

**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 REPLY BRIEF

APPEARANCES:

Brandon Hoskins
Bryce Burke
MOULTON BELLINGHAM PC
27 North 27th Street, Suite 1900
P. O. Box 2559
Billings, MT 59103-2559
(406) 248-7731
Brandon.Hoskins@moultonbellingham.com
Bryce.Burke@moultonbellingham.com

Attorneys for Appellant

Alex W. Hamman
CALTON HAMMAN & WOLFF,
P.C.
2075 Central Avenue, Suite 4
Billings, MT 59102
(406) 656-0900
alexhamman@chwlawfirm.com

Attorneys for Appellee

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ARGUMENT

I. IT IS IMPOSSIBLE TO AFFIRM THE DISTRICT COURT OR RULE IN FAVOR OF KRATZER WITHOUT RELYING ON AN OFFER OF COMPROMISE AS AN ADMISSION OF LIABILITY, IN CONTRAVENTION OF RULE 408, MONT.R.EVID.

Kratzer’s continued improper use of inadmissible settlement negotiations was emboldened by the District Court’s errors, including when it made its material ruling that Kratzer’s Pay App 3 “was apparently sufficient for Hardy to approve the payment of \$81,153.” (Order, at ¶ 13, App. 1.) The District Court specifically held the only evidence establishing that \$81,153 was owed to Kratzer were offers of compromise, including the “December 22, 2021, email [which] provides details of why that amount should be paid to Kratzer.” (*Id.*) The District Court then doubles down on this error by stating the debt was acknowledged in a May 10, 2022 email, when Hardy again stated it would pay that amount, but “again conditioned payment on Kratzer signing a release of all claims.” (*Id.*, at ¶ 13-14.) The District Court also ruled, and Kratzer still argues, that Hardy requested “a general release that was [not] required.” (*Id.*, at ¶ 12.) This is an obvious and inherent logical inconsistency requiring reversal of the District Court.

If an executed release and waiver was required by the Subcontract, which Kratzer admittedly did not provide, then Kratzer has not satisfied his obligations under the Subcontract and Hardy is not obligated to pay. If a release and waiver is not required by the Subcontract, as ruled by the District Court, then both emails

used to establish Hardy's liability in the amount of \$81,153 are offers of compromise because they were conditioned on release and waiver which would be additional consideration outside of the Subcontract. *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..."

Such inconsistency only exists in the District Court's ruling and Kratzer's argument, despite Kratzer's claim that Hardy "wants it both ways." (Kratzer Ans. Brf. at 35) Hardy consistently argued that an executed release and waiver was required for payment. Kratzer was also consistent in executing release and waivers for his first two payments when requested by Hardy. (Aff. Arrowsmith, ¶ 38, App. 2; Aff. Petersen, ¶ 25, Exs. C & D, App. 4) It was only after Kratzer tried to push through unapproved change orders with Pay App 3 and Hardy refused to pay that Kratzer found an issue with executing a release and waiver as required by the Subcontract.

Despite Kratzer's claims of Hardy's inconsistency and pretextual arguments, the undisputed history of Kratzer's positions illustrate he has only acted inconsistently or pretextually:

- 10/22/2021: Pay App 3 submitted for \$92,856.94 (with unapproved Change Order for \$28,852.94), not including retainage. (Order at 6, App. 1)

