

Case No.: S231549

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

UNITED RIGGERS & ERECTORS, INC.,
Plaintiff and Respondent,

vs.

COAST IRON & STEEL CO.,
Defendant and Appellant.

SUPREME COURT
FILED

JUL - 5 2016

Frank A. McGuire Clerk

Deputy

After a Decision By the Court of Appeal,
Second Appellate District, Division One
Case No. B258860

REPLY BRIEF ON THE MERITS

R. Duane Westrup, SBN 58610
WESTRUP & ASSOCIATES
444 Ocean Boulevard, Suite 1614
Long Beach, California 90802-4524
Telephone No.: (562) 432-2551
Facsimile No.: (562) 435-4856
E-Mail: jveloff@westrupassociates.com

**Attorney for Plaintiff, Respondent, and Petitioner
COAST IRON & STEEL CO.**

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**TO THE HONORABLE CHIEF JUSTICE AND HONORABLE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
CALIFORNIA:**

INTRODUCTION

Lawyers should not practice “...the art of proving by words multiplied for the purpose, that *white* is *black*, and *black* is *white*, according as they are paid.” (Swift, Gulliver’s Travels (1726) A Voyage to the Country of the Houyhnhnms, Ch. Five.) *Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666.

This is precisely what United is attempting to do in this case. Coast Iron did not create the dispute. Rather, United Riggers created the dispute when it submitted claims for extra money at the conclusion of the project. Each one of United Rigger’s claims was tried. (Clerk’s Transcript, Complaint, Issues pages 9-10.) The trial court found against United Riggers as to each issue for which it claimed extra compensation. (Ex. 1 to Motion to Augment filed with Appellate Court.)¹ United Riggers is attempting to distance itself from the dispute it created. United Riggers goes as far as stating that “*Martin Brothers* opinion opened the door to abuse and invited unnecessary litigation.” (United Brief, 2.) However, if United Riggers had

¹/ Unlike the trial court in *East West Bank v. Rio School District*, (2015) 235 Cal.App.4th 742, the contractor that submitted the claim to the school district prevailed on its claims for additional compensation and was awarded over \$9,000,000 in damages. *East West Bank* at 746-748.

not submitted a claim for additional money to Coast, this litigation would have been unnecessary.

THE STATUTES ARE CLEAR, NOT AMBIGUOUS

Putting aside all bluster and hyperbole, the case comes down to one simple issue: how should appellate courts have determined the Legislature's intent when it enacted the prompt payment statutes. In several cases, this Court has found that the first step in determining the Legislature's intent is to first look to the language of the statute giving them a plain and commonsense meaning. For instance:

Justice Chin, in *White v. Ultramar, Inc.*, (1999) 21 Cal.4th 563, wrote: "Under general settled cannons of statutory construction, we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them their 'usual and ordinary meaning.' [Citation.] 'The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should go beyond that pure expression of legislative intent.'" *Id.* at 572,

Justice Liu, in *People v. Gutierrez*, (2014) 58 Cal.4th 1354, wrote: "In construing statutes, 'our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citations.] We

begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citations.] We give the language its usual and ordinary meaning, and "[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." *Id.* at 1369.

Justice Werdegar, in *Equilon Enterprises v. Consumer Cause, Inc.*, (2002) 29 Cal.4th 53, wrote "When interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law...This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." *Id.* at 59.

Justice Werdegar, also wrote in *California Teachers Assn. v. Governing Board of Rialto Unified*, (1997) 14 Cal.4th 627: "In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, 'whatever may be thought of the wisdom, expediency, or policy of the act.' [Citation.] . . . This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. [Citations.] [¶] 'Our first step in determining the Legislature's intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.' [Citations.] *Id.* at 632-633.

In *Martin Brothers v. Thompson Pacific Construction, Inc.*, (2009) 179 Cal.App.4th 1401 (“*Martin Brothers*”), the court reiterated this basic principal of law:

“Our primary task in construing is to determine legislative intent. We first turn to the words themselves for the answer. When statutory language is clear and unambiguous there is no need for construction, and we will not indulge in it. We will not speculate that the Legislature meant something other than what it said. Nor will we rewrite a statute to posit an unexpressed intent.” (Citations omitted). *Martin Brothers* at 1411.²

The *Martin Brothers* court then went on to review the language of *Public Contract Code* Section 7107(e), which is virtually identical to *Civil Code* Section 8814(c), enacted in 2010 the year after *Martin Brothers* was published. The *Martin Brothers* court determined that the language relating to “good faith” disputes was ***clear and unambiguous*** and, therefore, not subject to interpretation. *Id.* at 1414. Thereafter, in 2010 the Legislature revisited the statutory scheme and examined California *Civil Code* Section 3260. The statute upon which United Riggers relies at pages 24 and 25 of

²The *East West Bank* court did not go through the same analysis as did the court in *Martin Brothers*.

its brief to demonstrate the alleged error in analysis by the *Martin Brothers* court. The Legislature elected to follow the *Martin Brothers* analysis and adopted the language in section 7107(e).

