

CASE NO. DA 21-0156
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; and
CENTRAL COPTERS, INC., a Montana corporation;
Defendants, Counterclaim Plaintiffs, and Appellants,

STEVE THORSON, an individual, dba TNT Building Systems, a general
partnership; TRAVIS THORSON, an individual, dba TNT Building
Systems, a general partnership,
Defendants, Crossclaim Defendants, and Appellees.

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County Cause No. DV-15-403A

APPELLANTS' REPLY BRIEF

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ARGUMENT

1. Central's appeal of the \$23,753.88 verdict for TNT is well taken because TNT failed to respond.

Central seeks reversal of the \$23,753.88 judgment in favor of TNT¹. The court allowed TNT, a Montana partnership, to file a last-minute \$25,000.00 claim, over objection and in violation of Montana law. Based on this error, the jury awarded \$23,753.88 to TNT, never mentioning the Thorsons. (Verdict, Docket 264).²

Although Steve Thorson signed Thermal's Insulation Contract for the partnership *and* in his personal capacity, evidence confirms this was not true for the Building Contract. The Building Contract was between TNT and Central. (Transcript ("Trans."), 196:22-24). TNT's invoices and Central's payment prove this. (Exhibits U and V, Trans. 201:22-23 and 205:22). Thorsons confirm TNT was hired to erect the building. (Thorsons' Response, 5). Therefore, TNT owns

¹ Central's Opening Brief used "Thorsons" but used that term (pg. 2) to define the TNT partnership in which Thorsons did business.

² Thorsons claim they never received the orders regarding consequential damages, pre-judgment interest, attorneys fees, or judgment. (Thorsons' Response, 4). This does not affect this appeal. Before appeal, the clerk served the orders and Thermal e-mailed and mailed Notices of Entry containing the orders (Dockets 297 and 379). Both used the address and e-mails Thorsons used throughout this case to receive and serve pleadings, including their Response Brief.

the \$23,753.88 judgment. This Court ordered TNT to appear through counsel but TNT refused. (May 4, 2022 Order, p. 3).

When an appellee “does not appear by brief or argument . . . this Court shall take the appellant’s versions and positions as being correct if they are in fact supported by the record.” Alden v. Bd. of Zoning Comm’rs, (1974) 165 Mont. 364, 365, 528 P.2d 1320, 1320. This Court has “no obligation to locate authorities or formulate arguments for a party in support of positions taken on appeal.” In re Marriage of McMahon, 2002 MT 198, ¶6, 311 Mont. 175, ¶6, 53 P.3d 1266, ¶6. For the uncontested and well-taken reasons in Central’s Opening Brief, the \$23,753.88 verdict in TNT’s favor should be reversed.

Thorsons’ attempt to support the TNT claim in their Response Brief³ should be disregarded because they only tried to construe the facts in their favor while ignoring the legal authority and its effect on TNT’s claim as stated in Central’s Opening Brief.

2. Potential juror Daines should have been removed for cause because his “principal” and “current” attorney partnered with Thermal’s trial counsel and worked on the litigation.

Thermal’s and Thorsons’ Response Briefs misquotes Daines’ *voir dire* testimony. Daines did not state “a former law partner of Thermal’s counsel was

³ Thorsons’ Response Brief is essentially a photocopy of Thermal’s Brief. This Reply addresses both Response Briefs where the arguments are the same.

his attorney.” (Thermal Response, 21; Thorsons’ Response, 13-15). Daines said attorney Landers – partner with Thermal’s trial counsel Evans – was, “at the moment,” his “principal” and “current” attorney. (Trans. 26:14-29:3).

Thermal and Thorsons failed to distinguish Crail Creek Assocs., LLC v. Olson, 2008 MT 209, 344 Mont. 321, 187 P.3d 667, where this Court held the lower court abused its discretion in denying the challenge under similar circumstances and applied the automatic reversal rule. They ignored §25-7-223(7), MCA providing challenge grounds based on “the existence of a state of mind in the juror evincing enmity against or bias in favor of either party.” They ignored State v. Golie, 2006 MT 91, 332 Mont. 69, 134 P.3d 95, holding an erroneous ruling on a challenge for cause is presumed prejudicial as a matter of law, meriting reversal.