- 11/12/2021: Kratzer tells Hardy he would “file suit against [H]ardy” if not paid the entire invoice containing \$24,577.94 of change orders he now admits he is not owed. (Aff. Petersen, ¶ 11, App. 4)
- 11/23/2021: Kratzer reduced his change order by \$3,520, admitting Pay App 3 was incorrect. (Order at 6, App. 1)
- 12/9/2021: Three days after Hardy submitted for final payment to Ekalaka, Kratzer emailed some supporting information for Pay App 3, which Hardy requested the prior month. Hardy requested additional information. Kratzer submitted days and hours information which was incorrect. (Order at 6-7, App. 1)
- 12/22/2021: After Hardy offered to compromise by paying \$81,153 (\$69,878 (Subcontract pay), \$4,275 (Change orders, reduced by \$24,577.94 from Pay App 3) and \$7,000 (retainage Kratzer had not yet billed for), Kratzer refused to accept that amount. (Order at 7, App. 1)
- 5/10/2022: Hardy tries to pay \$81,153, but Kratzer states “Nothing will be signed until my total invoice [of \$92,856.94] is approved for payment.” (*Id.*)
- 6/19/2022: Kratzer asks for the Release and Waiver for \$81,153. (*Id.*)
- 9/19/2022: Kratzer’s counsel demands \$106,501.42 (\$92,856.94, plus \$13,644.97 in interest accruing since 11/22/2021). (*Id.*)
- 10/26/2022: Kratzer’s counsel demands \$94,479.66 (\$81,153, plus \$13,326.66 in interest accruing since 11/22/2021) after “waiv[ing] the claim related to the change order” for the first time. (*Id.*, at Aff. Arrowsmith, Ex. F, App. 2)
- 2/21/2023: Kratzer’s Amended Complaint demands \$81,153 plus interest since February 4, 2022.
- 4/24/2023: Kratzer’s 2nd Amended Complaint demands \$80,341.47 plus interest since February 4, 2022.
- 10/12/2023: Kratzer’s Motion for Summary Judgment seeks \$81,153 plus interest since January 6, 2022.

In stark contrast, Hardy consistently argued since the December 22, 2021 email that it would pay Kratzer \$81,153 and choose “not pursue the MULTIPLE items that Kratzer Construction could be back charged for”, but only upon execution of a “conditional final lien release.” (*See* Aff. Petersen, Ex. A, App. 4) This position was provided after noting Kratzer’s failure to comply with the Subcontract change order process, noting failure to provide supporting information, seeking double payment for items already part of the scope in the Subcontract, and clarifying that Hardy was forced to complete “multiple items...to keep the project moving and correct [Kratzer’s] concrete slab” (*Id.*, at HARDY00098), all issues that Hardy maintains to date.

Hardy’s positions are the same on appeal as they were three years ago. That Hardy undisputedly maintained these positions for three years also contradicts many of the blatant misrepresentations of fact in Kratzer’s Answer Brief to the effect that “Hardy withheld payment on the **sole ground** the subcontract requires *Kratzer* to execute a release and waiver...” (Ans. Brf. at 15)

If the Court needs to look further than the inherent paradox in Kratzer’s arguments to reverse the District Court, his arguments regarding why the emails are not subject to Rule 408 are similarly misguided and largely addressed in Hardy’s Opening Brief’s discussion of *Matzinger* and *Kern*. The Court may take particular care to review *Matzinger*, which is materially misstated by Kratzer. This Court has

never required offers of compromise to be from an attorney and such a ruling would ignore the policy behind Rule 408. The commentary to Rule 408 states it is consistent with the then existent common law, mentioning two cases. One of those cases, *Continental Oil Co. v. Bell*, (1933) 94 Mont. 123, 21 P.2d 65, ruled that negotiations between the two parties, without attorneys, were inadmissible offers of compromise.

The District Court erred in utilizing Hardy's emails offering compromise, and such error requires reversal of its ruling because there is no admission as to an amount owed without it. Hardy has always expressly disputed liability for the amounts set forth in Pay App 3 because of Kratzer's breaches of the Subcontract and his failures to comply with his obligations under the Subcontract, discussed further below.

II. THE CONDITION PRECEDENT REQUIRING RELEASE AND WAIVER IS NOT AMBIGUOUS.

Kratzer admits the Subcontract requires executed release and waiver before final payment but claims the term is ambiguous because it contradicts the final payment within the 30 day term. That is not a reasonable reading of these provisions under Montana law. In interpreting the Subcontract the Court must view it as a whole "so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." *K&R Partn. v. City of Whitefish*, 2008 MT 228, ¶ 26, 344 Mont. 336, 189 P.3d 593, 600, citing MCA § 28-3-202. The only reasonable

interpretation is to find the release and waiver provision is a condition precedent to final payment because it gives credence to both provisions. As Kratzer seems to ignore Hardy's position that the waiver is a condition precedent and instead presents an unlawful interpretation of the Subcontract, Hardy rests upon its argument in its Opening Brief on this issue. (Opening Brf., at 10-14.)

