

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

BUCK KRATZER d/b/a KRATZER CONSTRUCTION,

Plaintiff and Appellee,

vs.

HARDY CONSTRUCTION CO. INC.,

Defendant and Appellant.

Appellee Buck Kratzer's Answer Brief

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

Brandon Hoskins
Bryce Burke
Moulton Bellingham PC
27 North 27th Street, Suite 1900
Billings, MT 59103-2550
Tel: (406) 248-7731
Brandon.Hoskins@moultonbellingham.com
Bryce.Burke@moultonbellingham.com
Attorneys for Appellant

Alex W. Hamman
Calton Hamman & Wolff, P.C.
2075 Central Ave., Suite 4
Billings, Montana 59102
Tel: (406) 656-0900
alexhamman@chwlawfirm.com
Attorneys for Appellee

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I. STATEMENT OF ISSUES.

1. Did the District Court correctly grant summary judgment to Plaintiff/Appellee Buck Kratzer (“Kratzer”), and deny summary judgment to Defendant/Appellant Hardy Construction Co., Inc. (“Hardy”) by:

a. Ordering Hardy pay Kratzer \$81,153.00;

b. Ordering Hardy pay Kratzer interest at the rate of 18% per annum from January 6, 2022, through January 23, 2023, pursuant to Mont. Code Ann. § 28-2-2104(2); and

c. Ordering Hardy pay Kratzer’s attorneys fees.

II. STATEMENT OF CASE.

This is a simple breach of contract. Hardy subcontracted with Kratzer for work on an addition for the Ekalaka Public Schools (“Ekalaka”). Hardy’s subcontract provides final payment to Kratzer is due within thirty (30) days after final completion and acceptance of the project by Ekalaka. On December 6, 2021, Hardy certified the project was complete and submitted its final pay application to Ekalaka, and Hardy was subsequently paid. Pursuant to the subcontract, Hardy was obligated to issue final payment to Kratzer within 30 days, by January 5, 2022. However, Hardy did not issue final payment to Kratzer.

Instead, Hardy withheld the entire final payment amount on a fictitious contract requirement in violation of its subcontract and Montana’s

Prompt Payment Act, Mont. Code Ann. § 28-2-2103(2). The District Court thus correctly denied Hardy’s cross motion for summary judgment and granted summary judgment to Kratzer, ruling that Kratzer is entitled to judgment in the amount of \$81,153.00 plus accrued interest at the rate of 18% per annum from January 6, 2022, to January 23, 2023, plus attorney’s fees. (Hardy App. 1, Order).

III. STATEMENT OF FACTS.

Buck Kratzer is a general contractor doing business as Kratzer Construction. (Hardy App. 1, Order, ¶ 1; Hardy App. 6, Kratzer Aff., ¶ 1). Adam Petersen (“Petersen”) was the project manager for Hardy for the Ekalaka project. (Hardy App. 4, Petersen Aff., ¶ 1). Jason Arrowsmith (“Arrowsmith”) is the president of Hardy. (Hardy App. 2, Arrowsmith Aff., ¶ 1).

On March 31, 2021, Kratzer and Hardy entered into a subcontract concerning a connecting corridor (“the Project”) for Ekalaka. Kratzer was to perform excavation and concrete work. (Hardy App. 3, Subcontract).

The subcontract provides:

“Final payment shall become payable thirty (30) days after final completion and acceptance of the Project by Owner.” (*Id.* at Section 4, ¶ 3).

The subcontract further provides the prevailing party is entitled to their

reasonable attorney's fees. (*Id.* at Section 31).

In the spring of 2021, Kratzer began performing excavation and concrete work. In April and May 2021, Kratzer submitted pay applications No. 1 and 2 to Hardy and Hardy timely paid Kratzer. (Hardy App. 6, Kratzer Aff. ¶ 3). Kratzer executed two Waivers forms for the two progress payments without dispute. (Hardy App. 2, Arrowsmith Aff., ¶ 38; Hardy App. 4, Petersen Aff., ¶ 25, Ex. C and D).

In the summer of 2021, Kratzer began pouring concrete. At that time, the weather was hot, dry, and windy. The top of the concrete dried faster forming a crust on the surface making finishing difficult as the concrete below did not cure at the same rate. As a result, there were several small dips and uneven surfaces which Kratzer cured through grinding and epoxy to smooth out the concrete surface. Hardy built on Kratzer's work prior to notifying him of the defects. (Hardy App. 6, Kratzer Aff., ¶ 4; Hardy App. 2, Arrowsmith Aff., ¶ 4; Hardy App. 4, Petersen Aff., ¶ 3).

On October 22, 2021, Kratzer submitted his final Pay Application No. 3 ("Pay App. 3") to Hardy in the amount of \$92,856.45 which included change orders in the amount of \$28,852.94. (Hardy App. 6, Kratzer Aff., ¶ 5, Ex. 2 and 3; Hardy App. 2, Arrowsmith Aff., ¶¶ 7-9; Hardy App. 4, Petersen Aff., ¶¶ 8-9). Kratzer had already completed the work prior to submitting the

change orders. (Hardy App. 2, Arrowsmith Aff., ¶ 10).

On November 21, 2021, Kratzer texted Petersen demanding Pay App. 3 be paid in full, or Kratzer stated he would file suit against Hardy. Petersen responded by text stating “Unfortunately that is not how we see it or understand it. Please call us Monday and we can discuss and come to a resolution.” After that text exchange, Kratzer and Petersen discussed the issue with the change orders. (Hardy App. 4, Petersen Aff., ¶¶ 11-12).

On November 23, 2021, Kratzer sent Hardy updated change orders for \$25,332.94. (Hardy App. 6, Kratzer Aff., ¶ 6, Ex. 4; Hardy App. 4, Petersen Aff., ¶ 13; Hardy App. 2, Arrowsmith Aff., ¶ 13). Petersen told Kratzer that Hardy disapproved of the change orders, but not in writing. Petersen then asked Kratzer for additional information to support the change orders. (Hardy App. 4, Petersen Aff., ¶¶ 14-15).

On December 6, 2021, Hardy submitted its final Application and Certificate for Payment to Ekalaka with an executed release and waiver. (Hardy App. 6, Kratzer Aff., ¶ 7, Ex. 5 and 6).

On December 9, 2021, Kratzer emailed some of the requested information regarding the change orders to Petersen. (Hardy App. 4, Petersen Aff., ¶ 16, Ex. A). On December 10, 2021, Hardy requested a breakdown of the items requested in Kratzer’s change orders. (Hardy App. 4,

Petersen Aff., ¶ 17; Hardy App. 2, Arrowsmith Aff., ¶ 14). Kratzer provided information regarding the days and hours worked relating to the change orders. (Hardy App. 4, Petersen Aff., ¶ 18; Hardy App. 2, Arrowsmith Aff., ¶ 15). On December 15, 2021, Hardy informed Kratzer that his breakdown of days and hours was incorrect and conflicted with the daily progress reports. (Hardy App. 4, Petersen Aff., ¶ 20; Hardy App. 2, Arrowsmith Aff., ¶ 17).