Sweeping these precedents away, Thermal and Thorsons misapply Williams v. Rigler, (1988) 234 Mont. 161, 761 P.2d 833. Williams does *not hold* that without evidence a juror has “present business pending” with the lawyer the court correctly denies a challenge for cause. (Thermal Response, 22; Thorsons, 14). Williams affirmed the court’s decision to deny a juror challenge based on several facts, including the juror’s relationship with the trial attorney. The judge did the questioning, asking the juror about his connection to defense counsel. But, Williams no more holds that proof of a *pending case* is required for a challenge for cause than it holds the district judge must ask the pertinent questions. These

were just factual elements to the decision. The court properly elicited proof the juror's connection to the defense attorney was too distant to matter. Daines is a different case.

Evans started *voir dire*, explaining Daines “is” a “client of Axilon” Law Group. (Trans. 15:2-3). Daines is involved in the construction industry. (Id., 20:3-17) He called attorney Evans’ partner, Landers, “at the moment,” his “principal” and “current” attorney. (Trans. 26:14-29:3). As a construction developer with a “principal attorney” there is no starting or stopping of Landers’ representation, and neither Evans nor Daines would describe him as a current client if there was.

When asked if he “could put [his] feelings about [his] current attorney aside in hearing the evidence,” Daines did not answer, instead saying “I don’t know why my current attorney matters.” (Id., 28:19-229:3). He never promised to put his feelings about Landers aside, saying only he “had great respect” for Landers and Evans. (Id., 28:19-29:3).

Thermal’s criticism of the questioning of Daines is noteworthy, considering Evans had more accurate information about Daines and the extent of his relationship with Landers and Evans than anyone in the courtroom (except Daines). Yet, Evans sat quietly through *voir dire*. If Thermal knew Daines’ relationship with Landers was too distant to prevent his challenge, Thermal could

have put the issue to rest. Instead, Evans hid the fact Landers was actually working on the litigation and claimed he had retired a few weeks earlier. (*Id.*, 27:12-15). Central did not learn the true extent of Landers' role in this litigation until post-trial motions. When Judge Ohman replaced retiring Judge Brown after trial, he denied a request to reimburse Landers' attorneys fees incurred before or during trial based on Evans' representation to the court that Landers was not involved in the case. (Order Re: Attorneys Fees, Docket 361, pp. 10-11, 14).

3. Thermal and Thorsons missed the point of the problem with the lower court's treatment of questions to her stepdaughter.

When asking juror LeClair about potential bias related to sitting through a proceeding presided over by her step mother Central's and Duffys' attorney was told, *in front of the jury*, to "move on." (Appendix D, 36:1-3). The questions now would become a *personal* affront to the judge and juror if Central and Duffys continued on. They could not afford to disregard the court in front of the jury.

Thermal ignores the great impact on the jury of a judge's instruction to an attorney. When overturning another *voir dire* error by Judge Brown in Crail Creek, *infra*, this Court highlighted the court's interruption of Olson's attorney that shut her down. The court ruled the juror would stay and when Olson's attorney tried to argue the challenge the judge stopped her because her position was "noted on the record." (*Id.*, ¶¶15-16). The attorney did not proceed further. On appeal, Crail Creek argued the attorney failed to sufficiently preserve the challenge for

cause – much like Thermal argues – but this Court disagreed, noting that the lower court “cut off any further response” from the attorney. (Id., ¶21).

The *voir dire* process is unique because the attorneys interacts with the jurors personally. The jury is forming perceptions of the case, parties, and lawyers, and is on the spot with personal questions. The court’s refusal to allow these questions and instructions to “move on” cannot be understated. Thermal’s and Thorsons’ clinical analysis of this situation misses this point.

4. Cases pre-dating Montana’s Construction Lien Statutes (“Statutes”) cannot repair the court’s erroneous legal ruling on the “real estate improvement contract” that formed the basis for Thermal’s lien.

When arguing in support of its lien on the Duffys’ property Thermal ignores two key facts:

1. Steve Thorson testified insulation was **not** part of the Building Contract. (Appendix D, 141:3-10, 174:1-7, 378:1-20, 394:11-395:25, 402:17-409:22). Excluding insulation, the Building Contract cannot be the “real estate improvement contract” on which Thermal bases its lien for insulation.
2. There is *no* evidence the Duffys signed the Insulation Contract or knew about or consented to TNT’s/Thorsons’ purchase of insulation.
Thorsons’ claim to buying insulation as an agent only applies to Central,

not Duffys. There is **no** contractual link between the insulation and the Duffys that allows Thermal to lien their property.

