IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 24-0320

BUCK KRATZER d/b/a KRATZER CONSTRUCTION,
Plaintiff,

v.

HARDY CONSTRUCTION CO., INC.,
Defendant.

On Appeal from the Montana Sixteenth Judicial District Court,
Carter County, Cause No. DV 2023-9
Hon. Nickolas C. Murnion

APPELLANT HARDY CONSTRUCTION'S OPENING BRIEF

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STATEMENT OF ISSUES

The issues for review on this case are:

1) Did the District Court err in granting summary judgment to Plaintiff/Appellee, Buck Kratzer ("Kratzer"), instead of granting summary judgment to Defendant/Appellant, Hardy Construction Co., Inc. ("Hardy") regarding the following:

a. Ordering payment to Kratzer despite Kratzer's failure to satisfy his obligations to earn payment under the Subcontract, including conditions precedent to provide release and waiver of claims, providing a compliant statement of the amounts owed, and failure to timely submit change orders.

b. Ordering interest be paid to Kratzer beginning January 6, 2022 through January 23, 2023,

c. Ordering Kratzer's attorneys fees be paid by Hardy.

2) Did the District Court err in utilizing an offer of compromise to establish liability for the amount owed under the Subcontract, in contravention of Rule 40, Mont.R.Evid., and the plain language of the communications clarifying the amount would be a compromise and is not what Hardy agreed was owed.

STATEMENT OF THE CASE

This case is about Kratzer's wrongful attempts to circumvent the requirements of the Subcontract he executed with Hardy by claiming untimely and unapproved change orders on his final payment application, while refusing to satisfy his obligations for payment. This appeal arises from the District Court's error in failing to enforce the plain terms of the written Subcontract between the parties in contravention of Montana law. The District Court granted summary judgment to Plaintiff/Appellee Kratzer and denied Appellant/Defendant Hardy Motion for Summary Judgment, ruling that Hardy must pay Kratzer $81,135, and accrued interest between January 6, 2022 and January 23, 2023, plus attorneys fees, despite Kratzer's failure to perform its obligations under the Subcontract, including the conditions precedent to final payment. (Order dated April 24, 2024, App 1)

STATEMENT OF THE FACTS

On March 23, 2021, Kratzer and Hardy entered into a Subcontract wherein Kratzer agreed to complete construction work for the Ekalaka Public Schools project (the "Project"). (Affidavit of Jason Arrowsmith, at ¶2 and Ex. 2, App. 2, 3)[1] Kratzer agreed to complete site demolition, earthwork, utility installation, and form and pour all site and building concrete, among other things. (*Id.*) Kratzer had multiple issues on site, including defective, uncompleted, and untimely work, which

[1] Previously attached to Kratzer's Amended Complaint.

caused delays on the Project and cost Hardy time and money. (Arrowsmith Aff., at ¶ 3-6, App. 3, Petersen Aff., at ¶ 3-7, App 4) The biggest issue was Kratzer's concrete slab "did not meet industry standards"[2] and required grinding and an epoxy coat[3] to correct Kratzer's defects. (*Id.*, both at ¶ 3) The repair on these issues required additional repair to other trades. (*Id.*, both at C 4) These defective construction issues caused Hardy damage of at least $7,056, to repair or finish Kratzer's work and delayed completion of the Project. (Arrowsmith Aff., at ¶ 6, App. 2)

After these issues, on October 24, 2021 Kratzer submitted Pay Application No. 3 (the app does not bill for retainage, so it is not a final bill) in the amount of $92,856.45, including unapproved change orders in the amount of $28,852.94. (*Id.*, at ¶ 7, 9, Ex. 3; Pay App 3, Ex. 3 to Kratzer Aff., App. 5) Hardy notified Kratzer it disapproved of Pay App 3. (Order, SUF ¶11, App. 1) On November 12, 2021, Kratzer texted Adam Petersen at Hardy demanding Pay App 3 be "paid in full by the end of the month", including the untimely and unapproved change orders, or be sued. (*Id.*, at ¶ 12) Peterson responded, "Unfortunately that is not how we see it or understand it, please call us Monday and we can discuss and come to a resolution".

[2] Kratzer's Response to RFA No. 1: "Admit that there was one spot on the concrete slab that did not meet industry standards resulting from the concrete drying at different rates which Kratzer subsequently corrected to meet industry standards."
[3] Kratzer's Response to RFA No. 2: "Admit Kratzer performed epoxy work to correct the issues resulting from the concrete drying at different rates."