On December 22, 2021, Petersen emailed Kratzer regarding Kratzer's final pay application. Petersen indicated Hardy would pay \$4,275 for Change Order Items No. 6, 7, 9, 10, and 12, denied the remaining change orders and extras, and would be willing to not pursue items that Kratzer could be back charged for. Hardy requested Kratzer execute a general release and lien waiver. Once Hardy received the signed release and waiver, Hardy would issue final payment to Kratzer for the remaining contract balance of \$69,878, \$4,275 for approved change orders, and \$7,000 in retainage for a total of \$81,153. (Hardy App. 6, Kratzer Aff., ¶ 8, Ex. 7; Hardy App. 4, Petersen Aff., ¶ 22; Hardy App. 2, Arrowsmith Aff., ¶ 18).

Petersen's email also included a release and waiver. Petersen indicated Kratzer would receive final payment upon execution of the release and waiver pursuant to the terms of the subcontract. The release and waiver provides Hardy is to pay Kratzer the sum of \$80,341.47. (Hardy App. 6,

Kratzer Aff., ¶ 9, Ex. 8; Hardy App. 4, Petersen Aff., ¶ 22).

Kratzer refused to sign the release and waiver. (Hardy App. 6, Kratzer Aff., ¶ 10, Ex. 7; Hardy App. 4, Petersen Aff., ¶ 24).

On May 10, 2022, Arrowsmith emailed Kratzer stating:

“I haven’t heard back 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.” (Hardy App. 6, Kratzer Aff., ¶ 11, Ex. 7; Hardy App. 2, Arrowsmith Aff., ¶ 20, Ex. C).

Kratzer indicated he would not sign a release and waiver unless the entirety of Pay App. 3 was paid. (Hardy App. 6, Kratzer Aff., ¶ 12, Ex. 7; Hardy App. 2, Arrowsmith Aff., ¶ 21).

On September 19, 2022, Kratzer, through his counsel, sent a demand letter to Hardy requesting payment of \$92,856.45. (Hardy App. 2, Arrowsmith Aff., ¶ 26, Ex. E). On October 26, 2022, Kratzer, through his counsel, waived his claims for the change orders and demanded payment of the principal amount of \$81,153 Hardy admitted was due plus interest. Kratzer did not submit an invoice in the amount of \$81,153. (Hardy App. 2, Arrowsmith Aff., ¶¶ 27-29, Ex. F).

On January 17, 2023, Hardy tendered \$81,153 and demanded Kratzer sign a release and waiver. (Hardy App. 6, Kratzer Aff., ¶ 13, Ex. 9; Hardy App. 2, Arrowsmith Aff., ¶ 32, Ex. G). On January 24, 2023, Kratzer declined Hardy’s tender and returned the check. Hardy owed interest at 18% per year

on the \$81,153 for delaying payment. Since Hardy had failed to tender the full amount due, Kratzer would waive interest by accepting Hardy's tender of the principal amount due. (Hardy App. 6, Kratzer Aff., ¶ 14, Ex. 10; Hardy App. 2, Arrowsmith Aff., ¶ 36, Ex. I).

On January 26, 2023, Hardy again tendered \$81,153 by check and indicated if Kratzer accepted the tender, Hardy would not consider that a waiver of interest. (Hardy App. 6, Kratzer Aff., ¶ 15, Ex. 11; Hardy App. 2, Arrowsmith Aff., ¶ 32, Ex. H). On February 13, 2023, Kratzer again rejected Hardy's tender and returned the check. Kratzer stated Hardy owes \$81,153 plus interest at the rate of 18% from February 4, 2022, and retaining the check waives interest pursuant to Mont. Code Ann. § 28-2-2104(3) and § 27-1-214. (Hardy App. 6, Kratzer Aff., ¶ 16, Ex. 12; Hardy App. 2, Arrowsmith Aff., ¶ 36, Ex. J).

On February 17, 2023, Kratzer filed his complaint and amended complaint on February 21, 2023. (ROA #1 & 2). In April 2023, Hardy's counsel claimed Petersen's December 22, 2021 email referenced in the Amended Complaint, was a settlement offer inadmissible to prove liability under Mont.R.Evid. Rule 408. So on April 24, 2023, Kratzer filed his Second Amended Complaint reducing his claim to \$80,341.47, the amount Arrowsmith indicated Hardy owes Kratzer. (ROA #4; Hardy App. 6, Kratzer

Aff., ¶ 17). Hardy then filed its Answer and Counterclaim on May 18, 2023. (ROA #5).

During discovery Kratzer requested Hardy set forth the amount it contends it owes. Hardy stated it does not owe Kratzer anything until Kratzer complies with the subcontract. Once Kratzer complies with the subcontract, Hardy stated it believes Kratzer is owed \$81,153 less Hardy's damages, attorney's fees, costs and other recoverable damages under Hardy's counterclaims. Hardy did not specify which provisions of the subcontract Kratzer had to perform. (Hardy App. 6, Kratzer Aff., ¶19, Ex. 5, Answer to Int. No. 8).

On October 16, 2023, Kratzer moved for summary judgment. (ROA #7). Hardy then moved for cross summary judgment on November 16, 2023. (ROA #11). The Court held oral arguments on the parties' motions on March 26, 2024. (ROA #18). At the closing of oral arguments, the District Court indicated it believed there were disputed facts and a jury trial might be necessary. (Hardy App. 7, Trans., p. 44-45). Hardy asked the District Court what were the disputed facts. (Hardy App. 7, Trans., p. 45, 13-14). The District Court indicated Hardy's counterclaims for defective work. (Hardy App. 7, Trans., p. 45-46). Hardy then subsequently dismissed its counterclaims. (ROA #19 and #21).

IV. STANDARD OF REVIEW.

We agree with the standard of review set forth in Appellant's brief. We would also add the following.

If this Court reaches the same conclusion as the District Court, but on different grounds, it may affirm the District Court's judgment. *Moore v. Goran, LLC*, 2017 MT 208, ¶ 7, 388 Mont. 340, 400 P.3d 729; *Johnson Farms, Inc. v. Halland*, 2012 MT 215, ¶ 11, 366 Mont. 299, 291 P.3d 1096.

No civil case shall be reversed by reason of error which would have no significant impact upon the result. Where there is no showing of substantial injustice, the error is harmless and may not be used to defeat the judgment. *Rocky Mt. Enters. v. Pierce Flooring* (1997), 286 Mont. 282, 294, 951 P.2d 1326, 1333 citing *In re Paternity of W.L.* (1995), 270 Mont. 484, 489-90, 893 P.2d 332, 336.

V. ARGUMENT.

A. Summary of Argument.

The District Court correctly denied Hardy's motion for summary judgment and granted summary judgment to Kratzer because Hardy breached its subcontract by withholding final payment to Kratzer in the amount of \$81,153.00. Since Hardy breached its subcontract, the District Court correctly determined that Kratzer is entitled to interest at the rate of

18% per year on the \$81,153.00 pursuant to Mont. Code Ann. § 28-2-2104(2) and correctly determined that Kratzer is the prevailing party entitled to his attorney's fees.