Thermal argues contractors have lien protection for *any and every* material they supply to a party in contract with them, but this position is not supported by *current* Montana law. Thermal relies on cases pre-dating the 1987 creation of the Statutes, a major revision to Montana's mechanic's lien statutes intended to ensure owners get notice of any lien against their property and prevent the secret lien. Cf. Dick Anderson Const., Inc. v. Monroe Prop. Co., LLC, 2011 MT 138, ¶18, 361 Mont. 30, ¶18, 255 P.3d 1257, ¶18. *Notice*, as the Statute's hallmark, is destroyed if a supplier can lien an owner's property for supplies the owner neither ordered nor consented to.

Thermal ignores the Statutes' plain language that, when read together, make clear the "real estate improvement contract" on which a lien can be based is the one for which Thermal furnished materials. §71-3-521, MCA. Thermal's lien only extends to the *contracting owner's* interest in the real estate (§71-3-525, MCA), which is the "person who owns an interest in real estate (the Duffys here) *and* who personally or through an agent, enters into an express or implied contract (the Insulation Contract here) for the improvement of the real estate." §71-3-522(4), MCA. Even Thermal's cited cases require a contractual connection between the owner and the supplier *related to the good being supplied*.

Essentially, Thermal claims if there exists *any* contract between TNT and Central to improve the property (the Building Contract), that contract broadly allows any supplier (Thermal) to lien for anything delivered to the property. Thermal's argument is so broad it destroys the point of notice. Thermal cites pre-Statute cases but, on this point, those cases agree.

“[A]ny materialman furnishing materials used on any building located on a given parcel of land without regard to any other considerations . . . is not the law of Montana however.” Glacier State Elec. Supply Co. v. Hoyt, (1969) 152 Mont. 415, 418–19, 451 P.2d 90, 91–92. “If it were, a lien could be imposed on improvements made on property without the knowledge or consent of the owner.” (Id.) A construction lien requires that “in addition to such furnishing of materials, a contract, express or implied, by the owner of the property is required. . . .” (Id.)

Thermal's reliance on §71-3-525(3), MCA to claim the Duffys' lease to Central is the missing piece has no merit. Again, Thermal failed to address the key fact making this Section inapplicable. The lien “does not attach to the lessor's interest *unless the lessor contracted for or agreed to the improvement before it was begun.*” (Id.). Because Thorson testified the Insulation Contract was separate from the Building Contract, Thermal must prove the Duffys, as lessors, contracted for or agreed to *the insulation* before delivery. This it cannot do. Thermal inappropriately tries to blur the line between the Duffys and Central and tries to

weaken protections of corporate laws where binding a shareholder only works by piercing the corporate veil. No party attempted this. No evidence disputes that Mark Duffy's actions were done as Central and not in his personal capacity. No evidence proves the Duffys consented to or agreed to Thermal's insulation in their personal capacity.

Thermal's attempt to discredit the Duffys by claiming they "changed their tune" on who actually hired TNT is a red herring. The evidence proves Central hired TNT to erect the building.

Thermal and Thorsons cite Glacier, *infra*, to attempt to prove an "implied agency" relationship between Central and TNT as contractor. (Thorson Response 20; Thermal Response 41). Glacier does not apply. First, this argument ignores evidence that Thorsons never considered insulation and its installation a part of the Building Contract and never had a contract with Central over insulation at the time they signed Thermal's Insulation Contract. (Trans. 141:3-10, 174:1-7, 378:1-9, 15-20, and 402:17-409:22). Glacier holds that "[a]ny implied contractual relationship that might otherwise exist between the owner and the materialman through the principal contractor and the subcontractor by application of agency principles can be disaffirmed by the parties' agreement." Glacier, 152 Mont. at 419, 451 P.2d at 92. Also, Glacier excludes *subcontractors*. (Id.) Trial testimony confirmed TNT was a subcontractor and Central the general. (Trans. 380:2-383:9 and 515:7-10).

