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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

HASKELL CORPORATION et al.,

Plaintiffs and Appellants,

v.

CONOCOPHILLIPS COMPANY,

Defendant and Appellant.

A124446

(Contra Costa County
Super. Ct. No. C05-01396)

After a court trial in this construction dispute, property owner ConocoPhillips Company (ConocoPhillips) was awarded a \$1.3 million judgment from Safeco Insurance Company of America (Safeco), which had acted as surety for contractor Haskell Corporation (Haskell). That judgment was offset against an amount ConocoPhillips owed to Haskell, resulting in a net judgment of almost \$2.3 million for Haskell. Haskell’s motion for new trial was denied, and ConocoPhillips was awarded more than \$180,000 in costs.

Haskell and Safeco appeal from the judgment and the cost order. Haskell contends inter alia that the trial court erred (1) by failing to find that the parties had abandoned the underlying construction contracts; (2) by excluding admissible evidence; (3) by rejecting Haskell’s superior knowledge and lien foreclosure causes of action; and (4) by awarding ConocoPhillips costs for its expert witness fees. Safeco (5) challenges the judgment for breach of its payment bonds. Both Haskell and Safeco object to the trial court’s award of (6) prejudgment interest. ConocoPhillips cross-appeals from the

judgment, contending that (7) the trial court should have credited it with an additional \$1.7 million. We affirm the judgment and the costs order.

I. FACTS

A. *Contract*

In 2002, plaintiff and appellant ConocoPhillips began a project to revamp its Rodeo oil refinery to produce ultralow sulfur diesel. This complex work required modifying existing facilities to add new equipment and piping. Defendant and appellant Haskell Corporation was awarded two of the revamping contracts in the spring of 2004, including the revamping of one of the oldest refinery units. Haskell had been the low bidder on both contracts. Its lump sum bids were increased after a series of exchanges with Bechtel Corporation (Bechtel), which supervised the construction project for ConocoPhillips.

The price for both contracts totaled more than \$26 million. Haskell's price was based on its ability to perform the work in sequence, in an efficient and uninterrupted manner—adhering to its “critical path plan” identifying each activity that needed to be completed before the next activity could be done. It estimated making a profit of more than \$2.3 million on the contracts. Both contracts had the same terms, except for the scope of work, prices, and scheduled milestones. The timelines of the two contracts overlapped, with the work on the first contract scheduled to be completed before work on the second contract was to be finished.

Each contract contemplated that the price was subject to increase for actual, identified changes to the scope of the work. Bechtel was authorized to initiate the change process by issuing a *change notice*. If Bechtel did not issue a change notice, but Haskell believed that it should have done so, Haskell was required to submit a *change notice request*. Bechtel would then either deny the request or issue a *change order*.

A change in the scope of a project may produce different types of costs. *Direct costs* of change are those costs measured by extra work required to do the change work. They include the value of additional materials, the costs of obtaining and moving those

materials to the jobsite, the salaries of the crew installing these materials, the cost of equipment required to do the installation work, and the salaries of staff needed to support the crew. Direct costs are typically set out in a change notice request.

Change work can also result in *impact costs*—those costs incurred because of a change’s impact on other work required to be performed. If a crew runs into a problem with one aspect of work and is diverted to another assignment, the time spent shifting the crew to the assignment that was not originally planned to be done that day is an impact cost. If a crew has to work overtime to complete change work, worker fatigue causing decreased productivity or efficiency on the originally contracted work is an impact cost. These “loss of productivity” costs can be difficult to measure with precision, because the additional cost often reflects a judgment of the difference between the normal time needed to do certain work and the time it actually took because of the changes in the planned work.

Delay and schedule recovery costs may be incurred because of the increased time required to complete the change work. *Delay costs* include such items as the cost of renting equipment or paying office staff for a longer period of time. *Schedule recovery costs*—also known as acceleration costs—are incurred to reduce delay costs. Examples of schedule recovery costs include hiring additional crews, paying overtime for additional work hours, or providing additional equipment to complete work in a shorter-than-planned period of time.