Hardy is requesting this Court reverse the District Court's order and instead grant summary judgment to Hardy. Hardy argues the District Court erred by failing to apply the plain language of the subcontract and it was entitled to withhold final payment to Kratzer on the following grounds: 1) Kratzer did not submit release and waivers from his subcontractors as a condition precedent for final payment; 2) Kratzer never submitted a payment application for \$81,153 in a form satisfactory to Hardy; 3) Kratzer never signed a release and waiver; and 4) Kratzer's defective work entitled Hardy to withhold payment.

Hardy then argues it was entitled to withhold payment under the Prompt Payment Act, Mont. Code Ann. § 28-2-2103(c). Finally, Hardy argues the District Court erred in determining Hardy's December 22, 2021, email is an admission of liability. Hardy contends the email was an offer of compromise and inadmissible under Mont.R.Evid. Rule 408.

The record establishes Hardy's arguments are without merit. First, the District Court correctly determined Hardy waived any requirement for Kratzer to submit releases and waivers from his subcontractors. Second,

Kratzer was not obligated to submit an invoice in the amount Hardy determined to be due. Third, Hardy's subcontract did not require a waiver and release by Kratzer as a condition of final payment. Fourth, Hardy's partial disapproval of Kratzer's pay application for defective work does not justify Hardy's refusal to pay the approved amount.

This is the heart of the case. Under the Prompt Payment Act, Hardy may not withhold the final payment Hardy admits is due as leverage to compel a subcontractor to release all claims it may have. But Hardy violated that Act in two respects. First, Hardy failed to follow the statutory procedure to disapprove payments. Second, Hardy failed to timely pay the \$81,153 Hardy admitted being due. Instead, Hardy withheld payment unless Kratzer signed a release.

A review of Hardy's December 22, 2021 email establishes it is an admission of liability. However, this issue has been rendered moot as Hardy admitted in discovery that it owes Kratzer \$81,153.00. So whether the District Court used Hardy's December 22, 2021 email is irrelevant and, at worst, harmless error which does not warrant reversal.

Lastly, the District Court correctly determined Hardy owes Kratzer interest pursuant to Mont. Code Ann. § 28-2-2104(2) and that Kratzer, as the prevailing party, is entitled to his attorney's fees. We therefore respectfully

submit this Court should affirm the District Court and remand for determination of additional attorney's fees.

B. The District Court correctly granted summary judgment to Kratzer as Hardy breached its subcontract by refusing to timely pay Kratzer.

The rules on construction of contract are clear. A contract must be given a reasonable interpretation. Mont. Code Ann. § 28-3-201. The language of a contract governs its interpretation unless that language would result in an absurdity. Mont. Code Ann. § 28-3-401. In other words, any interpretation must be reasonable. Mont. Code Ann. § 1-3-233. The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Mont. Code Ann. § 28-3-202. Where contracts are ambiguous, the ambiguity is construed "most strongly" against the drafter. Mont. Code Ann. § 28-3-206; *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 2015 MT 186, ¶ 22, 379 Mont. 513, 353 P.3d 483 (contract ambiguity properly construed against drafter).

Here, Hardy's subcontract provision covering time of final payment states as follows:

“Final payment shall become payable thirty (30) days after final completion and acceptance of the Project by Owner. 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 Contractor.” (Hardy App. 3, Subcontract, Section 4, ¶ 3)(Emphasis added).

These two sentences provide for two different means of determining the final payment due date. The first sentence provides payment shall become payable thirty days after final completion and acceptance of the project by the owner. The second sentence provides final payment is not due until the subcontractor submits releases and waivers from its subcontractors.¹ Therefore, the subcontract is ambiguous as there are two provisions setting forth different dates when final payment is due. Either final payment is due within thirty days after the owner accepts the project or final payment is due upon Kratzer submitting waivers and releases from his subcontractors. Since Hardy drafted the subcontract, this ambiguity is construed against Hardy. As such, Hardy was obligated to issue final payment to Kratzer within thirty days after final completion and acceptance of the Project by Ekalaka.

The District Court correctly determined Kratzer was entitled to summary judgment on this issue based on the following undisputed, material facts:

1. On October 22, 2021, Kratzer submitted Pay Application No. 3 in the amount of \$92,856.45 to Hardy. (Hardy App. 1, Order, p. 11).

¹The subcontract however does not obligate the subcontractor, Kratzer, to execute a release and waiver as a condition of payment as demanded by Hardy as a condition of payment.

2. On December 6, 2021, Hardy completed the project, delivered the project to Ekalaka and submitted its final pay application which was paid. (Hardy App. 1, Order, p. 11).
3. On December 22, 2021, Hardy disapproved of Kratzer's final pay application and approved payment of \$81,153. However, Hardy refused to pay Kratzer. Instead, Hardy conditioned payment based on a demand that the subcontract required Kratzer execute a waiver prior to final payment. (Hardy App. 1, Order, p. 11).

Pursuant to the subcontract, the District Court correctly determined Hardy was obligated to issue final payment in the amount of \$81,153.00 to Kratzer within 30 days of December 6, 2021, by January 5, 2022. (Hardy App. 1, Order, p. 14; Hardy App. 3, Subcontract, Section 4, ¶ 4).

It is undisputed Hardy did not issue final payment in the amount of \$81,153.00 to Kratzer by January 5, 2022. In fact, Hardy's position is Kratzer is still not entitled to payment to this day, despite the plain language of Hardy's subcontract. (Appellant Brief, p. 10).

Based on these undisputed facts, the District Court correctly denied Hardy's motion for summary judgment and granted summary judgment to Kratzer. The District Court correctly determined Hardy breached the terms of its subcontract by refusing to issue final payment of \$81,153.00 by January 5, 2022. (Hardy App. 3, Order, p. 11-16).

Hardy argues it was entitled to withhold final payment pursuant to the subcontract on the following grounds: 1) Kratzer did not submit release and

waivers from his subcontractors as a condition precedent for final payment; 2) Kratzer never submitted a payment application for \$81,153 in a form satisfactory to Hardy; 3) Kratzer never signed a release and waiver; and 4) Kratzer's defective work entitled Hardy to withhold payment. (Appellant Brief, p. 9-10).

A review of Hardy's arguments establishes they are without merit and each will be addressed in detail below. But first and foremost, Hardy's arguments all suffer from the same two fatal flaws. First, Hardy simply refuses to address the fact that the subcontract provides final payment shall be payable within thirty days after the Project is completed and accepted by Ekalaka. Hardy cherry-picks and cites multiple subcontract provisions, but notably fails to cite and address that provision.

Second, Hardy is rewriting history to justify its improper refusal to timely pay Kratzer. The written record is clear that in December 2021, Hardy withheld payment on the **sole ground** the subcontract required **Kratzer** to execute a release and waiver as a condition of final payment. (Hardy App. 6, Kratzer Aff., ¶ 9, Ex. 8; Hardy App. 4, Petersen Aff., ¶ 22). But Hardy's subcontract does not contain any such requirement. That is why Hardy never cites that alleged subcontract provision. It does not exist. So now, nearly three years later, Hardy argues it was entitled to withhold payment on other

grounds not raised in 2021. As such, Hardy waived those other grounds and cannot use them now to retroactively justify its refusal to pay Kratzer in 2021.