Thermal failed to distinguish dck Worldwide Holdings, Inc. v. CH SP Acquisition LLC, 2015 MT 225, 380 Mont. 215, 355 P.3d 724, limiting a lien to unpaid amounts of services and materials provided under the contract. The Statutes are not a blank check for a supplier to lien for anything provided to the property, but only for materials provided pursuant to the contractor-owner agreement. If the Court adopts Thermal's broad reading of the Statutes, it opens the door to contractors liening for items not specifically contemplated in the real estate improvement contract. The kitchen remodeler can order and lien for new appliances not part of the original project or the home builder can lien for landscaping not included in the original scope – all because they were delivered to the property. Liens protect the contractor, but notice balances that power over owners. Because Thermal cannot prove the Duffys, individually or through an agent, executed the Insulation Contract the lien cannot attach to their property.

5. Thermal and Thorsons are not correct that Central and Duffys did not challenge the sufficiency of the evidence behind the jury's verdict.

Central argued the “jury's finding that Central breached its contract with Thermal should be reversed” because Thorsons' testimony and “own actions” confirm TNT's contract with Thermal was not on Central's or Duffys' behalf. (Opening Brief, pp. 24-31). It also argued evidence overwhelmingly proved Thermal was not the insulation's fabricator. (Trans. 626:1, 630:8-9, 901:11-21, 907:25-908:1, 931:15-23, 932:25-933:1, 956:16-20, 991: 16-993:12, 994:3-8,

1032:13-21, 1084:10-19 (argument), 1164:15-22 (argument)). The verdict was not based on sufficient evidence in these respects. Still, Thermal and Thorsons ignore the real problem – the court removed these issues from the jury’s consideration by giving it no choice to find otherwise.

Thermal wrongly claims Turk v. Turk, 2008 MT 45, ¶17, 341 Mont. 386, ¶17, 177 P.3d 1013, ¶17 holds Central and Duffys waived problems with the Verdict Form by failing to object to its exact and specific language. In Turk, “[w]hen the court explained its decision to revise the verdict form and the jury instructions, [the appellants] *agreed* with the court’s decision to restrict the jury from considering any estate law issues . . . then *withdrew* their proposed jury instructions. (Id.) Central and Duffys did no such thing. Central argued about Thermal not being “fabricator” before trial (Docket 195, pp. 5-6; Trans. 1093:18-19, objecting to Thermal’s proposed Instruction 29), and during trial (Trans. 1084:6-19). It also proposed its own verdict form that clarified this error.

The jury is free to weigh the evidence presented, but here the jury was not free to credit this evidence because the court made the finding for it by inserting language that resolved these issues. Thermal and Thorsons ignored this issue in their Responses.

Thermal’s footnote argument – that holding a party obtaining materials from a different supplier is not a fabricator would prevent a shed supplier from

filing a lien if its shed included nails or pre-cut lumber from someone else – should be disregarded. (Thermal Response, 37, FN5). Thermal argued its insulation was not fungible (like nails or lumber) and was specifically fabricated for this specific building. If it relies on the specifically manufactured exception under §71-3-524, MCA, it must prove **it** is the fabricator. The evidence proved Johns Mansville fabricated the insulation, shipped it to customer Thermal Products, Inc., who sold it to Thermal for supplying. Thermal was not the fabricator and the jury should not have been told as much.

6. Thermal’s and TNT’s failures to address the legal issues of agency leave Central’s argument well taken.

The undisputed evidence proves Central *and TNT* executed the Building Contract. While Central disputes this contract included authority to order Thermal’s insulation (as argued in other sections) if Central gave authority *only TNT would have authority on Central’s behalf* – not Steve Thorson personally. TNT’s failure to defend its authority in this appeal means Central’s argument is well taken. McMahon, ¶ 6.

Thermal and Thorsons disregarded Central’s Argument in §II.B. – that the jury’s finding Central breached the Insulation Contract should be reversed because the court erroneously ruled verbal testimony from Thorsons was adequate to prove TNT was Central’s agent in executing the Insulation Contract. (Opening Brief, p. 24). Thermal and Thorsons did not distinguish Youderian Const., Inc., v. Hall,

(1997) 285 Mont. 1, 8, 945 P.2d 909, Fed Land Bank of Spokane v. Myhre, (194) 110 Mont. 416, 101 P.2d 1017, 1020 (an agent's verbal testimony is insufficient to prove agency), or Central's *Agency Motion* or *Motion to Deem Well Taken*, (Dockets 189 and 221, Opening Brief, pp. 26 and 27). They failed to distinguish §§30-2-201(3) and 28-10-203, MCA and the court's error in interpreting the interplay between them. (Opening Brief, pp. 28-30). Thermal and TNT did not seriously address this issue, claiming only the Court can affirm the finding on any basis in the record. (Thermal Response, 41; Thorsons' Response, 20).