Kratzer argues "Hardy simply refuses to address the fact that the subcontract provides final payment shall be payable within thirty (30) days after the Project is completed..." (Ans. Brf. at 15.) This is incorrect. Hardy addresses this issue with each of its arguments. Simply put, Kratzer has not performed its obligations under the Subcontract and this entitles Hardy to withhold payment past the 30 days until performance is complete. Kratzer attempts to only read this provision and not view the contract as a whole "so as to give effect to every part if reasonably practicable, each clause helping to interpret the other" as required by Montana law. *K&R Partn.*, ¶ 26. If the Court adopted Kratzer's argument, it could ignore every provision requiring performance of Kratzer in the Subcontract. Montana law does not support this argument.

In the end, Kratzer simply needed to perform and he would have been paid. He undisputedly could have provided the same release and waiver that he already executed twice and been paid. He undisputedly refused to do so because he sought to be paid tens of thousands of dollars more than he was owed and significantly

more than what he now claims. Kratzer’s argument on this issue fails as a matter of law.

III. THE UNDISPUTED FACTS PROVE HARDY NEVER WAIVED ITS CLAIM THAT KRATZER BREACHED THE SUBCONTRACT BECAUSE HARDY EXPRESSLY DEMANDED A WAIVER AND RESERVED ITS OTHER CLAIMS IF KRATZER WOULDN’T EXECUTE IT.

Hardy never waived its rights under the Subcontract, and only in its attempts to settle the matter through compromise did it seek anything other than full performance by Kratzer. Without a single undisputed fact or legal precedent, the District Court 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.”¹ “Waiver is a voluntary and intentional relinquishment of a known right or claim” which may only be proved by express declarations or by a course of acts and conduct which induces the belief that the intent and purpose was waiver. *Dodds v. Tierney*, 2024 MT 48, ¶23, 415 Mont. 384, 544 P.3d 857. To establish waiver, Kratzer must demonstrate Hardy's knowledge of the existing right, acts inconsistent with that right, and resulting prejudice himself for relying on the purported waiver.” *Id.*, citing *Edwards v. Cascade Cty.*, 2009 MT 229, ¶ 30, 351 Mont. 360, 212 P.3d 289. The undisputed facts are contrary to the final two elements, necessitating reversal of the District Court’s ruling on waiver. Hardy knew its rights, and it

¹ Order at 12, App. 1

sought to enforce those rights. Hardy never acted inconsistent with its rights and Kratzer was never prejudiced. This is not waiver.

Kratzer claims Hardy's act of waiver was when it "closed out the Project with Ekalaka...without requesting waivers from Kratzer's subcontractors." (Ans. Brf., at 18.) This argument is nonsensical. First, the Subcontract does not require Hardy request the waiver. Providing release and waiver is an unconditional performance requirement fully within Kratzer's control, a condition precedent:

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).

Kratzer admits he didn't complete this clear condition, but attempts to claim Hardy waived its right because it didn't demand Kratzer's performance of the condition. Demand was not required by Hardy, so Kratzer's failure is his own. A demand is not a prerequisite to performance of a contractual obligation unless demand is required by the terms of the contract or the peculiar nature thereof. 17A Am.Jur.2d *Contracts* § 610 (1991); 17B C.J.S. *Contracts* § 546 (1999), see also *Ramesbotham v. Farmers Elevator Co. of Jefferson*, 428 N.W.2d 542, 544 (S.D.1988); *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238, 243 (1991); *G.C.I., Inc. v. Hought*, 7 P.3d 906, 909 (Wyo. 2000). There is no such requirement in the Subcontract and there is nothing peculiar about requiring a lien release before final payment on a construction job. It is industry standard to do so.

Kratzer's argument regarding the Prime Contract is equally misguided. First, review of summary judgment is *de novo*, so it is fair to address new issues. Regardless, this is not a new issue. Hardy's previous Reply Brief made this argument (Rep. Brf. 1/5/2024, Dock. 17, at 13):

Hardy was required to comply with its schedule and satisfy the obligations to the Owner. Kratzer had already undisputedly caused delay to the Project, so it is shocking to see Kratzer argue Hardy should have waited longer to address Kratzer's admittedly inflated Pay App 3. ... In executing the Subcontract Kratzer "agrees in respect to the Work to be bound to all of the obligations that Contractor has assumed to Owner under the Prime Contract..." ...As Kratzer's text message on November 12, 2021 said, "My work is complete and has been for quite some time." ... There is no excuse for him failing to submit all required information prior to December 6, 2021. (citations omitted)