(*Id.*) Hardy and Kratzer discussed the various issues with Pay App 3, and around November 23, 2021, Kratzer lessened his change order requests to $25,332.94. (*Id.*) Hardy again demanded proper support for the change orders, which were just line items at that point. (Petersen Aff., at ¶ 14-16, Ex. A/B, App. 4)

Hardy submitted its final payment application to the School District on December 6, 2021, in accordance with Hardy's obligations under the Prime Contract. (Order, SUF ¶ 15, App. 1) Kratzer failed to provide support for labor on Pay App 3 until December 9, 2021. (*Id.*, ¶16) Hardy requested a further breakdown of the change orders requested on December 10, 2021. (*Id.*) In response, Kratzer only provided the days and hours worked related to the change order and refused to provide a breakdown of labor rates for the change orders. (Petersen Aff., ¶ 17-19, App. 4) On December 15, 2021, Hardy informed Kratzer that his breakdown of days and hours worked were incorrect, as they conflicted with the daily progress reports, which Kratzer admitted. (Order, SUF ¶17, App. 1)

On December 22, 2021, Hardy informed Kratzer only $4,275 of the change orders would be accepted. (*Id.*, ¶18) Hardy also offered a compromise: it would forego its damages relating to correcting Kratzer's defective work and pay Kratzer the remaining $7,000 in retainage which had not been billed, but only upon Kratzer executing a release and waiver as required by the Subcontract. (*Id.*; and Petersen Aff., at ¶ 22) The other change orders were rejected because they were already part

of Kratzer's scope of work, were only necessary due to Kratzer's failure to competently complete the concrete slab (requiring additional cost of epoxy to correct the deficient slab), were untimely, or were unsupported. (Petersen Aff., at ¶ 14, 22-24)

The Subcontract already required releases and waivers for final payment:

> Prior to final payment Subcontractor shall submit from each to its Subcontractors and suppliers written releases and waivers of claims and liens against the Project, the Owner, and Contractor. (Subcontract, Section 4, ¶ 3, App. 3)

Despite this provision, Kratzer refused to provide any release or waiver. (Kratzer Aff., at ¶ 10, App. 6) Kratzer admits that he utilized both subcontractors and suppliers on the Project, yet never provided a single release or waiver from them. (Hardy's Brf. dated November 14, 2023, Dckt. 12)[4]

On May 10, 2022, Jason Arrowsmith emailed Kratzer "I haven't heard from you in months, and would like to get you paid the $80,341.47 we owe you. Please sign the release and waiver and we'll get the check sent out immediately." (Arrowsmith Aff., at ¶ 20, Ex. C (2022 emails), App. 2) Kratzer responded "Nothing will be signed until my total invoice is approved for payment." (*Id.*, *see also* Ex. 7 to Kratzer Aff., App. 6) The "total invoice" at that point was the last invoice Kratzer

[4] Kratzer's Response to Interrogatory No. 8: "Kratzer purchased materials from Diamond J Redi-Mix LLC and Mason Supply, Inc. Kratzer utilized the following subcontractors: Cody Hall of Hall Construction, Stefan Livingston of SJL Construction, Andrew Wright of Wright Construction, and James Christensen."

ever provided, Pay App 3, in the amount of $92,856.45. On June 19, 2022, Kratzer asked Hardy to resend the Release and Waiver and Hardy did. (Arrowsmith Aff., Ex. C, App. 2) On June 29, 2022, Toni Kratzer emailed Hardy that the amount on the Release and Waiver was incorrect ($80,341.47) and that it should be $81,153.00, and Hardy resent in that amount. (*Id.*) Kratzer never signed the release.

On September 19, 2022, Kratzer's counsel sent a demand for $92,856.45. (*Id.*, Ex. E) On October 26, 2022, Kratzer's counsel demanded $81,153.00 for the first time, but he also demanded interest since November 21, 2021 for a total demand of $94,479.66. (*Id.*, Ex. F) The letter stated if "Hardy refuses to provide payment of $94,479.66 then Kratzer will be forced to file suit." (*Id.*)

In an effort to narrow issues between the parties with a partial settlement of claims, Hardy delivered an $81,153.00 check to Kratzer twice, while reserving the dispute over interest by letters dated January 17 and 26, 2023. (*See* Arrowsmith Aff., at ¶ 32-33, Exs. G & H) Hardy expressly stated it still "maintain[ed] Kratzer is in breach and is not owed interest (nor truly is it owed the principal sum for noncompliance with the Subcontract)" but would <u>not</u> consider acceptance of the check "an accord and satisfaction, release, nor waiver, preserving the parties' other claims." (*Id.*, Ex. G) Kratzer returned the checks both times with the letters dated January 24 and February 13, 2023. (*Id.*, Exs I & J.)

Kratzer filed three different Complaints in this action, each claiming different amounts owed or interest time frames. Kratzer never provided an invoice for $81,153.00. (Transcript of SJ Hearing, at App. 7,)

STANDARD OF REVIEW

The District Court's determination on summary judgment is reviewed *de novo*, under the same standards set forth under Mont.R.Civ.P., Rule 56 as the District Court. Singleton v. L.P. Anderson Supply Co. (1997), 284 Mont. 40, 43, 943 P.2d 968, 970; and *Ereth v. Cascade Cty*., 2003 MT 328, 318 Mont. 355, 81 P.3d 463. The construction or interpretation of a contract is a question of law which this Court reviews for correctness. *AWIN Real Estate, LLC v. Whitehead Homes, Inc.*, 2020 MT 225, ¶ 11, 401 Mont. 218, 472 P.3d 165.