The Court must review the record as a whole and apply Montana law. Thorsons' and Thermal's argument for authority to bind Central on the Insulation Contract argues the August 15th e-mail is sufficient. (Thermal Response, 44; Thorsons' Response, 22). This e-mail is not written authority for TNT to incur an additional \$37,520 above what Central believed was a \$70,000.00 bid. (Trans. 677:2-11, 679:19-680:14). Thorson admitted "after the litigation starts" he would charge Central another \$60,000 for insulation and labor above the bid amount to insulate the building. (Trans. 379:16-23). He admitted his "bid doesn't say that". (Id.). Thermal wants this Court to ignore years of precedent requiring written proof of TNT's authority. The August 15th e-mail does not contain all of the material elements of a contract in order to satisfy the Statute of Frauds. §§28-2-

102 and 30-2-201, MCA. It does not contain Central's consent to increase the bid by 50% nor any additional consideration. (Id.).

The *only party* who could confirm (other than Central) TNT's authority to order Thermal's insulation is TNT via Steve Thorson, who testified:

Q. You don't have any written documentation that shows that Central Copters gave TNT Building authority to buy insulation on it's behalf.

A. Correct.

(Trans. 454:21-24).

Thorson also stated insulation was "not included and must be ordered separately" and TNT was instructed to "go ahead [and] *get me a quote.*" (Thorson Response 8, Trans 686:2-21). Getting a quote is different from authorizing TNT to incur an additional \$37,250 in cost.

Steve Thorson's trial testimony contradicts his argument that he got an insulation quote and went over it with Central. (Thorson Response 18). On cross-examination Thorson admitted he recalled no conversation with Central about the quote and cannot recall giving the quote to Central. (Trans. 395:21-25 and 400:2-5).

Thermal and Thorsons overlooked that TNT treated Thermal's Insulation Contract differently than any other subcontractor agreement before it. These parties failed to address in their Responses that *for every subcontract*, TNT obtained and presented quotes or bids to Central for its approval and charged a

10% markup. (Trans. 383:7-19, 388:19-25). The facts that TNT and Thorsons signed the contract, used their own financial information for credit, did not present Central a quote or bid for approval, charged a 20% rather than 10% markup on the insulation, billed Central for insulation before receiving Thermal's invoice, did not attach Thermal's invoice to its bill, and failed to delineate its 20% markup or the supplier from which it came, all as it had done earlier, *prove* TNT treated insulation as an item it bought on its own account for resell to Central rather than a material it bought as Central's agent. (Trans. 397:16-24, 250:15-17, 250:25-251:4, 254:8-25, 399:22-400:21, 403:8-407:8, 419:1-420:24, Appendix G and H, Exhibits 66 and 67, 247:4-5, and Appendix K, Exhibit 77, 209:8).

Thermal argument about Central's communication with Thermal about paying for the insulation is another red herring. Central's after-the-fact attempt to resolve this situation with a supplier it did not know about until Thorsons abandoned the job, leaving the building mostly incomplete and insulation sitting in the snow, says *nothing* about authorizing TNT to order the insulation in the first place.

Thermal and Thorsons misquote Central's November 2014 e-mail to claim Central agreed to pay TNT's "invoice." (Thermal Response 43; Thorsons Response 22). Central's did not agree to pay TNT's *invoice*; it assured TNT of timely payment for work when TNT actually worked. (Trial Exhibit 55, Trans. 264:12-13, 551:23-552:7)

Central never shifted its theory on the Uniform Commercial Code (“UCC”), as Thermal claims. *Before* trial, Central objected to Thermal’s proposed instruction 35, arguing it “seems to instruct that ostensible or actual authority is automatically created in certain circumstances [and] ignores that Montana law is clear that the principal establishes the agency, not the agent or the third party.” (Docket 195). Also, “Montana law dictates that the agency relationship in this case must be created in writing because the act of purchasing a good under the Uniform Commercial Code is required to be done in writing. See, §§28-10-203 and 30-2-201, MCA; and see Duffys’/Central Copters’ proposed Instruction Nos. 47 and 48. Without these clarifications, these instructions are confusing and will mislead a jury.” (Id.).