Finally, it is undisputed Hardy was bound by its own obligations to timely complete the project, of which Kratzer's work was only a small portion. Hardy satisfied its obligations with Ekalaka, despite Kratzer's attempts to delay the same. Kratzer now argues that Hardy should have waited to finalize the Project to benefit Kratzer and ignore its duties to Ekalaka, which would have caused Hardy to breach the Prime Contract. To justify this illogical position, the Court must not only ignore the Subcontract but it must choose to allow Kratzer to benefit from his own wrongful conduct, in contravention of Montana law. *See e.g.* Mont. Code Ann. § 1-3-208.

Kratzer's delays and failures under the Subcontract do not require Hardy to delay Ekalaka's Project, nor should such wrongful conduct benefit Kratzer by

creating additional obligations for Hardy. This Court should hold Kratzer accountable for his failures because Hardy never waived its rights under the Subcontract, it only ever sought to enforce the plain terms of the Subcontract, including maintaining its obligations to Ekalaka.

IV. THE SUBCONTRACT CLEARLY REQUIRES A VALID PAY APPLICATION OR INVOICE FOR ANY PAYMENT, INCLUDING FINAL PAYMENT.

Kratzer argues there is a distinction between progress payments and final payments that is not stated in the Subcontract to retroactively support his failure to provide a legitimate pay application or invoice for his final payment request. It is unclear how exactly Hardy would know what to pay Kratzer since he was not simply requesting the remainder of the Subcontract price, rather requesting certain change order, many of which he now abandons after admitting they were illegitimate years later. As discussed previously and below, Kratzer has demanded varying amounts from Hardy over the past several years, including changing its position in its pleadings. This illustrates exactly why the Court should enforce Kratzer's Subcontract obligation to provide a pay application with legitimate supporting information prior to his being entitled to pay.

Kratzer's argument on this issue does not match his conduct. He already followed the progress payment process and submitted Pay App 3 for what he now claims was final payment (despite not including a request for retainage). Kratzer's

conduct proves he believed the Subcontract required a valid invoice or payment application for his final payment, which complies with the plain reading of the Subcontract. He did not want to submit a modified pay application after materially reducing his change orders because he still intended to seek more than he was owed, as he expressed in writing. It is the same reason he didn't sign a release and waiver. As Kratzer's argument contradicts the undisputed facts, it must be disregarded.

This argument also contradicts plain English. Final payment is simply the final "progress payment." Thus, all requirements for progress payments must be followed for final payment. The one paragraph that differentiates final payment does so only to address retainage and the requirement for final releases and waivers from subcontractors and suppliers:

Retainage in a sum equal to the percentage of retainage fixed in the Prime Contract or five percent (5%) of any progress payment acknowledged and paid by the Owner for the Work, whichever is greater, shall be withheld, without interest, by Contractor until final payment. 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.

It could be argued that the only payment for final payment would be retainage, and would not include anything Kratzer requests in Pay App 3. If Kratzer would have submitted a valid Pay App 3, with supporting documentation and without the unapproved change orders, all but the 5% retainage would have been paid with the October or November payment periods, and the parties would have never had a dispute lasting through December. Kratzer's failures under the Subcontract justify withholding payment.

In addition to the Subcontract provisions discussed in the Opening Brief, the following provides further affirmation of Hardy's ability to withhold payment due to Kratzer's failure to provide a legitimate pay application or any supporting information, and his threats to sue if he was not paid for his untimely and now admittedly illegitimate change order requests:

- “All payment applications are subject to audit by Contractor and any payment may be withheld or denied pending substantiation by audit” (Subcontract, at Section 4, App. 3) (emphasis added)
- “All payments are subject to withholding by Contractor of any amount reasonably necessary to fully protect Contractor against any actual or potential liability or damages directly or indirectly relating to the work or this Subcontract, or against Subcontractor's breach or threatened breach thereof.” (*Id.*, at Section 4)