We will address each of Hardy's other grounds below.

1. Hardy waived the requirement that Kratzer provide waivers and releases from subcontractors and this claim is a pretext to excuse Hardy's refusal to pay.

Hardy claims the District Court erred by not enforcing the plain language of the subcontract. Hardy argues the subcontract required Kratzer to provide releases and waivers from his subcontractors as a condition precedent to final payment. Since Kratzer did not submit releases and waivers from his subcontractors, Hardy argues it was entitled to withhold final payment. (Appellant Brief, p. 10). Hardy claims the District Court ignored this language and incorrectly determined that Hardy waived this requirement. (Appellant Brief, p. 11).

Hardy also argues the subcontract required Kratzer comply with the Prime Contract which would "ostensibly" require Kratzer to sign a waiver prior to final payment. Hardy additionally argues the parties established a course of performance in which Kratzer agreed that he had to execute a waiver prior to final payment because he signed previous waivers. (Appellant Brief, p. 12-14).

These arguments are without merit and the District Court properly enforced the plain language of the contract. First, Hardy is the party ignoring the plain language in the subcontract. Hardy cites the following contract provision in support of its argument:

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

Hardy leaves out the prior sentence which provides:

“Final payment shall become payable thirty (30) days after final completion and acceptance of the Project by Owner.” (Hardy App. 3, Subcontract, Section 4, ¶ 4).

Hardy never even attempts to deal with this language. That is because Hardy’s subcontract establishes Hardy had an unconditional obligation to pay Kratzer within 30 days. Every argument Hardy raises suffers from this fatal flaw which Hardy simply refuses to address.

Second, the District Court correctly determined Hardy waived the requirement Kratzer had to submit waivers from his subcontractors. (Hardy App. 1, Order, p. 12).

“Waiver is a voluntary and intentional relinquishment of a known right or claim. It may be proven by express declarations or by a course conduct which induces the belief that the intent and purpose was waiver. To establish a waiver, the party asserting waiver must demonstrate that the other party knew of the existing right, acted inconsistent with that right, and prejudice resulted to the party asserting waiver. *Edwards v. Cascade County*, 2009 MT 229, P 30,

351 Mont. 360, 212 P.3d 289.” *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 28, 353 Mont. 471, 221 P.3d 1184.

Hardy closed out the Project with Ekalaka on December 6, 2021, without requesting waivers from Kratzer’s subcontractors. (Hardy App. 6, Kratzer Aff., ¶ 7, Ex. 5 and 6). Then Hardy withheld payment on the sole grounds the subcontract required **Kratzer** to sign a waiver as a condition of final payment. (Hardy App. 4, Petersen Aff., ¶ 22). Hardy only claimed Kratzer had to provide waivers from his subcontractors in 2023 to justify its refusal to pay Kratzer in 2021. As such, the District Court correctly determined the condition was waived. (Hardy App. 1, Order, p. 12).

Likewise, waiver is also applicable to Hardy’s argument that Kratzer had to follow the Prime Contract. Notably, the Prime Contract is not in the record and Hardy did not argue the Prime Contract required Kratzer to sign a waiver before the District Court. This Court has long held it will not address an issue raised for the first time of appeal and “it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.” *Day v. Payne* (1996), 280 Mont. 273, 276-77, 929 P.2d 864, 866.

However, even if the Court considers this issue, it is clear that Ekalaka waived this condition. On December 6, 2021, Hardy closed out the Project with Ekalaka and received payment without Ekalaka requesting Hardy

obtain a waiver from Kratzer. (Hardy App. 6, Kratzer Aff., ¶ 7, Ex. 5 and 6). Since Ekalaka made final payment to Hardy without requiring Hardy to submit waivers from Kratzer, this condition was waived. Hardy cannot enforce Ekalaka's condition when Ekalaka elected to waive that condition.

Lastly, Hardy's course of performance argument is without merit. Hardy cites Mont. Code Ann. § 30-2-208(1) and *Farmers Elevator Co. of Reserve v. Anderson* (1976), 170 Mont. 175, 181, 552 P.2d 63 to support its argument.

First, that statute and *Farmers* both are based on the UCC statute for the sale of goods. This case is a construction contract, so the UCC does not apply.

Second, Mont. Code Ann. § 30-2-208(1) provides "...any course of performance accepted or acquiesced in **without objection** shall be relevant to determine the meaning of the agreement." (emphasis added). Kratzer objected and refused to execute a waiver as a condition of final payment. (Hardy App. 6, Kratzer Aff., ¶ 10, Ex. 7; Hardy App. 4, Petersen Aff., ¶¶ 11-12, 24). There was no completed course of performance in the first place.

Finally, this distinction is illustrated in *Farmers*. This Court found Anderson's completed course of performance in delivering grain constituted a waiver of his right to assert a statute of frauds defense. *Farmers* at Mont.

180. Under *Farmers*, a party may waive a particular contract term through a completed performance. But that is not what Hardy is arguing.

Hardy is attempting to add a new condition not contained in the contract at all. That is not a waiver by course of performance. That is contract modification. Hardy's argument is Kratzer, by signing two previous waivers, agreed by conduct to modify the contract to require him to sign a third waiver, even though the contract has no such requirement. But that argument is precluded by the non-modification clause of Hardy's subcontract.

“This Subcontract cannot be changed, modified, or amended except in writing executed by all parties.” (Hardy App. 3, Subcontract, Section 22).

The purpose of this clause is to prevent a past waiver of any provision to be a future modification of the subcontract. Therefore, Kratzer's prior execution of two waivers cannot be used to modify the subcontract to create a new obligation that he execute a third waiver as a condition of final payment. It certainly does not allow Hardy to continue to withhold final payment to Kratzer long after Hardy received final payment from Ekalaka.

Based on the foregoing, the District Court correctly determined Hardy waived the contract requirement that Kratzer provide waivers from his subcontractors prior to final payment and Kratzer's prior execution of a

waiver was at his discretion and not required by the subcontract. (Hardy App. 1, Order, p. 12).

2. Kratzer was not obligated to submit an invoice in the amount Hardy determined to be due.

Hardy claims the District Court erred as the subcontract allowed Hardy to withhold payment because Kratzer never submitted a payment application in a form satisfactory to Hardy. Essentially, Hardy argues it timely disapproved of Kratzer's final invoice because Kratzer failed to timely or did not provide the proper documentation. Then after Hardy determined it owed Kratzer \$81,153, Hardy argues Kratzer was obligated to submit an invoice agreeing to Hardy's determination. (Appellant's Brief, p. 14-16). This is just another way to argue Kratzer had to agree to Hardy's number as a condition of being paid the amount Hardy admitted was due.

In support of its argument, Hardy cites the following subcontract language:

“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.” (Hardy App. 3, Subcontract, Section 4, ¶ 1). (emphasis added).

Hardy yet again fails to address the plain language in the subcontract. The language cited by Hardy concerns progress payments, not final payment. As to final payment, the subcontract clearly provides final payment is due

within thirty (30) days after final completion and acceptance of the project by owner.