Over objection, the court gave Instruction 35. (Transcript, 1094:10). Also, *before trial* Central offered Instructions 47 and 48, matching §§28-10-203 and 30-2-201(1), MCA, respectively. (Docket 199). The court gave both instructions (renumbered as 18 and 19; Docket 262), but added its instruction 20 including the inapplicable language from §30-2-201(3)(a). (Id., and Opening Brief, pp. 27-29). The court’s error permeated jury instructions and impacted the verdict on TNT’s authority despite no writing under §§28-10-203 or 30-2-201(1), MCA.

7. The verdict is a general verdict, but regardless, even a special verdict must be internally consistent and this one was not.

Despite its title, the verdict form is a Rule 49(b) *general* (not special) verdict with questions for the jury's determination because it asked the jury to make conclusions of law based on the facts. M.R.Civ.Pro. 49(b). It has long been held a special verdict asks the jury to make only factual determinations from which the Court enters judgment as a matter of law. Hickey v. Breen, (1910) 40 Mont. 368, 106 P. 881, 882.

General verdicts require the jury to apply the law to the facts, and therefore require legal instruction, whereas special verdicts compel the jury to focus exclusively on its fact-finding role, leaving judgment to the court. Coburn Cattle Co. v. Small, (1907) 35 Mont. 288, 88 P. 953, 954, and Zhang v. American Gem Seafoods, Inc., (9th Cir. 2003) 339 F.3d 1020 (applying federal rules matching Montana's).

The verdict was "general" because the jury was not just asked to answer fact questions as required in a special verdict, but also find liability. Cf. Johnson v. Butte Alex Scott Copper Co., (1915) 51 Mont. 126, 149 P. 717, 719. The verdict asked the jury to determine legal issues not just answer certain factual questions from which the judge would make a legal ruling. It did not ask the jury about the factual elements of a breach of contract but whether the parties breached a contract. Rule 49(b) applies.

Even if the verdict is “special” remand remains appropriate because it is internally inconsistent. Nw. Truck & Trailer Sales, Inc. v. Dvorak, (1994) 269 Mont. 150, 158, 887 P.2d 260, 264–65 (the court finding no inconsistency in the special verdict but still applying the analysis). Even a special verdict must contain interrogatories framed to “enable the jury to determine the factual issues essential to judgment.” (Id.) “While it is within the trial court’s discretion to structure the form and frame the questions of a special verdict, the interrogatories must be adequate to enable the jury to determine the factual issues essential to judgment.” Bevacqua v. Union Pac. R. Co., 1998 MT 120, ¶96, 289 Mont. 36, ¶96, 960 P.2d 273, ¶96. A three-part standard determines a special verdict’s adequacy is whether, when read as a whole, the questions present the issues adequately, fairly, and clearly. Kiely Const., L.L.C. v. City of Red Lodge, 2002 MT 241, ¶57, 312 Mont. 52, ¶57, 57 P.3d 836, ¶57. Under Rule 49 the court may require a jury to return a special verdict in the form of a special written finding *on each issue of fact*. Mont. R. Civ. Pro. 49. The lower court errors when submitting a special verdict without an instruction telling the jury how to use it. State Bank of Townsend v. Maryann’s, Inc., (1983) 204 Mont. 21, 32, 664 P.2d 295, 301.

The verdict did not adequately present the contested issues to the jury nor clearly submit the ultimate fact questions. The jury was asked to opine about TNT/Thorson’s contract with Thermal. It determined TNT/Thorsons breached

their contract with Thermal. It was also asked to opine about whether TNT/Thorsons executed the Thermal Contract on Central's behalf, which it did. The verdict is inconsistent as to which defendant was the contracting party. If the contract was the TNT's/Thorsons' contract, then they owe.