The work on the two ConocoPhillips-Haskell contracts fell into three periods—*pre-turnaround*, when the Rodeo refinery was still in operation; a *turnaround* period during February and March 2005 when the refinery was shut down; and *post-turnaround*, after the refinery went back into operation and until the project was finally completed. It was critical to ConocoPhillips that turnaround be as short as possible, to limit its losses during the period when the refinery was inoperative.

Haskell formally executed the two construction contracts in June 2004, shortly before arriving at the jobsite to begin work. It served as general contractor on these two contract matters, hiring subcontractors to complete the work. With Haskell as principal, a

surety—plaintiff and appellant Safeco—issued payment bonds to ConocoPhillips agreeing to pay the legitimate liens of Haskell’s subcontractors.

B. Construction

1. Drawings

When Haskell appeared to start work at the refinery on its first contract, two problems became apparent. The first involved the design drawings for the work. Haskell expected that the design drawings would contain some inaccuracies, and the drawings it received were deficient. Hundreds of design drawings had been provided by Bechtel during the bid process. These drawings suffered from inaccuracies because of the refinery’s age, poor drawings of the preexisting facilities, foundational settlement, thermal expansion of concrete and steel piping and equipment, and the ongoing operation of the refinery during the design phase. Many of the drawings required the contractor to verify their accuracy in the field before undertaking construction.

The contracts had alerted Haskell that it might receive new drawings—issued for construction, rather than issued for bid—after execution of the contracts. By contract, Haskell was required to check these drawings and to notify Bechtel promptly of any discrepancies or errors in the plans and specifications. In July 2004, Haskell filed a \$1.2 million change request, asserting that the “issued for construction” drawings it received had changed the scope of the project from that specified in the “issued for bid” drawings. Ultimately, Haskell settled claims on both of its contracts for any change in scope and for the incomplete design drawings for approximately \$414,000, but it did not believe that it had been fairly compensated for the impact costs of the incomplete drawings.

2. Foundation Delays

A second issue arose when Haskell arrived at the jobsite because another of ConocoPhillips’s contractors had not completed the foundations in Haskell’s designated work area. Haskell could not begin its work there until the concrete foundations were completed and had been given sufficient time to cure. The foundation delays affected Haskell’s critical path plan for its first contract, driving up its costs. It promptly advised Bechtel of this potential impact.

In August 2004, Haskell submitted a \$1.2 million change request on its first contract for impact costs resulting from the foundation delays and from the disruption of its critical path plan. Privately, Haskell officials estimated in October 2004 that it would cost an additional \$7 million—\$4 on the first contract and \$3 on the second—to bring its two contracts back onto schedule. In November 2004, Haskell increased its change request for impact costs to \$5.5 million. By January 2005, the claim had risen to almost \$6.1 million.

3. Other Problems

Bechtel was responsible for providing many of the materials such as prefabricated pipe required for the work. The contracts anticipated that Haskell would seek the necessary materials from Bechtel two weeks before the work was to be done. The disruption of Haskell's critical path plan made obtaining some of the materials that it needed for alternative work more difficult. In some instances, Bechtel supplied materials intended for Haskell to other contractors, making Haskell's work even more inefficient. Bechtel also supplied incorrectly fabricated materials that had to be retooled in order to be usable.

Haskell fell behind schedule on both contracts. ConocoPhillips considered cancelling Haskell's second contract and awarding it to another contractor, but in December 2004, Haskell was allowed to continue with its work on the second contract after agreeing to absorb any impact costs of the second contract.

4. January 2005 Settlement

Haskell's \$6.1 million pre-turnaround impact claims were settled in January 2005 when it accepted a \$4.3 million change order. This change order specified that the price adjustment constituted payment in full for direct and indirect costs, overhead and profit, and all impact costs of the work covered by the settlement. It was a full and final settlement of all pre-turnaround delay and recovery schedule costs. By accepting its terms, Haskell expressly waived the right to recover further cumulative impact costs related to pre-turnaround change work.

By its terms, the change order was a compromise. For example, Haskell agreed to pay \$412,439 for iron work and \$409,032 of its administrative staff costs. It accepted responsibility for \$350,000 of overtime costs on its second contract. By accepting significantly less than it sought in its change request, Haskell assumed much of its pre-turnaround costs. The change order also provided that for the remainder of the contract period, all impact costs were to be included in each change request, rather than submitted as a cumulative, global impact claim covering multiple changes.