Regarding admissibility or use of evidence used in a summary judgment ruling, this Court also reviews such issues *de novo*. *See Smith v. Farmers Union Mut. Ins. Co.,* 2011 MT 216, ¶ 15, 361 Mont. 516, 260 P.3d 163 ("We review evidentiary rulings made in the context of a summary judgment proceeding de novo, and need not defer to the judgments and decisions of the district court, in order to determine whether evidentiary requirements for summary judgment have been satisfied.") (citation omitted); *Lorang v. Fortis Ins. Co.,* 2008 MT 252, ¶ 53, 345 Mont. 12, 192 P.3d 186; *Smith v. Burlington N. & Santa Fe Ry.,* 2008 MT 225, ¶ 41, 344 Mont. 278, 187 P.3d 639.

SUMMARY OF ARGUMENT

The District Court failed to apply the plain language of the Subcontract by ordering payment to Kratzer despite Kratzer's failures to satisfy his obligations under the Subcontract. Kratzer's failures include: (1) failure to complete the condition precedent of delivering releases and waivers; (2) failure to deliver proper Payment Applications for the final payment; (3) failure to obtain change order authorizations for the amounts demanded in his final payment; and (4) failure to complete his work according to industry standards. Hardy was entitled to withhold payment from Kratzer for all of the above failures, as well as because Kratzer threatened to sue Hardy if his unapproved change orders were not also paid, per Section 4 of the Subcontract.

Hardy was also entitled to withhold final payment to Kratzer under the Prompt Payment Act because of the above failures under the Subcontract, including failure to provide "a billing statement or invoice…pursuant to the terms of the subcontract" pursuant to MCA § 28-2-2103(2).

Finally, the District Court erred in using the December 22, 2021 offer of compromise email to establish liability for the amount to be paid, both in contravention of Rule 408, Mont.R.Evid., and in contradiction to the facts on record, as Kratzer was demanding amounts in excess of $81,153 at all times after that date, while threatening to sue if he did not receive the higher amounts.

ARGUMENT

I. HARDY WAS ENTITLED TO WITHHOLD PAYMENT DUE TO KRATZER'S FAILURES TO SATISFY HIS OBLIGATIONS UNDER THE SUBCONTRACT, INCLUDING CONDITIONS PRECDENT TO PAYMENT, AND THUS, HARDY IS ENTITLED TO SUMMARY JUDGMENT.

Montana law required the District Court interpret and enforce the provisions of the Subcontract, "to give effect to the mutual intention of the parties as it existed at the time of contracting" and "enforce the contract as made by the parties." MCA§ 28-3-301 and *Morn. Star Enterprises, Inc. v. R.H. Grover, Inc.,* (1991) 247 Mont. 105, 111, 805 P.2d 553, 556. Instead, the District Court essentially ignored Kratzer's required performance under the Subcontract and inserted its own requirements to the Subcontract to manufacture a nonexistent breach by Hardy. There is no term of the Subcontract nor undisputed fact which supports the District Court's findings. Thus, this Court should reverse the District Court and order summary judgment be granted to Hardy, including ordering no interest is owed and Hardy is entitled to its reasonable attorneys fees.

Kratzer was required to complete each of the following under the Subcontract before he was entitled to the payment he seeks in this case: (A) "submit from each of its Subcontractors and suppliers written releases and waivers of claims and liens against the Project, the Owner, and Contractor"; (B) submit his "written application [for payment] in a form satisfactory to Contactor at least five (5) days prior" to the

date required for Contractor to submit its bill to the Owner; (C) obtain change order authorizations in advance of work performed; and (D) complete his work to industry standards. (Subcontract, Sec. 4, App 3) The only reason there was any disputes over Pay App 3 is because Kratzer attempted to shoehorn $28,852.94 of unapproved change orders and then threatened to sue if they weren't paid. (Petersen Aff., ¶ 9-11, Ex. 3; App. 4) This initial breach of the Subcontract is the reason Kratzer has not been paid and it is 100% his own fault. Kratzer undisputedly failed to satisfy any of the above requirements, and thus, he is not entitled to payment to this day.

A. Hardy is entitled to withhold payment because Kratzer never satisfied the condition precedent for final payment that he "submit from each of its Subcontractors and suppliers written releases and waivers of claims and liens against the Project, the Owner, and [Hardy]" pursuant to Section 4 of the Subcontract.

The Subcontract clearly requires Kratzer submit a release and waiver from all subcontractors and suppliers as a condition precedent before receiving his final payment. The District Court seemingly agreed, but then chose not to enforce the unambiguous provision, finding Hardy needed to request the releases and waivers and waived such right by not doing so before submitting its final payment application to the Owner. Nothing in the record supports these findings, which were noticeably provided without reference to undisputed facts, Subcontract terms, or relevant law. Thus, the District Court erred by not enforcing the plain language of the Subcontract.

