Jury Instruction No. 29.

Here, both theories apply. Central Copters has argued that “[n]othing in the credit application or quote stated that Steve Thorson was signing on Central’s (or the Duffys’) behalf,” and “Thermal[] repeatedly admitted it had no knowledge of any relationship between Thorsons and Central.” Appellant’s Br., 25, 27 (emphasis in original). Thus, under Central Copters’ own view of the facts, TNT either did not disclose that it was acting on Central Copters’ behalf or failed to adequately identify Central Copters as its principal. As such, TNT—as the agent—also became liable on the contract. *Empire Office Machines*, ¶¶ 14-18. TNT also separately became liable on the contract because

Thermal Design extended TNT—not Central Copters—credit. *See* § 28-10-702, MCA; Ex. 67.

But TNT’s liability for breach does not somehow absolve Central Copters’ liability on the contract it authorized TNT to enter on its behalf. Because the jury validly found that TNT acted as Central Copters’ agent in entering the contract for the Simple Saver System, Dkt. 264, ¶ 4, Central Copters is equally liable for breach of that contract. *See* § 28-10-601, MCA; *see also Big Sky Civil and Env’tl., Inc. v. Dunlavy*, 2018 MT 236, ¶¶ 14-15, 393 Mont. 30, 429 P.3d 258 (agent who enters a contract on behalf of an unidentified or undisclosed principal “is personally liable to the third party *with the principal*”) (emphasis added)). Thus, the jury’s verdict was not inconsistent in any sense.

CONCLUSION

For the foregoing reasons, Thermal Design respectfully requests that the Court affirm the jury’s verdict and the district court’s post-trial orders.

Dated: May 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,990 words, as determined by the undersigned's word processing program.

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