Moreover, Hardy did not ask for a new invoice in 2021. The only condition imposed for payment was a demand for a waiver . (Hardy App. 4, Petersen Aff., ¶ 22). So it is pretty clear Hardy is retroactively changing the reason for withholding payment in 2021 as a pretext to avoid liability.

Finally, if Kratzer’s pay application was insufficient as Hardy alleges, the Prompt Payment Act provides a procedure to disapprove payment to a subcontractor. The relevant portions of Mont. Code Ann. § 28-2-2103(2) provide:

“(b) Payment is not required under this subsection (2) unless the subcontractor provides the contractor a billing statement or invoice for work performed or materials supplied pursuant to the terms of the subcontract.

(c) Prior to submitting a monthly or final pay application to the owner, the general contractor may disapprove the subcontractor’s request for payment or a portion of the request based upon a written claim of any of the conditions listed in subsection (1)(c).”

On October 22, 2021, Kratzer submitted Pay App. 3 to Hardy. (Hardy App. 6, Kratzer Aff., ¶ 5, Exhibit 2). Kratzer’s Pay App. 3 complies with the act as it is an invoice for work performed and materials supplied pursuant to the terms of the subcontract. (Hardy App. 1, Order, p. 13). As the District Court noted, this pay application was sufficient for Hardy to approve

payment of \$81,153 and Hardy did not need to reach an agreement regarding the disputed work to tender payment of the approved amount of \$81,153. *Id.*

If Hardy wished to withhold payment, it had to comply with Mont. Code Ann. § 28-2-2103(2)(c) by setting forth in writing the amount disapproved and the reason for disapproval prior to submitting its final pay application to Ekalaka. Hardy did not do so. Hardy submitted its final pay application to Ekalaka on December 6, 2021, but did not disapprove of Kratzer's pay application until December 22, 2021. (Hardy App. 6, Kratzer Aff., ¶¶ 7-8, Ex. 5, 6 and 7; Hardy App. 4, Petersen Aff., ¶ 22; Hardy App. 2, Arrowsmith Aff., ¶ 18).

Hardy simply misses the point on its legal obligation. Kratzer did submit a payment application and documentation. Hardy then reviewed, untimely disapproved part but approved \$81,153. Once approved, Hardy had an obligation to pay the amount it approved. Hardy cannot shift that duty to Kratzer. Nothing in the subcontract or the Prompt Payment Act required Kratzer to submit a new invoice in the amount approved by Hardy. Nor did Hardy ask for a new invoice at the time. This was Hardy's number. What would have been the point? The law does not require idle acts. Mont. Code Ann. § 1-3-223. As such, the District Court correctly determined Hardy was not entitled to withhold payment. (Hardy App. 1, Order, p. 13-16).

3. Kratzer was not required to sign a waiver and release as a condition of final payment.

Hardy claims it was entitled to withhold payment because Kratzer stated his intention to sue. Hardy cites the following contract provision:

“All payments are subject to withholding by Contractor of any amount reasonable necessary to fully protect Contractor against any or potential liability or damages directly or indirectly relating to the Work or this Subcontract, or against Subcontractor’s breach of threatened breach hereof.” (Hardy App. 3, Subcontract, Section 4, ¶ 4).

Hardy then argues the District Court erred because Kratzer’s threat to sue amounts to potential liability entitling Hardy to withhold payment under the above subcontract provision. (Appellant’s brief, p. 17-20).

Hardy yet again fails to address the plain language in the subcontract. The subcontract clearly provides final payment is due within 30 days after Ekalaka accepted the Project. Acceptance occurred on December 6, 2021. (Hardy App. 6, Kratzer Aff., ¶ 7, Ex. 5 and 6). Therefore, Hardy was obligated to issue final payment to Kratzer by January 6, 2022, which Hardy refused to do thereby breaching the subcontract.

Then Hardy did not withhold payment in 2021 due to potential liability as it claims. It withheld payment on the grounds Kratzer had to sign a waiver pursuant to the subcontract as a condition of final payment. (Hardy App. 4, Petersen Aff., ¶ 22). Again, Hardy is attempting to rewrite history by mispresenting why it withheld payment in 2021.

Lastly, Hardy's argument that it was concerned about potential liability is refuted by the subcontract. Section 4 of the subcontract provides:

“Acceptance of final payment by Subcontractor constitutes a general release of Contractor and its surety. If Subcontractor takes exception to so releasing Contractor by acceptance of payments, Subcontractor must return said payment together with an affidavit listing each and every exception to such release...” (Hardy App. 3, Subcontract, Section 4, ¶ 4). emphasis added).

So Hardy's concerns about potential liability is entirely disingenuous. If Hardy was so concerned about liability, all it had to do was simply pay Kratzer the approved amount of \$81,153.

Based on the foregoing, the District Court correctly determined that Kratzer was not obligated to sign a waiver as a condition of final payment. (Hardy App. 1, Order, p. 12).

4. Kratzer was entitled to be promptly paid for approved amounts.

Hardy claims the plain language of the subcontract supports reversal of the District Court as it was entitled to withhold payment to Kratzer for defective work. It argues the same provision of the Subcontract discussed above applies and this entitles Hardy to withhold payment from Kratzer based on Kratzer's alleged defective work. (Appellant's Brief, p. 21-22).

Yet again, Hardy fails to deal with the plain language in its subcontract and misrepresents why it withheld payment in 2021. The subcontract clearly

provides final payment is due within 30 days after Ekalaka accepted the Project. (Hardy App. 3, Subcontract, Section 4, ¶ 4). But Hardy did not withhold payment in 2021 due to defects or potential liability. It withheld payment to coerce Kratzer to sign a waiver as a condition of final payment. (Hardy App. 4, Petersen Aff., ¶ 22).

Furthermore, Hardy already made deductions for alleged defective work. Kratzer's Pay App. 3 was for \$92,856.45. (Hardy App. 6, Kratzer Aff., ¶ 5, Ex. 2 and 3). At that time, Hardy claimed defective work and reduced the payment by \$11,703.45 to \$81,153. This is the net amount due **after** Hardy made deductions for defective work. Hardy then told Kratzer that he would be paid \$81,153 on the condition he sign a waiver. (Hardy App. 6, Kratzer Aff., ¶ 8, Ex. 7; Hardy App. 4, Petersen Aff., ¶ 22; Hardy App. 2, Arrowsmith Aff., ¶ 18). They did not withhold payment based on any alleged defective work. Again, Hardy is attempting to revise history to excuse its breach.

The fact establish Hardy waived any claims for defects. In 2021, Hardy accepted Kratzer's work, delivered the Project to Ekalaka as being complete, and requested and accepted final payment. (Hardy App. 6, Kratzer Aff., ¶¶ 4 and 7, Ex. 5 and 6). Hardy's acceptance of Kratzer's work, certifying the Project completed and accepting payment for the Project constitutes wavier of any claim for defects. See *Grass Range High Sch. Dist. v. Wallace Diteman, Inc.*

(1970), 155 Mont. 10, 465 P.2d 814 (acceptance of alleged defective work constitutes a waiver).