It is undisputed Kratzer never provided releases and waivers from any one of its seven suppliers or sub-subcontractors. (Hardy's Brf. 11/14/2023, Dckt. 12) [5] This is the furthest this Court needs to review the facts of this case before reversing the District Court and deciding that Kratzer failed to perform a necessary condition precedent for final payment:

> Prior to final payment Subcontractor shall submit from each of its Subcontractors and suppliers written releases and waivers of claims and liens against the Project, the Owner, and the Contractor." (Subcontract, Section 4, App. 3)

This clause contains no qualifiers, including that Hardy make a request for said releases and waivers. The District Court correctly acknowledged the Subcontract requires such releases and waivers, but then incorrectly found "Hardy waived any right to request such a waiver after he [sic] closed out the project and requested a general release that was nor [sic] required." (Order, at 12, App. 1)

Besides failing to enforce the terms of the Subcontract, the District Court erroneously found Hardy waived the need for a release and waiver. (Order, at 12, App 1) because Hardy has steadfastly told Kratzer he is not entitled to payment for many reasons, including failure to provide release and waiver.

> [W]aiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for

[5] Kratzer's Response to Interrogatory No. 8: "Kratzer purchased materials from Diamond J Redi-Mix LLC and Mason Supply, Inc. Kratzer utilized the following subcontractors: Cody Hall of Hall Construction, Stefan Livingston of SJL Construction, Andrew Wright of Wright Construction, and James Christensen."

> such waiver, a party would have enjoyed. It may be proved by express declarations or by a course of acts and conduct as to induce the belief that it was his intention and purpose to waive. (Emphasis added.)

Farmers Elevator Co. of Reserve v. Anderson (1976), 170 Mont. 175, 181, 552 P.2d 63, at 66, citing *Northwestern Fire & Marine Insurance Co. v. Pollard* (1925), 74 Mont. 142, 149, 239 P. 594, 596. The District Court did not state a single fact supporting a finding Hardy voluntarily gave up its right to releases and waiver, instead finding that by demanding a general release from Kratzer, Hardy somehow waived its Subcontract rights. However, this finding ignores the central issue: Hardy's position that it would accept a general release for payment of $81,153.00 was an offer of compromise. Hardy still maintained that without such a deal, it maintained its rights to pursue the costs of fixing Kratzer's defects and Kratzer had not complied with the Subcontract. This issue will be discussed further below, but the District Court's willful use of inadmissible offers of compromise seems to be the only support for the incorrect ruling issued on summary judgment.

The parties also established a course of performance during the Project, in which Hardy accepted a release and waiver from Kratzer alone. Kratzer did not have any issue with this process, which was required pursuant to the requirements of the Prime Contract, and therefore, the Subcontract: "Subcontractor agrees in respect to the Work, to be bound to all of the obligations that Contractor has assumed to Owner under the Prime Contract…" (Subcontract, Sec 2, App 3)

Notably, the Subcontract requirement that Kratzer comply with the Prime Contract is also true for final payments. Ostensibly, this would require releases and waives from Kratzer and his subcontractors/suppliers. This is a standard process on most construction projects. Kratzer only took issue with executing the release and waiver after he demanded $28,852.94 in unapproved change orders that Hardy rejected..

Montana has defined course of performance as ". . . a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Farmers Elevator Co.*, 170 Mont. at 181, 552 P.2d at 66. Under MCA § 30-2-208(1) ". . . any course of performance accepted or acquiesced in without objection . . ." is relevant to determine the meaning of the parties' agreement. *Id.* The parties clearly agreed a release and waiver were required for payment on Kratzer's first two payments, as required by the Prime Contract. Thus, a release and waiver must be required for final payment. Kratzer breached the Subcontract, as informed by the parties' course of performance and by the unambiguous express terms of the Subcontract by not providing any releases and waivers with Pay App 3.

When the language of a contract is clear and unambiguous, "it is the court's duty to enforce the contract as made by the parties" not to insert extraneous terms or read in additional requirements not found in the writing. *Morn. Star Enterprises,*

Inc. v. R.H. Grover, Inc. (1991), 247 Mont. 105, 111, 805 P.2d 553, 556. The District Court failed to enforce the release and waiver condition precedent by instead reading in a non-existent requirement that Hardy request the release and waiver from subcontractors and suppliers, and by finding a waiver not supported by evidence.

B. Hardy is entitled to withhold payment because Kratzer never submitted a payment application for the amount of $81,153 he now claims, in a form satisfactory to Hardy.

Kratzer undisputedly failed to provide the correct information with Pay App 3, submitted change orders after the work was already complete, failed to provide the substantiation required by the Subcontract and Hardy until weeks after the final pay application submittal to the Owner, and failed to ever submit an updated application or an application for retainage. Kratzer admitted as much when he resubmitted change orders on November 23, 2021 in a lesser amount and when when he provided information in an attempt to satisfy Hardy's audit after the final application to the Project Owner. (Order, SUF ¶ 13-17) Even then, Hardy discovered Kratzer's labor breakdowns did not comply with the daily logs, and Kratzer admitted his mistake. (*Id.*) Each of the above issues is fatal to Kratzer's demand for payment under the Subcontract:

> Unless Subcontractor submits its written application in a form satisfactory to Contractor at least five (5) days prior to the date for similar applications fixed in the Prime Contract, no progress payment

> shall be payable for such payment. (Arrowsmith Aff., Ex. A, at Section 4, App. 2)
>
> As to all change orders, Subcontractor shall in no event be entitled to any compensation or allowance in an amount greater than that which Contractor actually receives from Owner less a reasonable deduction for work performed by Contractor, and for Contractor's overhead and profit.