5. Turnaround

Work on the revamp project became even more intense during the turnaround period when normal refinery operations were shut down. Haskell workers were at the jobsite for two 10-hour shifts, seven days a week during most of this time to complete turnaround work and pre-turnaround work that Haskell had not completed before turnaround began. As the pace of the project accelerated, Haskell hired extra staff, but was still unable to keep complete records of its hours and costs. Later, having estimated that it cost the company \$7 million in additional costs to bring the two contracts back onto schedule, its officials admitted that Haskell lacked the records to support that estimate. Haskell sought time extensions on the contracts from Bechtel and ConocoPhillips, but never obtained any.

Because of the pace of the work and the design problems, Haskell submitted numerous requests for information (RFI) seeking clarification about what to do when a problem arose on the project or when material did not fit as designed. In all, Haskell submitted more than a thousand RFI's on the two contracts. In some instances, the RFI was approved by Bechtel, confirming a solution that had been worked out in the field.

Although the contracts required that change work be approved before it was done, the change process was soon overwhelmed by the pace and sheer number of changes arising during turnaround. The change process broke down, because to follow it would create even more delay. The work was done using a more streamlined RFI process. ConocoPhillips instructed Haskell to focus on the work, not on filing claims. Haskell

was to do whatever was necessary to complete the project on time; the costs would be worked out later, and Haskell would be paid for its work.

6. Project Completion

In April 2005, Haskell gave notice of substantial completion of both contracts. During the course of construction, Haskell had submitted 18 change requests on the two contracts. Each change request noted that payment made would constitute full payment for the covered work, including all direct and indirect costs. Each change order contained the following notice: “The completion date, contract price and all other terms, covenants and conditions of the . . . contract, except as duly modified by this and previous Change Orders and Amendments, if any, remain in full force and effect.” Haskell was paid almost \$9 million on these change orders. Ultimately, ConocoPhillips paid Haskell more than \$35 million on the two contracts. Still, Haskell’s contract work significantly overran the \$26 million contract price.

By May 2005, Haskell filed additional change requests totaling almost \$11.5 million. That same month, a change order was executed by which ConocoPhillips paid almost \$3.7 million to Haskell. ConocoPhillips advanced this sum so that Haskell could pay its subcontractors, and ConocoPhillips could obtain discharge of the subcontractors’ liens. Haskell approved this change order *after* substantial completion of its work. However, Haskell and its surety Safeco refused to pay the subcontractors, claiming a right to withhold payment to them because of Haskell’s dispute with ConocoPhillips about its own unresolved claims. As they were not paid, the subcontractors’ liens against ConocoPhillips were not discharged.

On June 17, 2005, Haskell submitted a final claim to ConocoPhillips for an additional \$23 million—\$12.6 million for unresolved change requests and \$12.4 for turnaround and post-turnaround work.¹ Evaluating this claim, Bechtel estimated that ConocoPhillips owed Haskell no more than \$3.9 million on the pending change requests,

¹ Haskell later admitted that the second part of this claim was too high, because of some duplication of costs.

of which Haskell had already received a \$3.7 million advance. When it added in other credits, Bechtel concluded that ConocoPhillips owed Haskell nothing more than the advance it had received. As such, ConocoPhillips declined any further payment. It also demanded that Haskell and Safeco pay Haskell's subcontractors and discharge the subcontractors' liens against ConocoPhillips. Haskell and Safeco did not do so.

C. Litigation

1. Pretrial Matters

Beginning in June 2005, several of Haskell's unpaid subcontractors filed actions against Haskell, Safeco, and ConocoPhillips seeking payment and foreclosing their liens, on various theories of recovery. In August 2005, ConocoPhillips filed a cross-complaint against Haskell and Safeco for breach of contract. In September 2005, Haskell filed a \$23 million foreclosure lien against ConocoPhillips. It also cross-complained against ConocoPhillips for breach of contract, foreclosure of its \$23 million mechanic's lien, quantum meruit, claims of superior knowledge, and breach of implied warranty. These actions were consolidated.