Lastly, Hardy dismissed its counterclaims for the alleged defective work. Hardy initially alleged damages for defective work in Counts 3 and 4 of its Counterclaim. (ROA #5). However, after the District Court indicated Hardy's counterclaims for defective work may create disputed facts requiring a jury trial, Hardy dismissed its counterclaims for defective work. (Hardy App. 7, Trans., p. 45-46 and ROA #19 and #21).

So Hardy's argument that it was entitled to withhold payment for defects or for any of the reasons above is nonsense. The fact is Kratzer submitted his pay application in the amount of \$92,856.45. Hardy reduced that amount to \$81,153, but conditioned payment on a non-existent contract requirement that Kratzer waive any claims he might have. Every argument Hardy raised since is an attempt to rewrite that history to justify Hardy's refusal to pay Kratzer while ignoring the plain language of its subcontract. Based on the foregoing, the District Court correctly determined Hardy breached the subcontract and correctly granted summary judgment to Kratzer. (Hardy App. 1, Order, p. 13-16).

C. Hardy untimely disapproved Kratzer's payment request in violation of Mont. Code Ann. § 28-2-2103(2)(c).

The Prompt Payment Act provides a procedural framework to disapprove payment to a contractor or a subcontractor. Mont. Code Ann. § 28-2-2103(2) provides:

“(a) Within 7 days after a contractor receives a periodic or final payment from an owner or a state agency, the contractor shall pay the subcontractor, if any, the full amount due the subcontractor in accordance with the subcontract for work performed or materials provided in accordance with that subcontract.

(b) Payment is not required under this subsection (2) unless the subcontractor provides the contractor a billing statement or invoice for work performed or materials supplied pursuant to the terms of the subcontract.

(c) Prior to submitting a monthly or final pay application to the owner, the general contractor may disapprove the subcontractor's request for payment or a portion of the request based upon a written claim of any of the conditions listed in subsection (1)(c).” (emphasis added).

Mont. Code Ann. § 28-2-2103(1)(c) then provides:

“The owner may disapprove the request for payment or a portion of the request based upon a claim of:

- (i) unsatisfactory job progress;
- (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;
- (v) failure of a contractor to make timely payment for claims, including but not limited to claims for labor,

equipment, materials, subcontracts, taxes, fees, professional services, rent, and royalties;
(vi) damage to the owner; or
(vii) the existence of reasonable evidence that the construction contract cannot be completed for the unpaid balance of the contract sum.”

Hardy claims the District Court erred by determining Hardy was not entitled to withhold payment pursuant to the Prompt Payment Act and should be reversed in Hardy’s favor. Hardy argues it was entitled to withhold payment under the Mont. Code Ann. 28-2-2103(1), including subsections (c)(ii), (c)(iii), and (c)(iv) for failure to remedy defective work, disputed work, and failure to comply with the subcontract. In support of its argument, Hardy cites *JEM Contracting, Inc. v. Morrison-Maierle, Inc.*, 2014 MT 21, 373 Mont. 391, 318 P.3d 678. Hardy additionally claims it was entitled to withhold payment under Mont. Code Ann. § 28-2-2103(2)(b) due to Kratzer’s failure to provide an invoice in the amount of \$81,153. (Appellant’s Brief, p. 22-24).

Hardy is incorrect on the law and was never entitled to withhold payment. For Hardy to be entitled to withhold payment, Hardy had to disapprove of Kratzer’s pay application, in writing, prior to Hardy submitting its final pay application to Ekalaka. Mont. Ann. § 28-2-2103(2)(c). Hardy did not do that.

Hardy submitted its final pay application to Ekalaka on December 6, 2021, but did not disapprove of Kratzer's pay application until December 22, 2021. (Hardy App. 6, Kratzer Aff., ¶¶ 7-8, Ex. 5, 6 and 7; Hardy App. 4, Petersen Aff., ¶ 22; Hardy App. 2, Arrowsmith Aff., ¶ 18). So Hardy clearly failed to follow the statutory procedure as it submitted its pay application to Ekalaka first **then** disapproved of Kratzer's pay application afterwards.²

Arguably, Kratzer is entitled to the full amount of \$92,856.45 because Hardy failed to comply with the statute. However, Kratzer has accepted Hardy's number of \$81,153 which Hardy said was owed **after** Hardy had already closed out the Project and received payment from Ekalaka. So the undisputed facts establish Hardy was never entitled to withhold payment as it claims.

Furthermore, Hardy fails to address the fact that the Prompt Payment Act requires prompt payment of **approved amounts**. Mont. Code Ann. § 28-2-2103(2). This is confirmed by the *JEM* case.

² Hardy previously argued it disapproved of Kratzer's Pay App. 3 in the November 12, 2021 text between Petersen and Kratzer. However, that text only requests Kratzer call Hardy to discuss his final pay application and does not meet the statutory criteria of Mont. Code Ann. § 28-2-2103(2)(c). It does not set forth any of the conditions listed in subsection Mont. Code Ann. § 28-2-2103(1)(c). Nor does it set forth any amounts being rejected and why. (Hardy App. 4, Petersen Aff., ¶¶ 11-12).

In *JEM*, Madison and Gallatin counties accepted JEM's bid for road improvements. The counties then retained Morrison-Maierle, Inc., ("MMI") to provide engineering services and to act as their representative. Unforeseen subsurface conditions increased costs and time for the job. After discussing the problem, JEM alleged MMI agreed that JEM would be paid for the increased costs. *JEM* at ¶¶ 5-6.

But MMI later denied JEM's change order because JEM had provided insufficient evidence and had failed to follow the procedure set forth in the contract for nonconforming site conditions. JEM then filed suit against the counties and MMI. After JEM settled with the counties, the District Court dismissed JEM's complaint against MMI on summary judgment. *Id.* at ¶¶ 7-9.

On appeal, JEM argued the Prompt Payment Act overrode a contract provision requiring a contractor to continue working while not receiving progress payments. JEM claimed a change order equates to a progress payment, so therefore, the statutory prohibition likewise prohibits provisions requiring a contractor to continue work while not being paid for a change order. This Court rejected JEM's argument because the contract allowed JEM to terminate performance for nonpayment. This Court held

that since the counties and MMI had not approved the change orders, they were entitled to disapprove those amounts. *Id.* at ¶ 12-15.

“Section 28-2-2103, MCA, clearly recognizes an owner's right to dispute all or part of a progress payment request for a litany of reasons, including ‘disputed work or materials,’ § 28-2-2103(1)(c)(iii), MCA, **and requires an owner to promptly pay only the ‘approved amount.’**” *Id.* at ¶ 14.(emphasis added).

So the holding in *JEM* confirms Kratzer’s argument. Upon review of Kratzer’s pay application, Hardy approved of some changes, denied others, and approved a total payment of \$81,153. Hardy is correct that under *JEM*, it was entitled to withhold payment of ***disapproved or disputed amounts***, provided Hardy complied with the statutory procedure which it did not do. But Hardy was never entitled to withhold payment of “***approved amounts***.” Both *JEM* and Mont. Code Ann. § 28-2-2103(2) required Hardy to promptly pay approved amounts. The fundamental purpose of the Prompt Payment Act is to require a contractor to timely pay all approved amounts due.