The language in California *Civil Code* Section 3260(f) differed from the language in California *Public Contract Code* Section 7107(e). In 2010, the Legislature could have amended Section 7107(e) to be consistent with the language relied upon by United in California *Civil Code* Section 3260(f), *it did not*.³ Instead, the Legislature repealed California *Civil Code* Section 3260(f) and replaced it with California *Civil Code* Section 8814. The Legislature replaced the language in California *Civil Code* Section 3260(f) with the more inclusive language found in California *Civil Code* Section 8814(c). Thus, reflecting the Legislature's clear intent to adopt the holding in *Martin Brothers* and apply the *Martin Brothers* reasoning found in the public work arena to the private sector as well. The court herein below was clearly in error in following the *East West Bank*⁴ analysis. If the Legislature had wanted California *Civil Code* Section 8814 to be limited to mean "only relating to completion of the original contract work", the

³/When the Legislature amends a statute, it is presumed that it was fully aware of the prior judicial construction. *White v. Ultramar, Inc.*, (1999) 21 Cal.4th 563, 572.

⁴/This reference is to *East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742, hereinafter referred to as "*East West Bank*."

Legislature would have retained the language in California *Civil Code* Section 3260(f). It did not. The court's ruling below has no basis in fact, law, or logic and should be reversed.

In this case, Coast Iron followed the *Martin Brothers* case in its conduct. United Riggers is now asking this Court to find the statute ambiguous and interpret it as United sees fit. While this Court has the power to do so, it should exercise restraint in the use of such power. The Legislature's expressed its opinion in 2010 when it repealed California *Civil Code* Section 3260(f) and declined to change the statute in the face of the *Martin Brothers* decision. Coast Iron should not be penalized for following the holding in *Martin Brothers*.

United's entire argument rises or falls on the admission it made at page 16 of its brief wherein United Riggers states: "*In cases where statutory language is ambiguous and capable of more than one construction...*" The *Martin Brothers* court held that the term "dispute" is clear and unambiguous. *Martin Brothers* at 1414. Thus, United's entire argument rests on the invalid assumption that the term "dispute" as used in the statute is ambiguous. Since United Riggers is in error in its basic assumption, it's entire argument fails. This finds additional support in the fact that in 2010 the Legislature repealed California *Civil Code* Section

3260(f) and replaced it with the more inclusive language found in California *Civil Code* Section 8814(c).

In its brief, United Riggers also setup a number of strawman issues which it then argued made the term “dispute” ambiguous. The *Martin Brothers* court looked at the word “dispute” and gave its analysis of the word, its dictionary definition, and concluded the word is not ambiguous. *Martin Brothers* at 1412. The Legislature agreed by repealing California *Civil Code* Section 3260(f) and replacing it with the language approved in *Martin Brothers*. It could have adopted the language found in section 3260(f), but instead they used the language analyzed by the *Martin Brothers* court.

UNITED FAILED TO ADDRESS THE 50% OF THE RETENTION

United Riggers did not even attempt to address the *Martin Brothers* analysis of the right to withhold 150.0% of the disputed amount found in California *Civil Code* Section 8814(c). As the *Martin Brothers* court observed “By definition, 50.0% of the amount withheld will be proceeds that are undisputed.” *Martin Brothers* at 1411. Further, at the end of a project, such as was the case here, the only funds available to the wrongfully sued party from which to withhold is the retention. The interpretation suggested by United Riggers would render California *Civil*

Code Section 8814(c) meaningless.

In this case, a good faith dispute existed between the parties in that United claimed it was owed hundreds of thousands of dollars for extra work that Coast contended had already been paid to United or performed by other contractors. Coast prevailed. United was awarded nothing by the trial court. Pursuant to Code, Coast was awarded it's attorney fees and costs.

At page 18 of its brief ,United Riggers admits that California *Civil Code* Section 8814(c), if read in isolation might allow any good faith dispute to trigger an exception to the statutory penalties of California *Civil Code* Section 8818. The *Martin Brothers* court explained that the analysis begins by looking at the statute itself. If the statute is clear there is no further inquiry. United Riggers ignores this analysis and simply jumps to the conclusion that "Because an ambiguity exists." See, United's Brief at page 18. United Riggers completely ignores its obligation to explain why the phrase "good faith dispute" is ambiguous. United Riggers did not explain the ambiguity because it cannot, there is no ambiguity. The *Martin Brothers* court was correct.