The first quoted section makes it clear “any payment application” and “any payment” may be withheld for substantiation by audit. There is no exception to the words “any payment,” which by plain meaning would include final payment. It is undisputed Hardy audited Pay App 3, mainly the change orders which clearly show zero supporting information, only line items. (*See* App. 5, at 103) The second provision similarly makes no distinction on withholding payment subject to threatened breach of the Subcontract. As early as November 21, 2021, Kratzer threatened to sue Hardy if it didn't pay for what he now admits are illegitimate change orders, and he continued that threat for nearly a year. (Kratzer's Proposed FOFCOL, Dock. 22, at 5-6.) Such threats were in furtherance of a breach of the

Subcontract (seeking untimely and unauthorized change orders, breaching Section 8 of the Subcontract), and thus Hardy was fully authorized to withhold payment based the second provision as well. Hardy was supported by multiple provisions of the Subcontract due to Kratzer's failure to provide a legitimate pay application, and these other provisions do not require the Court to determine whether a final payment is also a progress payment.

The undisputed facts also prove Pay App 3 was insufficient before and after Hardy submitted final payment to the owner. Kratzer later provided additional information to support Pay App 3 after Hardy notified him it did not approve of Pay App 3.² He also altered his change order requests³ and provided updated labor information after Hardy notified him it was incorrect.⁴ All of this conduct further acknowledged Kratzer undisputedly knew a legitimate payment application was required because he continually attempted to comply with that requirement.

Finally, Kratzer's interpretation of the Subcontract is simply impractical and creates an absurdity that would give him a windfall, contrary to Montana law. *See e.g.* Mont. Code Ann. § 28-3-401. Kratzer's interpretation would mean he did not even need to provide notice of what he should be paid for final payment, which begs the question why he submitted Pay App 3. The Court must remember there wasn't

² Order SUF ¶ 11-14, 16-17, App. 1.

³ Order SUF ¶ 13, App. 1.

⁴ Order SUF ¶ 15-16, App. 1; Aff. Petersen, ¶ 20, App. 4.

just a remaining contract price, Kratzer submitted \$28,852.94 of previously unapproved change orders with Pay App 3, of which \$24,577.94 are now admittedly illegitimate. Kratzer's position essentially ignores or forgives his many wrongful acts under the Subcontract and seeks benefit from the same in the form of interest. The dispute only arose because Kratzer completed his work defectively and then demanded payment of at least \$24,577.94 more than what he knew he was owed. This is wrongful conduct. Kratzer admits his change orders were untimely, but now seeks \$4,275 of those change orders without penalty, but in the same breath claims Hardy should pay \$30,000 in interest because it sought to hold Kratzer accountable to his end of the Subcontract. This would be an absurd result.

If Kratzer complied with the Subcontract and sought what he was truly owed, this matter would have been closed in December 2021 with no dispute. This Court should not, and under Montana law cannot, let Kratzer benefit from his own wrongdoing.

V. THE SUBCONTRACT CLEARLY REQUIRES EXECUTED RELEASES AND WAIVERS PRIOR TO FINAL PAYMENT.

Kratzer makes the argument that "Hardy did not withhold payment in 2021 due to potential liability" because Hardy actually "withheld payment on the grounds that Kratzer had to sign a waiver pursuant to the subcontract..." (Ans. Brf. at 24) This is a distinction without a difference. First, as discussed *ad nauseum*, there are multiple provisions allowing Hardy to withhold payment from Kratzer based on his

wrongful conduct, which is undisputed at this point. Second, a waiver, whether required under the Subcontract or not, is the only way to address Kratzer's express written threat of litigation over the unapproved change orders. So, in addition to being required by the Subcontract, a release and waiver could be demanded under the Subcontract following Kratzer's threat of litigation over his claim to what are now \$24,577.94 in illegitimate change orders.

Kratzer's argument that if Hardy would have just paid the \$81,135 it "constitutes a general release" under the Subcontract so Hardy should have just paid that amount, was demonstratively not an alternative solution here. Kratzer informed Hardy on November 12, 2021 in writing that "[i]f my invoice is not paid in full [(\$92,856.94)] by the end of the month i [sic] will file suit." (Order, SUF ¶12, App. 1) Kratzer again demanded to be paid in full in May 2022 and then sent a demand through his attorney on September 19, 2022, for the full \$92,856.94 plus interest. (Aff. Arrowsmith, at ¶20-21, 26, Ex. E, App. 2.) And we know Kratzer wouldn't accept a check for \$81,135 anyway, because he returned such a check twice. (*Id.*, at ¶32-33.) Kratzer now suggesting Hardy could have just paid \$81,135 despite Kratzer expressly stating he wouldn't accept it and later returning such a check twice perfectly illustrates how ludicrous his arguments are. The Court should not reward this blatant disregard of the undisputed facts of this case.