By May 2007, ConocoPhillips had made three payments totaling \$1,109,868 to Haskell's subcontractors. The subcontractor actions were settled and dismissed, leaving only the disputes among Haskell, Safeco, and ConocoPhillips to be resolved. In July 2007, Haskell was offered \$2.9 million in exchange for the mutual dismissal of this action, but it did not accept ConocoPhillips's offer. (Code Civ. Proc., § 998.)

In August 2007, ConocoPhillips's motion for judgment on the pleadings was granted with leave to amend on Haskell's claims for quantum meruit, claims of superior knowledge, and breach of implied warranty. Later that month, Haskell filed its first amended cross-complaint, alleging these causes of action anew and setting its damages at \$15 million rather than the \$23 million set out in its original cross-complaint.² Motions

² Despite a voluminous record on appeal, none of the parties provided us with a copy of the first amended cross-complaint on which the case was tried. On our own motion, we obtained it from Haskell. We take judicial notice of this trial court record. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

for summary adjudication by all parties were denied. In January 2008, Haskell's expert witness submitted a revised cost report to ConocoPhillips, seeking \$7.2 million for costs of change work.

2. Foundation and Design Issues

A court trial was conducted in July and August 2008. ConocoPhillips blamed Haskell for project delays and downplayed the effect of any delays caused by its own conduct. ConocoPhillips knew that Bechtel's engineering drawings were incomplete at the time that Haskell began its work. It also knew that critical foundation work had not been completed at that time. ConocoPhillips and Bechtel failed to notify Haskell of these facts before the payment bonds were executed. Haskell would not have begun work on the project on the scheduled date—and would not have signed the Safeco payment bonds at that time—if the foundational delays had been known. In ConocoPhillips's own postproject internal review, it acknowledged significant design problems that hampered the refinery revamp.

The trial court also heard evidence of Bechtel's mismanagement of the project. Its design and procurement process failed, disrupting Haskell's critical path plan and affecting productivity. It did not provide needed coordination of work among ConocoPhillips contractors. By failing to arrange timely inspections, Bechtel wasted many Haskell work hours. The trial court concluded that the decision not to inform Haskell to delay starting its work until after the foundations were poured was the beginning of this dispute. It faulted Bechtel and ConocoPhillips for causing some of Haskell's work to be inefficient and delayed, and for failing to allow for some reasonable additional compensation as a result.

3. Haskell's Claims

At trial, Haskell did not seek the \$23 million it prayed for in its original cross-complaint or the \$15 million it sought in its amended pleading. Its expert witness offered evidence in support of a total claim of \$12.9 million—\$7.2 million for direct costs of disputed change requests, plus \$10.6 million in impact claims, minus a credit of \$4.9 million for amounts due to ConocoPhillips. Of the \$7.2 million of pending change

requests for direct costs, \$3.3 million was attributed to the pre-turnaround period and \$3.9 million was claimed for turnaround and post-turnaround. The expert admitted that his \$10.6 million impact claim was a new claim—not one that had been included in the change requests. Of this claim, \$3.2 million was allocated to pre-turnaround and \$7.4 million was for turnaround and post-turnaround impacts.

4. Overstatement of Haskell Claim

a. Effect of January 2005 Settlement

ConocoPhillips argued that all delay recovery and schedule impact costs associated with pre-turnaround change work had been settled in the January 2005 change order. By the terms of the change order, Haskell waived the right to any further cumulative impacts resulting from pre-turnaround changes, including impact costs. At trial, Haskell attempted to distinguish delay and schedule recovery costs from impact costs, which it asserted was a distinct category of costs. It argued that the January 2005 change order settled only the delay and schedule recovery costs from pre-turnaround changes, allowing it to claim turnaround and post-turnaround impact costs of pre-turnaround change work.