Hardy did not do that. After Hardy untimely disputed a ***portion*** of Kratzer’s payment request, Hardy withheld the approved amount of \$81,153 in its entirety on the condition Kratzer release all claims. Hardy asserts this was proper. It clearly is not. Under Hardy’s logic, a contractor can refuse to pay the entire amount by disputing ***only*** a portion of the invoice. Then the

contractor can require a subcontractor to release any claim to the disputed amount as a condition of receiving the approved amount. That abuse is exactly why the Prompt Payment Act was enacted in the first place. So if we adopt Hardy's position that renders the Prompt Payment Act meaningless.

Even if Hardy disputed amounts, it is self-evident that Hardy was still obligated by its subcontract, the Prompt Payment Act and *JEM*, to promptly pay the amount Hardy approved. Hardy clearly failed to do so and breached both its subcontract and the Prompt Payment Act.

Lastly, as addressed above, Kratzer was not required to submit another pay application in Hardy's number for \$81,153. This is merely a last ditch attempt by Hardy to justify its breach of its subcontract and the Prompt Payment Act.

Based on the foregoing, the District Court correctly determined the Prompt Payment Act did not provide Hardy authority to withhold payment of the approved amounts. (Hardy App. 1, Order, p. 14-16). Rather under Hardy's subcontract, by statute, and under *JEM*, ***approved amounts*** must be promptly paid. That is why it is called the Prompt Payment Act. It is undisputed Hardy did not promptly pay the approved amount of \$81,153 in violation of its subcontract and the Prompt Payment Act. Therefore, we

submit this Court should affirm the District Court grant of summary judgment to Kratzer.

D. The District Court correctly determined Hardy's December 21, 2021 email is an admission of liability.

The District Court found Hardy's December 21, 2021, email constitutes an admission of liability. (Hardy App. 1, Order, p. 15-16). Hardy argues the email is an offer of compromise and the District Court erred by finding the email an admission of liability and inappropriately used the email to determine liability. (Appellant's Brief, p. 24-27).

We submit the District Court correctly determined the email is an admission of liability. In the email Petersen told Kratzer what Hardy disputes for payment and set forth an approved amount of \$81,153 but conditioned payment on the non-existent, subcontract requirement that Kratzer sign a waiver. (Hardy App. 6, Kratzer Aff., ¶ 8, Ex. 7; Hardy App. 4, Petersen Aff., ¶ 22; Hardy App. 2, Arrowsmith Aff., ¶ 18).

The email is not from an attorney representing Hardy and does not indicate it is a settlement offer. See *Matzinger v. Remco, Inc.* (1976), 171 Mont. 383, 388-89, 558 P.2d 650, 653 (letter from contractor to subcontractor discussing claim for extra work determined to be admission of liability); *Kern v. Washburn*, 2004 ML 4278, Eighteenth Judicial District

Court of Montana (letter stating position to accept 70% constituted an admission of liability).

Hardy wants it both ways. Hardy is claiming it was entitled to withhold payment until Kratzer performed his contractual obligation to sign a waiver. (Hardy App. 4, Petersen Aff., ¶ 22). Yet at the same time, Hardy is claiming the waiver constitutes part of an offer to compromise. Both cannot be true. As the District Court correctly noted, a demand to perform a contractual obligation is not a settlement offer. (Hardy App. 1, Order, p. 15). As such, we submit the email was a demand for contract performance and constitutes an admission of liability.

More importantly, whether the email is a settlement offer or an admission of liability is moot. Hardy admitted in discovery it owes Kratzer \$81,153 less Hardy's damages, attorney's fees, costs and other recoverable damages under Hardy's counterclaims. (Hardy App. 6, Kratzer Aff., ¶19, Ex. 5, Answer to Int. No. 8).

This confirms that in Petersen's email Hardy simply offered to pay what was owed which is not a settlement offer. Since Hardy has admitted in discovery that \$81,153 is, in fact, the amount due, whether Petersen's email is an admission is immaterial and moot.

At worst, the District Court's determination is harmless error as the District Court had independent and separate grounds (Hardy's discovery answers) to find Hardy owes Kratzer \$81,153. So this issue has no impact on the case and there is no showing of substantial injustice, therefore, any error is harmless and may not be used to defeat the judgment. *Rocky Mt. Enters. v. Pierce Flooring* (1997), 286 Mont. 282, 294, 951 P.2d 1326, 1333.

E. The District Court correctly determined Kratzer is entitled to interest.

The District Court correctly applied Mont. Code Ann. § 28-2-2104(2) and determined Kratzer is entitled to interest. (Hardy App. 1, Order, p. 16-17).

Mont. Code Ann. § 28-2-2104(2) provides:

“If a periodic or final payment required by a subcontract to be paid by a contractor to a subcontractor is delayed for more than 30 days from the date the payment is required by the subcontract to be made, the contractor shall pay to the subcontractor interest beginning on the day following the date when the payment is due, at the rate of 1 1/2% a month or a pro rata fraction of that amount on the unpaid balance. If a subcontractor receives interest from the contractor for a delayed payment by the contractor, the subcontractor shall ensure that any interest accrued on the delayed payment is distributed by the subcontractor to other subcontractors, if any, on a pro rata basis.”

As set forth above, the subcontract required Hardy to issue final payment to Kratzer within thirty (30) of Ekalaka accepting the Project. (Hardy App. 3, Subcontract, Section 4, ¶ 4). On December 6, 2021, Hardy submitted its final pay application to Ekalaka and Ekalaka accepted the

Project. (Hardy App. 6, Kratzer Aff., ¶ 7, Ex. 5 and 6). Final payment was therefore due on January 5, 2022 pursuant to the subcontract.

Hardy delayed payment by more than thirty days from January 5, 2022. Therefore, by statute, Kratzer is entitled to interest on the final payment amount of \$81,153 at the rate of 18% per year beginning on January 6, 2022. Mont. Code Ann. § 28-2-2104(2).

Based on the foregoing, the District Court correctly applied Mont. Code Ann. § 28-2-2104(2) in determining Kratzer is entitled to interest from January 6, 2022, to January 26, 2023, which was the date Hardy first unconditionally tendered final payment. (Hardy App. 1, Order, p. 16-17). Therefore, we respectfully submit this Court should affirm the District Court's award of interest.

F. The District Court correctly awarded attorney's fees to Kratzer as the prevailing party.

The District Court correctly determined Kratzer is the prevailing party and properly awarded Kratzer attorney's fees pursuant to the subcontract. (Hardy App. 1, Order, 17-19). Mont. Code Ann. § 28-3-704 provides a contractual right to attorney's fees is reciprocal with the prevailing party entitled to recover fees. The subcontract contains an attorney fees provision which provides:

“If Contractor or Subcontractor files suit against the other, which suit is in any way connected with this Subcontract, the prevailing party

shall be entitled to recover a reasonable sum for attorney fees from the other party.” (Hardy App. 3, Subcontract, Section 31).