(*Id.*, at Section 8) Accordingly, it is undisputed Kratzer did not submit a pay application "in a form satisfactory to" Hardy until after the final application was submitted to the Owner on December 6, 2021. Kratzer first emailed the audit information on December 9, 2021, three days later, admitting he recognized the pay application did not comply with the Subcontract. (Petersen Aff., ¶ 16, App 4) Hardy's requests for breakdown of the labor and other information and Hardy's discovery that Kratzer's breakdown of days and hours worked was incorrect, occurred even later. (*Id.*, ¶ 17-19, 20-21.)

Kratzer's argument on this issue is:

> I'm not sure why [Hardy] submitted their final pay application TO Ekalaka before determining what they owe Kratzer. That seems to be problematic but [] I believe that's their problem. (Transcript of SJ Hearing, at 13, App. 7)

What Kratzer fails to acknowledge is Hardy had duties to the Owner to finalize the Project, duties which Kratzer agreed to be bound to under Section 2 of the Subcontract, agreeing to "be bound to all of the obligations that the Contractor has assumed to Owner." (App. 3) Kratzer already caused delays with his admittedly

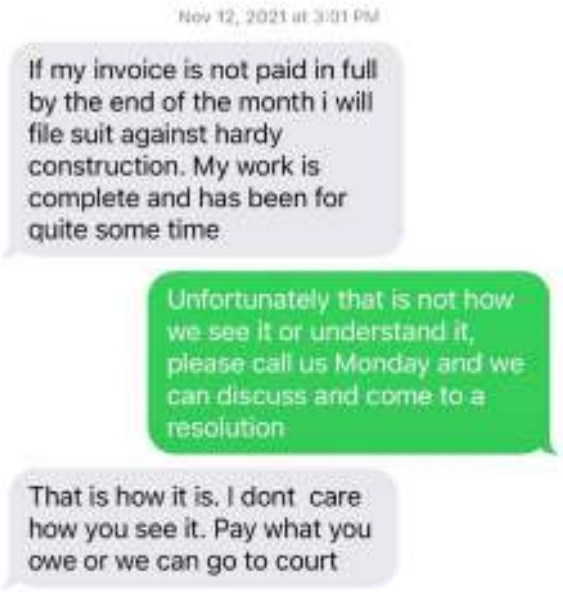
defective work, then submitted late change orders in Pay App 3. Kratzer, and by extension the District Court, contend that Kratzer could hold up the entire project, with no recourse, by demanding sums not owed. That is not what the Subcontract, nor reason, would require.

Based on all of the above undisputed facts, it was only Kratzer's fault that Pay App 3 was not fully submitted until after the final pay application was submitted to the Owner. These undisputed facts invalidate the District Court's finding that Kratzer should have been paid within 30 days of Hardy's final payment application to the Owner. Even if MCA § 28-2-2103 applies, a subcontractor is only owed payment "for work performed or materials provided in accordance with that subcontract"[6] and only if "subcontractor provides the contractor a billing statement or invoice for work performed or materials supplied **pursuant to the terms of the subcontract**."[7] (emphasis added) Under both statute and the Subcontract, Kratzer failed to meet yet another condition precedent to receive payment, which entitled Hardy to withhold payment.

[6] Subsection (2)(a)
[7] Subsection (2)(b)

C. Hardy is entitled to withhold payment without a release and waiver because Kratzer stated his intent to sue Hardy for untimely and unapproved change orders, in breach of the Subcontract.

Kratzer's Pay App 3 dated October 24, 2021, was submitted for a notably larger sum ($92,856.45) than the $81,153.00 he seeks now and which the Court erroneously held was undisputedly owed. That is because Kratzer untimely submitted $28,852.94 in unapproved change orders with Pay App 3, which Hardy disapproved. (Order, at 6, App 1) In fact, the amount of $81,153.00 only contains $74,153.00 of the amounts submitted with Pay App 3 ($69,878.00 for contract value remaining, and $4,275.00 for a small amount of the submitted change orders). Hardy told Kratzer it would not pay for the untimely and unapproved change orders and Kratzer provided notice of his intent to breach the Subcontract, threatening to sue Hardy:



(Peterson Aff., ¶ 11, App. 4) On November 23, 2021, Kratzer admitted the change order requests were excessive by providing a smaller list of change orders, lessening the total by $3,520.00. (Order, ¶ 10, 13, App 1) However, Kratzer changed his position multiples, later demanding all of the untimely and unapproved change orders in May 2022,[8] and through his counsel on September 15, 2022.[9] Kratzer never agreed to accept $81,153.00 until October 26, 2022, and then while claiming interest for nearly a year:

> Mr. HAMMAN: …[Kratzer] agreed to waive the change orders on October 26, 2022. Yep.
>
> THE COURT: So up until that time your client hadn't waived those change orders?
>
> MR. HAMMAN: Correct.
>
> THE COURT: So he was still demanding more than [$81,153]?
>
> MR. HAMMAN: Yes.
>
> THE COURT: But yet you're asking for interest to go back to January of 2022?