Thermal's claim Central did not "develop" this argument before appeal has no merit. Central argued the verdict was a general one with interrogatories under Rule 49(b) in its Rule 50 and 59 Motions of April 10, 2020 (Docket No. 278). Thermal dropped a footnote in response, questioning the analysis and proving it understood the issue. Central also argued this issue in Section B of its Reply in Support of Rule 50 and 59 Motions. (Docket No. 288). Thermal had knowledge of this issue since before the appeal.

Thermal wrongly claims "once a construction lien is established" it is up to the court to rule in equity. This argument ignores the court's denial of Thermal's pre-trial motion asking for the court to split between the judge and jury equitable and legal issues. (Docket 240; Appendix D, 7:7-14 and 80:18-20). Also, the verdict form allowed the jury to rule on some factual issues related to the lien (i.e. whether the insulation not incorporated into the property was a specifically fabricated good), but failed to let the jury determine whether it should attach to the Duffys' property. As such the verdict already assumed for the jury the lien's validity as an encumbrance on the Duffys' property and gave the jury only one

narrow way to rule the lien was not proper (i.e. the specifically manufactured exception).

Thermal and Thorsons wrongly argue the verdict was consistent in finding Steve Thorson, TNT, *and* Central all liable on the same contract because the agent and principal can be liable on the same contract under Empire Off. Machines, Inc. v. Aspen Trails Assocs. LLC, 2014 MT 94, 374 Mont. 421, 322 P.3d 424. Empire never held *both* the principal and agent were liable at the same time – one for direct liability and one as an agent.

The Empire Court affirmed the lower court’s summary judgment grant in favor of Demaray, majority member of limited liability company, Windemere. (Id.) Windemere signed leases with Empire for copy machines, clearly marking the contract was executed by Empire and Windemere through their agents. (Id., ¶¶4-5). Revised leases later did not specify Demaray signed as Windemere’s agent. (Id.). When Windemere failed to pay, Empire sued Windemere and Demaray personally. (Id.). This Court affirmed summary judgment in Demaray’s favor. (Id. ¶8).

Empire’s holding analyzed whether the agent contracted on its own *or* on behalf of someone else – not both. The jury’s finding that *all* of the defendants are liable on the same contract is confusing and contradictory because the *only* way Central could be liable on a contract it did not personally execute was through

TNT's agency, but if TNT is personally liable in its own respect it was therefore not acting on Central's behalf. Again, there is no evidence Steve Thorson was hired to do anything on Central's behalf.

Thermal's and Thorsons' argument the agent and principal can both be liable because the agent did not disclose the principal's identity ignores key facts and misstates Montana law. First, Empire does not hold the agent *and* principal are equally bound on anything. Second, assuming *arguendo* Central was a principal, because Thermal knew about it Central was not undisclosed.

The 'notice' of the principal's identity necessary to relieve an agent of personal liability does not require a third party to have actual knowledge of the principal's identity. If the third party has 'reason to know' the principal's identity, there has been sufficient notice for an agent to escape personal liability.

(Id., ¶18).

Thermal had enough notice of Central's existence it could have bound Central on the contract if that was its intent. Thermal dealt with TNT/Thorsons. (Trans. 827:18-20). When prices lowered it told TNT/Thorsons it would put more money in *their pocket*. (Id. 397:16-24). TNT/Thorsons listed Central on the quote (Id. 827:24-828:1) yet Thermal chose to treat TNT/Thorsons as its customer. (Id. 826:3-827:1).

No facts or law support finding TNT/Thorsons *and* Central both liable for breach of contract. The jury’s finding otherwise belies Montana agency law and the facts, and is inconsistent to the point of reversal.

“[I]f any ambiguity existed as to the party intended to be bound, the contract must be interpreted ‘most strongly’ against the party who drafted it.” (Id.; Exhibits 66 and 67; Trans. 247:4-5).

8. Conclusion:

Duffys and Central respectfully request this Court take the action set out in its Opening Brief.

Dated: June 9, 2022.

/s/ Kellie G. Sironi
Kellie G. Sironi

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify this Appellants' Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word is 5,000 words or less.

Dated this June 9, 2022.

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CERTIFICATE OF SERVICE

I certify that on June 9, 2022, I filed and e-served the foregoing Appellants' Reply Brief with the Clerk of the Montana Supreme Court; and served a true and correct copy of the same upon all parties of record with a hardcopy mailing per the Rules via first class mail, postage prepaid and addressed as follows:

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