VI. MONTANA LAW AND THE SUBCONTRACT EXPRESSLY REQUIRE KRATZER TO FULLY PERFORM BEFORE HE IS

OWED PAYMENT, SO HE WAS NOT ENTITLED TO PARTIAL PAYMENT.

Pursuant to the undisputed facts, Kratzer admits his many breaches of the Subcontract predate any purported breach by Hardy, as follows:

- Kratzer admits, by only claiming \$81,153, that \$24,577.94 of his change order requests were illegitimate. (Kratzer’s Proposed FOFCOL, Dock. 22, at 5-6.)
- His change order requests were untimely as they were first submitted long after the work was completed.⁵ (*Id.*)
- Kratzer threatened to sue Hardy if it did not pay his illegitimate change orders at least three times on 11/12/2021. (Order, SUF ¶12, App. 1)
- Kratzer admits he did not complete his work to industry standards, necessitating repairs and delays. (Kratzer’s Proposed FOFCOL, Dock. 22, at 5-6.)
- Kratzer admits by his conduct that his Pay App 3 was not compliant with the Subcontract because he submitted all supporting information months later, including after Hardy finalized the project with the owner. (*Id.*, at 6, ¶ 11-12.)
- Kratzer admits he did not submit a pay application for \$81,153. (*Id.*, at 7, ¶ 19.)

Despite all of these undisputed breaches prior to non-payment, Kratzer argues he should have been paid for the approved sum of \$81,135. After ignoring the fact that he expressly stated he wouldn’t accept this payment and did, in fact, reject such payment twice, Kratzer also misrepresents the facts related to this “approved amount” and misstates the law.

⁵ The Subcontract requires all change orders to be authorized by Hardy in the form of “signed, written change orders” and with “written notice thereof ...given to [Hardy] prior to commencing such work...” (Subcontract section 8, App. 1)

First, Kratzer makes the material misstatement that Pay App 3 was reduced \$11,703.45 relating to “defective work” to get to \$81,135. (Ans. Brf. 26.) This is a material misrepresentation of the facts on record. As even shown in Kratzer’s own Statement of Facts, the \$81,135 was made up of “remaining contract balance of \$69,878, \$4,275 for approved change orders, and \$7,000 in retainage..” (Ans. Brf. at 5) Again, Kratzer materially misstates facts to try to fit a legal narrative. The number of such misrepresentations is egregious. The actual undisputed fact of record is that Hardy claimed \$7,056 in additional damages which would reduce the \$81,135 to \$74,079. (Aff. Arrowsmith, at ¶19 and Ex. B)

When applying the actual undisputed facts of record, and not Kratzer’s fabrications, *Grass Range High Sch. Dist. V. Wallace Diteman, Inc.*, (1970) 155 Mont. 10, 465 P.2d 814, is wholly inapplicable. In *Grass Range*, there were known defects which were corrected within the one year warranty period by the contractor. When the School District sued two years after the warranty period, the Court found that since the final payment was conditioned on repairing the exact issue about the floor as mentioned on a punch list, and final payment was made, any claims to the defect were waived. *Grass Range*, at 15, 465 P.2d 816-817. The opposite is true here. Again, Hardy repaired the damage at its own cost and delay, then issued the final payment application to the owner while refusing to pay Kratzer without release and waiver. There are no lingering defects, only a question of the cost of repair,

\$7,056, which Hardy offered to forego in its December 22, 2021 email offer of compromise. As the *Grass Range* Court found, to avoid waiver of this issue the “architects should have refused to accept the floor...[and] the school district could then have refused to make final payment without including a reservation...” *Id.* That is exactly what Hardy did here. This case actually further supports Hardy’s assertion that it did not waive its rights under the Subcontract to demand release and waiver. Kratzer’s argument must fail.

VII. IT IS UNDISPUTED HARDY DISAPPROVED OF PAY APP 3 PRIOR TO FINAL SUBMITTAL TO EKALAKA AND KRATZER WAIVED ANY RIGHTS TO ARGUE TO THE CONTRARY.