(Transcript, at 14-15, App. 7) Kratzer then argued the Prompt Payment statutes and the *JEM* case support this position. That is incorrect. *JEM* held that it was legitimate to withhold payment from the contractor on disputed amounts and those amounts not properly presented for payment under the relevant contract, expressly

[8] Aff. Arrowsmith, ¶20-21.
[9] Aff. Arrowsmith, Ex. E.

citing MCA§ 28-2-2103. *JEM Cont., Inc. v. Morrison-Maierle, Inc.*, 2014 MT 21, ¶ 13-16, 373 Mont. 391, 318 P.3d 678 (discussed further below). Of course, this ruling supports Hardy's argument in this case, as does the Subcontract.

The Subcontract provides that "all payments" may be withheld by Hardy to:

> fully protect [Hardy] against any actual or potential liability or damage directly or indirectly relating to the Work or this Subcontract, or against Subcontractor's breach or threatened breach hereof.

(Subcontract, Sec. 4, App 3) Kratzer already breached the Subcontract by failing to provide timely change orders. ("Any claim of Subcontractor for extra work or materials not so authorized [by a change order]… shall be deemed waivered by Subcontractor unless written notice thereof is given to Contractor prior to commencing such work." (Subcontract, Sec. 8, App 3)) Further, Kratzer's threat to sue for these amounts he was not owed under the Subcontract amounted to "potential liability…relating to the Subcontract" which allowed Hardy to withhold the payment to "fully protect [Hardy]." (*Id.*, Sec. 4) The District Court suggests Hardy had a duty to pay the undisputed sum within 30 days and take the risk of a lawsuit, but the Subcontract provision above contradicts the District Court's ruling expressly.

Kratzer's breach and threat to sue continued through this lawsuit. Kratzer's counsel's first demand on September 15, 2022 was for $92,856.45, plus interest, for a total demand of $106,501.42. This increased from Kratzer's position on

November 23, 2021, when he first reduced his claimed change orders. Again, Kratzer was breaching the Subcontract by demanding untimely and unapproved change orders, reasserting the $3,520.00 of change orders he admitted were illegitimate. Hardy was still justified in withholding payment because Kratzer was demanding amounts not owed in the Subcontract and adding nearly $14,000.00 in interest.

Kratzer continually changed his position through the underlying ruling. Kratzer filed multiple amended complaints, each changing the sum claimed, or the date from which interest was owed. Kratzer's attorney changed his position multiple times in demand letters. Even when Hardy provided a check for $81,135.00 and an express statement Kratzer could sue for any other amounts he claimed he was owed, Kratzer refused to accept it. To have paid Kratzer without a release, as the District Court suggests was the proper result, would not have "fully protect[ed Hardy] against any actual or potential liability or damage directly or indirectly relating to the Work or this Subcontract, or against [Kratzer]'s breach or threatened breach hereof." (Subcontract, Sec. 4, App 3) Thus, Hardy was authorized by the Subcontract to withhold payment.

By ruling for Kratzer, the District Court completely ignored Kratzer's failure to comply with the Subcontract payment terms, his continued demands for untimely and unapproved change orders, his changing positions of what was owed, and

Hardy's right to withhold payment based on these issues by the express provisions of the Subcontract to protect itself from Kratzer's wrongful conduct. This Court should not allow Kratzer to act as though he complied with the Subcontract when he has never even submitted an invoice, claim or demand to Hardy for $81,153.00. The Court should enforce the Subcontract and reverse the District Court.

D. Kratzer's defective work also entitled Hardy to withhold payment.

Kratzer admits he completed defective work which required repairs and delays in the Project. (Aff. Kratzer, ¶ 4, App. 6; Aff. Arrowsmith, ¶ 3-6, App. 2) These repairs damaged Hardy in the amount of $7,050.00. (Aff. Arrowsmith, ¶ 6, App 2) In the Change Order markup provided to Kratzer, Hardy listed many issues with Kratzer's work and described damage caused to Hardy, including:

> … multiple items that Hardy Construction did (and had to do) for Kratzer Construction to keep the project moving and correct the concrete slab that was out of tolerance will be discussed and agreed to in advance.
>
> These items include, but are not limited to: floor grinding and leveling (including equipment rental), pumping water in front of the building where the sidewalk was scheduled to have been completed months prior, re-painting the corridor from damage due to the epoxy floor, pouring the concrete diamonds, shovel time to help earthwork crew, material and time to put in temporary exit door platforms to get a temporary certificate of occupancy since the sidewalk pour was well behind schedule. (Aff. Kratzer, Ex. 4, App. 7)

The same provision of Section 4 of the Subcontract discussed in subsection C above applies, entitling Hardy to withhold payment from Kratzer based on his

breach in the Subcontract and the related damages in the Work. Again, the plain language of the Subcontract supports reversal of the District Court.