Ultimately, the trial court found that the language of the January 2005 settlement unambiguously prohibited any additional claims for pre-turnaround impact costs and required that all change requests for turnaround and post-turnaround claims include both direct costs and impacts. It also concluded that whether or not Haskell knew of the procurement, fabrication, and design drawing issues at the beginning of the project, it clearly knew about these problems by the time Haskell officials agreed to the January 2005 change order.

b. Record-keeping Lapses

The two construction contracts required Haskell to maintain records to track its costs. Haskell estimated that during pre-turnaround and turnaround, more than a thousand change requests were made. It offered evidence that the pace of work overwhelmed its capacity to track changes. It argued that the change order process proved too cumbersome, given the rapid pace of changes on the project, and was not

followed. The trial court acknowledged that in the frenzy of trying to keep the projects on track, Haskell could not have recorded all of its costs.

Still, Haskell had serious credibility problems establishing aspects of its claim. It reported total unpaid job costs of \$10.4 million—less than its expert’s trial claim of \$12.9 million. It conceded that during the bidding process, it had underestimated the costs of performing its contractual obligations by significant amounts. Private communications with Safeco admitted that Haskell had engaged in a deliberate practice of overbilling to recover the sums it had underestimated in its contract bids.

The trial court also saw Haskell financial reports given to Safeco that did not reflect the losses the contractor accepted in the January 2005 change order. The reports suggested that Haskell expected ConocoPhillips to fully compensate it for *all* direct costs and impacts of the two contracts, despite the January 2005 settlement accepting nearly \$2 million in losses. This evidence, combined with Haskell’s failure to track—and thus, its inability to verify—its costs accurately, satisfied the trial court by a preponderance of evidence that Haskell’s claims were intentionally inflated to make up for its failure to estimate the contract costs properly during the bidding process. This finding would prove costly to Haskell.

5. Evaluation of Expert Evidence of Costs

Satisfied that Haskell was entitled to *some* additional compensation, the trial court turned its attention to determining what part of Haskell’s claim was legitimate and what was inflated. Some facts were clear. Haskell records showed total unpaid job costs of \$3,976,390 at the end of pre-turnaround. When the project was complete, Haskell reported total unpaid job costs of \$10,383,282. By its own admission, it was responsible for \$2,402,492 in costs resulting from the pre-turnaround settlements. Haskell and ConocoPhillips each offered expert witnesses who testified about the amounts they believed that Haskell was—or was not—due.

The trial court was dissatisfied with some aspects of the evidence offered by the experts for both sides, finding significant errors in their methodologies. Haskell’s expert’s calculations of direct costs were based on hours and dollar amounts that Haskell

claimed. Its expert did not verify these direct costs, despite Haskell's failure to track all of its direct costs at the time that they were supposedly incurred. The expert also failed to analyze whether Haskell was entitled to recover for each change request.

On impact costs, the trial court criticized Haskell's expert for claiming \$10,619,000, for two reasons. First, the claim was more than what Haskell reported as total unpaid job costs of \$10,383,282. Second, the impact cost exceeded the "cost plus 15%" amount specified in the contracts for disputed charges, which expressly provided compensation for all impact costs related to the change work. Finally, the trial court noted that Haskell's expert included claims for pre-turnaround impact costs that Haskell had agreed to assume in its January 2005 settlement.

ConocoPhillips argued that Haskell was entitled to recover nothing for pre-turnaround changes work and no more than \$2.3 million in direct costs of change that occurred during turnaround and post-turnaround. Its expert offered much evidence that proved useful to the trial court, but he failed to allow Haskell any compensation for reasonable costs resulting from ConocoPhillips's failure to delay the start of Haskell's work until the foundation work had been completed.

6. Motions

In midtrial, Haskell sought to amend its foreclosure lien to reduce the amount due based on evidence adduced at trial, without success. ConocoPhillips's motion for judgment against Haskell was granted on the lien cause of action, but denied in all other respects. Its motion for judgment against Safeco was denied. (Code Civ. Proc., § 631.8.)

D. Decision

In December 2008, the trial court issued a statement of decision, offering a lengthy explanation of its findings and conclusions. Essentially, the trial court found Haskell, Safeco, and ConocoPhillips each had breached obligations to the other side. The trial court found that Haskell had inflated its claim for pending change requests as a means of recovering its losses. The change requests sought millions more than Haskell had tracked in extra costs and included costs which Haskell had accepted in the January 2005 compromise settlement. The trial court seems to have denied any recovery for Haskell's

\$10.6 million claim for impact costs. It concluded that the January 2005 settlement barred any further recovery for pre-turnaround impacts and required turnaround and post-turnaround change requests to include impact claims, rather than to be submitted as a global claim at the end of the project.