UNITED RIGGERS LIST OF HORRIBLES ARE UNFOUNDED

United Riggers goes on, at page 30 of its brief, to give a list of horrors that could occur under the *Martin Brothers* analysis. None of the

items listed have anything to do with California *Civil Code* Section 8814.

United Riggers gave no analysis how any of those things could ever happen and no examples of where they have happened in the past, because it cannot. Furthermore, most if not all of the items listed are normally addressed in the contract between the owner of the project and the contractor, and the requirement to have liability insurance.

**UNITED RIGGERS REFERENCE TO ARTICLES ARE
NOT PART OF THE RECORD**

Finally, United Riggers relies on a number of articles from 2011 that were critical of the *Martin Brothers* decision, none of which are part of the record in this case. (United's brief at page 32.) Each of the articles pre-date the implementation of California *Civil Code* Section 8814 in July of 2012. The Legislature did not see fit to alter California *Civil Code* Section 8814 in light of the *Martin Brothers* decision and neither should this Court. Upon examination United Riggers' arguments are "full of sound and fury, signifying nothing." Macbeth from Act 5 Scene 5. The *Martin Brothers* court has nothing to apologize about, because it was correct. It's analysis was adopted by the Legislature when it repealed California *Civil Code* Section 3260(f) and replaced it with California *Civil Code* Section 8814(c).

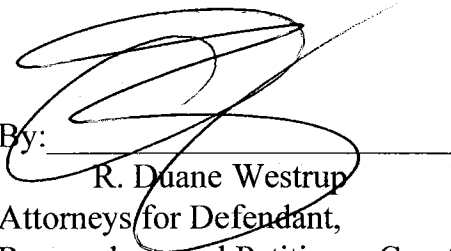
CONCLUSION

United Riggers forced Coast to pursue this appeal to defend its rights. United Riggers created the dispute that was subject to Coast Iron's withholding of retention. The trial court found no ambiguity in the prompt payment statutes and found that there was a good faith basis for Coast Iron's withholding of the retention. Accordingly, Coast Iron respectfully requests that this Court reverse the Court below and award Coast Iron its reasonable attorney fees and costs.

Date: June 30, 2016

Respectfully submitted,

WESTRUP & ASSOCIATES

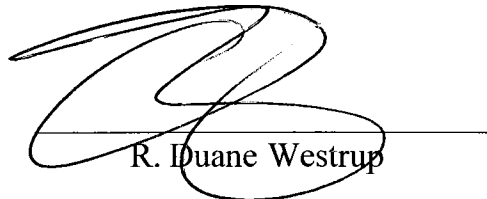
By: 
R. Duane Westrup
Attorneys for Defendant,
Respondent, and Petitioner Coast
Iron & Steel Co.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(1))

I, R. Duane Westrup, an attorney at law duly admitted to practice before all the courts of the State of California and principal of the law firm of Westrup & Associates, attorneys of record herein for defendant, respondent, and petitioner Coast Iron & Steel Co., hereby certify that this Reply Brief on the Merits (including the memorandum of points and authorities, headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) complies with the limitations of Rule of Court 8.504(d)(1) in that it is set in a proportionally-spaced 13-point typeface and contains 2234 words as counted by the Corel Word Perfect version 10 word-processing program used to generate this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 30, 2016 in Long Beach, California.



R. Duane Westrup

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California 90802-4524.

On June 30, 2016, I served the following documents described as **REPLY BRIEF ON THE MERITS**. I served the documents on all interested parties, as follows:

Dirk Bruinsma
Law Office of Dirk Bruinsma
1181 Puerta Del Sol, Suite 120
San Clemente, California 92673
Email: dirk@bruinsmalaw.com
Tel: 949/443-9030
Attorney for United Rigger &
Erectors, Inc.

Kristen Martin
Law Offices of Kristen Martin
600 Anton Blvd., Suite 1100
Costa Mesa, California 92626
Email: Kristen@lawguna.com
Tel: 714/371-4308
Attorney for United Rigger &
Erectors, Inc.

Clerk, Court of Appeal
Second Appellate District, Div. 1
300 S. Spring Street
Fl. 2, N. Tower
Los Angeles, CA 90013-1213

Clerk, Los Angeles Superior Court
12720 Norwalk Blvd.
Norwalk, CA 90650-3188

I am employed in the office of a member of the bar of this Court at whose direction the service was made. The documents were served by the following means (specify):

By United States Mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above. I placed the envelope for collection and mailing, following our ordinary business practice. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Long Beach, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: June 30, 2016



JAMES VELOFF