The general rule as to who is considered the "prevailing party" within the terms of a contract that calls for the payment of costs and fees is that the prevailing party is the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case. *Schmidt v. Colonial Terrace Assocs.* (1985), 215 Mont. 62, 68, 694 P.2d 1340, 1344 (Plaintiffs prevailing party, despite losing quiet title issue because Plaintiffs prevailed on main issue in controversy and received net judgment in their favor) (citing *Jordan v. Elizabethan Manor* (1979), 181 Mont. 424, 434, 593 P.2d 1049, 1055).

No one factor should be considered in determining the prevailing party for the purpose of attorney fees. The party that is awarded a money judgment in a lawsuit is not necessarily the successful or prevailing party. The award of money is an important item to consider when deciding who, in fact, did prevail. *E.C.A. Envtl. Mgmt. Servs. v. Toenyas* (1984), 208 Mont. 336, 345, 679 P.2d 213, 217-18. The party that survives an action involving a counterclaim, set-off, refund or penalty with the net judgment should generally be considered the successful or prevailing party. *E.C.A. Envtl. Mgmt. Servs.*, Mont. at 345, P.2d at 218.

In *Schmidt*, this Court stated the rule set forth in *Medhus v. Dutter* (1979), 184 Mont. 437, 603 P.2d 669, should also be applied to the rule set forth in *E.C.A. Environmental v. Toenyas*. See *Schmidt* at Mont. 70, P.2d 1345. The Medhus rule provides:

"If an action is filed, the defendant counterclaims and succeeds in having the plaintiff's claims totally denied but only recovers a portion of the relief demanded in the counterclaim, the defendant should receive costs. If, however, a party initiates a law suit, the defendant counterclaims, and the judgment awards both parties part of the relief they seek, the party prevailing on the main issue in controversy in the case must be allowed costs." *Medhus v. Dutter* (1979), 184 Mont. 437, 447, 603 P.2d 669, 674 (costs properly awarded to Medhus as the prevailing party on the main issue in controversy); See also *Schmidt* at Mont. 69-70, P.2d 1345 (Defendants entitled to attorney's fees as they received a net judgment in their favor at the end of the case, therefore prevailed on the main issue in controversy).

Here, Kratzer filed suit alleging breach of contract and requested attorney's fees pursuant to the subcontract provision. (ROA #4). Hardy filed counterclaims alleging: 1) breach of contract; 2) breach of the implied covenant of good faith; 3) negligence; and 4) professional negligence. Hardy requested its attorney's fees pursuant to the subcontract. (ROA #5). Kratzer moved for summary judgment on his claim for breach of contract and to dismiss Hardy's counterclaims entirely. (ROA #7).

Hardy then moved for cross partial summary judgment seeking judgment in its favor on Kratzer's Count One – Breach of Contract and on

its Count 1 – Breach of Contract and requested its attorney’s fees. (ROA #11).

On March 29, 2024, Hardy filed an Unopposed Motion to Withdraw its Counterclaims 3 – Negligence and 4 – Professional Negligence and requested the Court convert its Motion for Partial Summary Judgment to a Motion for Summary Judgment. (ROA #19). On April 8, 2024, the Court granted Hardy’s motion and dismissed Hardy’s Counterclaims 3 and 4 without prejudice. (ROA #21). Since Hardy withdrew its Counterclaims 3 and 4, Kratzer is the prevailing party on those claims.

That just leaves the issue of breach of contract, which is the main issue in controversy in this case. As set forth above, Hardy breached by failing to pay Kratzer pursuant to the terms of the subcontract and Kratzer is entitled to judgment in the amount of \$81,153. Based on the foregoing, the District Court correctly determined Kratzer is the prevailing party entitled to his attorney’s fees. (Hardy App. 1, Order, p. 17-19).

Furthermore, we respectfully submit Kratzer is entitled to his attorney’s fees and costs on appeal. This Court has held that, where an award of attorney's fees is based on a contract, the prevailing party is entitled to his reasonable attorney's fees on appeal. *Eschenbacher v. Anderson*, 2001 MT 206, ¶ 51, 306 Mont. 321, 34 P.3d 87 (Anderson, as the

prevailing party, entitled to award of attorney's fees and costs on appeal); see also *Smith v. Johnson* (1990), 245 Mont. 137, 145, 798 P.2d 106, 111.

Therefore, we respectfully request this Court affirm the District Court's award of attorney's fees and remand for determination and award of Kratzer's attorney's fees on appeal.

VI. CONCLUSION.

The District Court correctly granted summary judgment to Kratzer. After deductions for disputed work, Hardy approved the amount of \$81,153. Hardy's subcontract provides the \$81,153 is payable 30 days after Ekalaka accepts the Project, which occurred on December 6, 2021. But Hardy never issued final payment to Kratzer.

Instead, Hardy withheld payment on a fictitious subcontract requirement that Kratzer was obligated to sign a waiver prior to final payment. In doing so, Hardy breached the plain terms of its subcontract as well as the Prompt Payment Act. As such, the District Court correctly determined Hardy breached the subcontract and owes Kratzer \$81,153.

Since Hardy improperly delayed payment, the District Court then correctly determined Kratzer is entitled to interest on the \$81,153 at the rate of 18% per annum from January 6, 2022 through January 23, 2023 pursuant

to Mont. Code Ann. § 28-2-2104(2). Then the District Court correctly determined Kratzer is the prevailing party entitled to his attorney's fees.

Based on the foregoing, the District Court did not commit any errors. The District Court correctly applied Montana law in granting summary judgment to Kratzer. Therefore, we respectfully submit this Court should affirm the District Court's Order and remand for determination and award of Kratzer's attorney's fees on appeal.

Respectfully submitted this 5th day of November, 2024.

CALTON HAMMAN & WOLFF, P.C

By /s/ Alex W. Hamman

ALEX W. HAMMAN

Attorneys for Appellee Buck Kratzer

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellee Buck Kratzer's Response Brief dated November 5, 2024 is printed with a proportional spaced Georgia text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 9,482 excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

Dated this 5th day of November, 2024.

CALTON HAMMAN & WOLFF, P.C.

By /s/ Alex W. Hamman
ALEX W. HAMMAN

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellee Buck Kratzer's Answer Brief was served by Email and U.S. Mail, postage prepaid this 5th day of November, 2024, upon the following:

Brandon Hoskins
Bryce Burke
Moulton Bellingham PC
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings Montana 59103
Brandon.Hoskins@moultonbellingham.com
Bryce.burke@moultonbellingham.com

By */s/ Alex W. Hamman* _____

CERTIFICATE OF SERVICE

I, Alex W. Hamman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-05-2024:

Bryce Anthony Burke (Attorney)
27 N 27th Street
Suite 1900
PO Box 2559
Billings MT 59103-2559
Representing: Hardy Construction Co., Inc.
Service Method: eService

Brandon James Tyler Hoskins (Attorney)
27 North 27th Street, Suite 1900, PO Box 2559
Billings MT 59103
Representing: Hardy Construction Co., Inc.
Service Method: eService

Electronically Signed By: Alex W. Hamman
Dated: 11-05-2024