In addition to the arguments in Hardy’s Opening Brief, the District Court established that it was undisputed “Hardy notified Kratzer it disapproved of Pay App 3” sometime in November. (Order at 6, ¶11, App. 1.) Kratzer submitted new change order requests in a lower amount on November 23, 2021, and then waited until December 9, 2021 to provide the supporting information requested in November. (*Id.*, at ¶ 13-16.) Kratzer then supplemented this information further over the next couple days. (*Id.*) Kratzer’s engagement with Hardy on these issues after final payment application to the owner is a knowing waiver of the Prompt Payment Act provisions. Pursuant to the elements of waiver as discussed above, Kratzer knew or should have known of the statutory provisions in Mont. Code Ann. § 28-2-2103. *See Dodds*, at ¶23. Kratzer then acted inconsistently with what he

claims his rights are now, by continuing to amend and supplement Pay App 3 after submission to owner for final payment. *See id.* Hardy has now been prejudiced by continuing to engage in the Subcontract process of auditing Kratzer's insufficient billing, because Kratzer has turned around and claimed the Prompt Payment Act overrides these Subcontract provisions. Thus, Kratzer waived his claims regarding Mont. Code Ann. § 28-2-2103.

Hardy's analysis of Mont. Code Ann. § 28-2-2103 and the safe harbors for payment withholding still apply as argued, but it bears mentioning that Kratzer continues to misrepresent the holding in *JEM*. First, Kratzer again contradicts himself by relying on *JEM*'s ruling regarding an "owner's right to dispute all or part of a progress payment request." *JEM Contracting, Inc. v. Morrison-Maierle, Inc.*, 2014 MT 21, ¶14, 373 Mont. 391, 318 P.3d 678 (emphasis added). For Kratzer to be successful, the final payment must be treated differently than a progress payment, so he cannot rely on this dicta from *JEM*. Indeed, the *JEM* decision relies on the subcontractor's ability to suspend work to suffer further damages as part of its ruling. *Id.*, at ¶ 13. This is the scenario with Kratzer's Pay App 3 because all work was completed. Further, the *JEM* Court actually found that the subcontractor was not entitled to any payment because "JEM's argument would turn a statute meant to protect contractors' progress payments for agreed-upon work into a mandate that owners progressively pay contractors for billed amounts regardless of

work quality or conformance with the contract.” *Id.*, at ¶ 14 (emphasis added). Again, here we have multiple breaches and threatened litigation from Kratzer prior to potential payment. Kratzer still has failed to conform to the Subcontract by not providing release and waiver from himself or his subcontractors and suppliers. Thus, *JEM* is still a case that supports Hardy’s position.

CONCLUSION

Unfortunately, the District Court erred in ruling for Kratzer on summary judgment despite the undisputed facts requiring judgment as a matter of law in Hardy’s favor. This Court should not allow Kratzer to benefit from his many breaches of the Subcontract, failures to perform, and frustration of performance leading to this lawsuit. While it is wrong for Kratzer to submit inadmissible settlement negotiations to attempt to establish liability, the Court can see from these communications that Hardy was consistent and only attempted to protect itself and the owner following Kratzer’s threats to sue for amounts he now admits are completely indefensible. This Court should reverse the District Court and remand for determination of attorneys fees and costs in Hardy’s favor.

“[T]o 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,” this Court must reverse the District Court’s ruling. MCA§ 28-3-301 and *Morn. Star Enterprises, Inc. v. R.H. Grover, Inc.*, (1991) 247 Mont. 105, 111, 805 P.2d 553, 556.

RESPECTFULLY SUBMITTED this 4th day of December, 2024.

MOULTON BELLINGHAM PC

By /s/ Brandon Hoskins
BRANDON HOSKINS
BRYCE BURKE
27 North 27th Street, Suite 1900
P. O. Box 2559
Billings, Montana 59103-2559

*Attorneys For Appellant Hardy
Construction Co., Inc.*

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 4,981 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 Reply to the following on 12-05-2024:

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

Alex W. Hamman (Attorney)
2075 Central Ave., Suite #4
Billings MT 59102
Representing: Buck Kratzer, Kratzer Construction
Service Method: eService

Electronically signed by Marcie Treumann on behalf of Brandon James Tyler Hoskins
Dated: 12-05-2024