The trial court found that Haskell was entitled to \$7.2 million in direct costs on its change requests. Acknowledging that this amount might be somewhat overstated, it declined to award any additional sums for overhead and markup to counter that possibility. This \$7.2 million was reduced by \$4,945,237 in credits³ that Haskell's expert had conceded were due to ConocoPhillips, resulting in a finding that ConocoPhillips owed approximately \$2.3 million to Haskell, plus prejudgment interest. The trial court declined to credit ConocoPhillips with another \$1.7 million that the oil company had argued was due as a result of the January 2005 settlement. Instead, the trial court found that Haskell was entitled to this sum as damages for ConocoPhillips's unreasonable conduct in failing to inform Haskell of delays when it appeared to perform its contract work.

As for Safeco, the trial court found that it was not entitled to rely on Haskell's unresolved claims against ConocoPhillips as a basis for refusing to pay Haskell's subcontractors according to the terms of its payment bonds. These bonds required it to pay the subcontractors and to discharge ConocoPhillips's liens, but Safeco failed to comply with the terms of its bonds. In December 2008, the trial court entered judgment against Safeco, and for ConocoPhillips in the amount of \$1,310,164. This amount represents the three payments totaling \$1,109,868 that ConocoPhillips paid Haskell's subcontractors after instigation of litigation and prejudgment interest on those payments from the dates that they were made. That total award to ConocoPhillips from Safeco was then offset against the award and prejudgment interest due to Haskell from

³ This sum included \$3,655,962 in advances given in the May 2005 change order, three payments totaling \$1,109,868 that ConocoPhillips made to Haskell's subcontractors to obtain discharge of their liens, and \$179,407 in back charges that Haskell admitted it owed ConocoPhillips.

ConocoPhillips.⁴ The result was a net award of almost \$2.3 million for Haskell and against ConocoPhillips. Postjudgment interest was also awarded to Haskell, running from the date of the judgment at the statutory rate.

Haskell's lien foreclosure cause of action was dismissed with prejudice, and its September 2005 lien against ConocoPhillips was voided. Notice of entry of judgment was given in December 2008. Haskell moved for a new trial, to no avail.

ConocoPhillips was found to be the prevailing party against Safeco, and Haskell was declared the prevailing party in its claims against ConocoPhillips. In March 2009, the trial court awarded ConocoPhillips \$174,800 in costs from Haskell—\$200,000 in expert witness fees reduced by \$25,200 in costs that Haskell was entitled to recover from the oil company. (See Code Civ. Proc., § 998.) ConocoPhillips was also awarded \$8,000 in costs from Safeco.

II. ABANDONMENT

A. *Lack of Intent*

Haskell raises a series of challenges to the trial court's interpretation and application of a line of cases on abandonment of a construction contract. (See *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628 (*Peterson*).) It seeks a new trial on its abandonment theory. The trial court found against Haskell on the contractor's abandonment theory on several grounds. It found that Haskell did not establish either of two elements of abandonment—an intent to abandon the contracts and a final project that was materially different from the contracted work. It found the ConocoPhillips-Haskell contracts were factually distinguishable from those in the abandonment cases, and found that Haskell was both contractually and equitably estopped from claiming abandonment of the contracts. Although Haskell disputes all these findings on appeal, we need address only one of them—whether it established an intent to abandon the contracts.

⁴ In so doing, the trial court impliedly found that Haskell was jointly and severally liable for the judgment against Safeco.

A construction contract with a firm price often includes provision for compensation for work beyond the scope of the contract by means of a change order. (See 10 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 27:87, p. 27-336.) If the owner imposes on the contractor an excessive number of changes going so far beyond the scope of the work contemplated under the original contract that it may fairly be said that the contract has been altered, then the parties may be deemed to have intended to abandon the contract. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 235-236 (*Amelco*); *Peterson, supra*, 172 Cal.App.3d at pp. 639-640; *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156 (*Daugherty*); *Opdyke & Butler v. Silver* (1952) 111 Cal.App.2d 912, 917-919.)