II. THE PROMPT PAYMENT ACT ALSO EXPRESSLY ALLOWS HARDY TO WITHHOLD PAYMENT DUE TO KRATZER'S WRONGFUL CONDUCT.

Reading all of the undisputed facts together, it is clear Kratzer incurred additional costs relating to his defective work and associated repairs, which he tried to pass along to Hardy and the Owner through his untimely change order in Pay App 3. Then Kratzer refused to give up the claims to such change orders, forcing Hardy to withhold payment or risk paying a smaller sum and then still being sued. Such facts are similar to those found in *JEM Cont., Inc. v. Morrison-Maierle, Inc.*, 2014 MT 21, 373 Mont. 391, 318 P.3d 678, where the general contractor (JEM) encountered unanticipated subsurface conditions in a road improvement project. *Id.*, at ¶ 6. JEM discussed the discrepancy with MMI (the engineer) and proceeded without providing written notice of the differing conditions for another 18 days, waiting another 20 days to submit a change order. *Id.*, at ¶ 7. MMI informed JEM it did not provide sufficient support for the change order and did not follow the proper contract procedure, just as Hardy informed Kratzer here. MMI denied payment based on these issues. JEM then sought payment from the owner, Park and Gallatin Counties, who also denied the request, just as the Ekalaka School Board did here. (Aff. Arrowsmith, Ex. K) JEM then sought payment but failed "to

provide certain documents required by the contract," which again resulted in denial of the payment request. *Id.*, at ¶ 8.

The District Court ruled against JEM on summary judgment regarding claims for fraudulent inducement and similar claims, because (1) JEM failed to state cognizable claims for relief; (2) MMI's alleged promises were nothing more than "agreements to agree;" and (3) the claims contradicted the clear and unambiguous terms of the contract. *Id.*, at ¶ 9. On appeal JEM claimed the relevant Contract's provisions were void as against the policy in the Prompt Payment Act, amongst other things. *Id*, at ¶ 12.

This Court held the counties/MMI were entitled to withhold payment from JEM on disputed amounts and those amounts not properly presented for payment under the relevant contract, citing MCA§ 28-2-2103. *Id*, at ¶ 13-16. The same should be true here. Hardy is entitled to withhold payment for several reasons under MCA§ 28-2-2103(1), including subsections (c)(ii), (c)(iii), and (c)(iv):

> (c) The owner may disapprove the request for payment or a portion of the request based upon a claim of:
>
> …
>
> (ii) failure to remedy defective construction work or materials;
>
> (iii) disputed work or materials;
>
> (iv) failure to comply with material provisions of the construction contract or accompanying documents, including but not limited to payroll certifications, lien releases, warranties, material certifications, and test data…

The facts of these issues are all discussed above in relation to Subcontract provisions which entitle Hardy to withhold payment due to Kratzer's failures. The codification of these same reasons to withhold payment further bolster the need to reverse the District Court and grant summary judgment to Hardy, pursuant to MCA§ 28-2-2103(2)(c). Additionally, MCA§ 28-2-2103(2) provides Kratzer is only owed payment "for work performed or materials provided in accordance with that subcontract"[10] and only if "subcontractor provides the contractor a billing statement or invoice for work performed or materials supplied pursuant to the terms of the subcontract."[11] Again, Kratzer's failures in these areas are discussed above and were provided as express reasons for withholding payment in the offer of compromise delivered by email on December 22, 2021. Hardy was entitled to withhold payment based on all 5 of these statutory provisions under the Prompt Payment Act, providing ample legal authority to reverse and rule in Hardy's favor.

III. THE DISTRICT COURT ALSO ERRED IN UTILTIZING OFFERS OF COMPROMISE TO ESTABLISH LIABILITY IN CONTRAVENTION OF RULE 408, MONT.R.EVID.

Kratzer wrongfully introduced the December 22, 2021 email to the District Court despite it being clearly an offer of compromise, and inadmissible under

[10] Subsection (2)(a)
[11] Subsection (2)(b)

Rule 408, Mont.R.Evid. The District Court suspends logic in its order by finding the email is not an offer of compromise and finding:

> [The] email is not a settlement offer. This email is not from an attorney representing Hardy and does not indicate it is a settlement offer. Even if it was a settlement offer, Hardy could have made a partial payment of what it believed it owed Kratzer based upon the pay applications it approved. (Order at 16, App 1)

Despite being completely unsupported by a single legal authority, this finding also seems to create factors unimportant to a determination of what an offer of compromise is meant to be.