When a construction contract is deemed abandoned, the contractor—with the approval and expectation of the owner—may still opt to complete the work. (*Peterson, supra*, 172 Cal.App.3d at p. 640.) Under these circumstances, the terms of the written contract are deemed abandoned, but the work is not. (*Amelco, supra*, 27 Cal.4th at p. 236; *Peterson, supra*, at p. 640; *Daugherty, supra*, 14 Cal.App.3d at pp. 156-157.) In these circumstances, an implied contract is deemed to have been created, allowing the contractor to be paid for the reasonable value of the work on a quantum meruit theory, rather than being limited to the original contract price. With the contract set aside, the contractor may then recover the reasonable costs of all its work on a quantum meruit basis. (*Amelco, supra*, at p. 238; *Peterson, supra*, at pp. 639, 645; *Daugherty, supra*, at p. 156; *Opdyke & Butler v. Silver, supra*, 111 Cal.App.2d at p. 919; *Dodge v. Harbor Boat Bldg. Co.* (1950) 99 Cal.App.2d 782, 790-791; see 10 Miller & Starr, Cal. Real Estate, *supra*, § 27:87, p. 27-336.)

Abandonment may be inferred from the conduct of the parties. (*Peterson, supra*, 172 Cal.App.3d at p. 641; *Daugherty, supra*, 14 Cal.App.3d at p. 156; see *Opdyke & Butler v. Silver, supra*, 111 Cal.App.2d at p. 919.) An abandonment may occur when the scope of the work undertaken greatly exceeds that required by the contract. (*Peterson, supra*, at p. 641.) Both parties must be found to have intended to disregard the contract in order to establish abandonment. (*Amelco, supra*, 27 Cal.4th at p. 236; *Peterson, supra*, at

p. 643; see 10 Miller & Starr, Cal. Real Estate, *supra*, § 27:87, p. 27-336.) Whether a contract was abandoned is an issue of *fact*, which we test on appeal by application of the substantial evidence rule. (See *Amelco*, *supra*, at p. 239; *Peterson*, *supra*, at pp. 639, 646; *Daugherty*, *supra*, at pp. 155-156, 158.)

The trial court, sitting as the trier of fact, found that Haskell did not establish that it and ConocoPhillips had evidenced an intent to abandon the contracts. Substantial evidence supports this finding. Even though the parties ignored the change process during the frenzy of turnaround work, ConocoPhillips instructed Haskell to complete its work on schedule, with the understanding that Haskell would be paid for that work. This understanding is strong evidence that the parties did *not* intend to abandon the contract.

The language of the approved and accepted change orders also tends to support the trial court's conclusion that ConocoPhillips and Haskell did not intend to abandon the contracts. Each of 18 change orders that Haskell accepted during the course of the work—including one agreed to after Haskell had substantially completed that work—expressly stated that the terms of the contracts that had not been modified by the change order remained in full force and effect. Thus, rather than rejecting them, Haskell itself repeatedly *affirmed* the underlying contracts. The language in these change orders provides substantial evidence supporting the trial court's factual finding of a lack of intent to abandon those same contracts.

The trial court's conclusion that Haskell had purposefully overbilled its change requests was also damaging to the contractor. Substantively, this finding of claim inflation constitutes evidence that Haskell was *using* the contract, not *abandoning* it. As a procedural matter, Haskell—the party asserting that the contracts had been abandoned—bore the burden of proving an intent to abandon by a preponderance of evidence. (See Evid. Code, §§ 115, 500.) An intent to abandon is typically inferred from the conduct of the parties, thus allowing competing reasonable inferences if the evidence on this issue is conflicting. (See, e.g., *Peterson*, *supra*, 172 Cal.App.3d at p. 641.) Haskell's purposeful inflation of its claims undermined its credibility, making it more difficult for it to persuade the trial court to infer from the conduct of both parties an

intention to abandon the contracts. The trial court could reasonably find that Haskell had failed to carry its burden of proof of an intent to abandon. Without proof of an intent to abandon the contracts, the trial court acted within its authority when it rejected Haskell's abandonment theory and related quantum meruit claim. (See *Amelco, supra*, 27 Cal.4th at p. 236; *Peterson, supra*, at p. 643; see 10 Miller & Starr, Cal. Real Estate, *supra*, § 27:87, p. 27-336.)