Kratzer argued the *Matzinger*[12] and *Kern*[13] cases in its briefing, so we assume the District Court utilized these cases. Such reliance would be in error. These cases are easily distinguishable because Hardy always disputed liability for the amounts set forth in Pay App 3 as set forth in multiple written communications after Pay App 3 was submitted and continued that in the December 22, 2021 email and through this litigation. The email offered to pay for roughly 15% of the change orders Kratzer originally submitted with Pay App 3 in October 2021. In the Change

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[12] The *Matzinger* Court remanded the matter to the District Court to determine what of the disputed construction work was "covered by the original contract", meaning they would not be payable. The Supreme Court could not determine how much the District Court even relied on the letter purportedly admitting any facts, thus, the rehearing. *Matzinger v. Remco, Inc*., (1976) 171 Mont. 383, 389, 558 P.2d 650

[13] *Kern* is also a non-precedential ruling from the 18th Judicial District Court, and not the Montana Supreme Court. This case relies on plain language from an insurer stating it was "70% negligent", which is nowhere near the language of the relevant email between these parties. *Kern v. Washburn*, 2004 ML 4278, at ¶ 17.

Order markup provided to Kratzer, Hardy listed many issues with Kratzer's work, which would ostensibly be waived if the parties settled the issue:

> As stated before, if any costs outside of items 6,7,9,10, and 12 would like to be considered or discussed further, then the multiple items that Hardy Construction did (and had to do) for Kratzer Construction to keep the project moving and correct the concrete slab that was out of tolerance will be discussed and agreed to in advance. These items include, but are not limited to: floor grinding and leveling (including equipment rental), pumping water in front of the building where the sidewalk was scheduled to have been completed months prior, re-painting the corridor from damage due to the epoxy floor, pouring the concrete diamonds, shovel time to help earthwork crew, material and time to put in temporary exit door platforms to get a temporary certificate of occupancy since the sidewalk pour was well behind schedule.
>
> EXHIBIT

(Kratzer Aff., Ex. 4, App. 6) Adam Petersen then provided the following settlement offer:

> Hardy Construction will issue a change order for $4,275 and is willing not to pursue the MULTIPLE items that Kratzer Construction could be back charged for. At no time did Hardy Construction agree to pay for the additional labor for the epoxy floor, or any of the other unapproved items.
>
> We have attached a conditional final lien release; upon receiving the signed waiver back from you, we will issue you final payment for the following: your remaining contract of $69,878, the additional $4,275, final retainage of $7,000 = $81,153. The waiver is conditional upon you receiving payment and the check clearing the bank.

(*Id.*., Ex. 7) All of the language from Hardy is conditional. Petersen states Hardy "will issue a change order and is willing not to pursue" back charges, but only if Kratzer signs the "conditional final lien release." (*Id.*) (emphasis added) Petersen

also states payment will only be provided "upon receiving the signed waiver back from you," which is essentially a settlement agreement. (*Id.*) These are not admissions of facts, rather, they are the offered terms of settlement amongst the parties. *See e.g. Matzinger v. Remco, Inc*., (1976) 171 Mont. 383, 388, 558 P.2d 650: "…a concession which is hypothetical or conditional only can never be interpreted as an assertion representing the party's actual belief, and therefore cannot be an admission…"

The District Court also found "demand to perform a contractual obligation is not a settlement offer", again, without any citation to legal authority (*Id.* at 15) However, this finding inherently contradicts the District Court's other rulings. Either Hardy was justified in demanding a release and waiver for payment or it was demanding a release in return for the payment as an offer of compromise. In either circumstance, Hardy was justified and the December 22, 2022 email remains an offer of compromise. The District Court's ruling on the admissibility of the email is inherently contradictory.

Unlike *Matzinger* and *Kern* the parties never agreed on what was owed. Kratzer's reliance on this email as some sort of smoking gun is misguided, and the email was inappropriately used by the District Court as an admission of liability, contrary to Rule 408, Mont.R.Evid. The Court should reverse the District Court's Order on these ground, as well.

CONCLUSION

This Court must reverse the District Court and grant Hardy summary judgment to remedy the District Court's error which wrongly invalidates the plain terms of the Subcontract, inserts terms not found in the written Subcontract, and ignores Rule 408, Mont.R.Evid. If the District Court's ruling were affirmed, it would provide a blueprint for gamesmanship by subcontractors to leverage owners of property and their general contractors for payments they should not otherwise be paid. The Court should, therefore, reverse and grant summary judgment to Hardy, order that payment to Kratzer shall be made within 30 days of receipt of a general release and waiver in the form Hardy has already presented to Kratzer and that no interest is owed so long as such payment is timely made. Such payment should be ordered reduced by Hardy's reasonable attorneys fees and legal costs expended in defending the plain language of the Subcontract, such fees being subtracted from the principal sum of $81,135.00 to be paid to Kratzer upon his execution of the release and waiver.

RESPECTFULLY SUBMITTED this 9th day of September, 2024.

MOULTON BELLINGHAM PC

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 6,564 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ Brandon JT Hoskins
BRANDON JT HOSKINS

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CERTIFICATE OF SERVICE

I, Brandon James Tyler Hoskins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-09-2024:

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