An underlying thread of Haskell's claim of error is its argument that an abandonment must be inferred because its situation was factually identical to that presented in *Peterson, supra*, 172 Cal.App.3d 628. As we read that case, Haskell fails to note one key distinction—its own measure of responsibility for the dispute with ConocoPhillips. In *Peterson*, the project owner did not comply with its obligations, but the contractor did. In our case, both Haskell and ConocoPhillips contributed to the breakdown of the normal work process—ConocoPhillips, by not delaying the start of Haskell's work until the site was ready for the contractor to work, and Haskell, by purposefully inflating its claims to recoup some of its underbidding losses. As Haskell was not the innocent party that the *Peterson* contractor was, that case is factually distinguishable on the basis of the differing conduct of the contractors.

B. Applicability of Substantial Evidence Test

Haskell argues that we cannot rely on the substantial evidence test to uphold the trial court's determination of this factual question on appeal. It reasons that the trial court misunderstood the abandonment line of cases in so fundamental a manner as to render its factual determinations about this issue unreliable. The usual application of the substantial evidence test may become suspect if the trial court commits a legal error that undermines our certainty that it actually performed its factfinding function. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1477-1478.) If a trial court gives an incorrect legal reason for its ruling, on appeal, we look to see if any alternative legal basis supports its decision. (*Id.* at p. 1477.) In our case, the trial court gave several alternative grounds in support of its finding of a lack of abandonment. Assuming arguendo that the trial court misinterpreted certain aspects of the abandonment

cases, as Haskell's specific challenges go to the trial court's alternative reasons for its ruling, we are satisfied that we may rely with confidence on the substantial evidence of lack of intent to abandon.

First, Haskell argues that the trial court erred by finding that the contracts at issue were not true lump sum contracts. In its factual recitals, the trial court stated that the construction contracts were not true lump sum contracts because they allowed for change orders to provide additional compensation for any increased scope of work. It cited this conclusion as evidence supporting its finding that the *second* factual element of abandonment—a material change to the contract—was not established. As we have concluded that Haskell did not meet its burden of proving the *first* element of abandonment—a course of conduct evincing an intent to abandon—any error related to this characterization of the underlying contracts was necessarily harmless.

Next, Haskell cites a trial court finding that the contracts at issue in the abandonment cases offered much more limited remedies to the contractor than the two ConocoPhillips contracts. The trial court made this finding when it ruled that the contracts in the abandonment cases were factually distinguishable from those at issue in this matter. As we have upheld the trial court's alternative finding that, even if we apply general principles of the abandonment cases, Haskell did not prove a mutual intent to abandon, any error in finding the contracts in those cases to be distinguishable from the ConocoPhillips-Haskell contracts had no bearing on our determination of this appeal.

Third, Haskell contends that the trial court erred when it speculated that the ConocoPhillips contracts—drafted after the abandonment cases had been decided—contained revised language based on those decisions. At trial, the court opined that since *Peterson* had been decided, attorneys had drafted boilerplate language in change orders reaffirming the underlying contracts in response to the abandonment cases. On appeal, Haskell argues that the language of the change orders in the underlying contracts before

us are actually quite similar to those used in *Peterson*.⁵ Even if we assume arguendo that the contract language was the same, the fact remains that the presence of language in the Haskell-ConocoPhillips change orders had a tendency to prove that the parties had no intent to abandon the underlying contracts. The cited contract language was relevant and substantial evidence supporting the trial court's finding of a lack of intent to abandon. (See Evid. Code, § 250; see also *Amelco, supra*, 27 Cal.4th at p. 239; *Peterson, supra*, 172 Cal.App.3d at pp. 639, 646.) While Haskell urges us that the change orders' recitals of the continuing effect of the underlying contracts were surplusage, we do not find these words to be so.

Next, Haskell complains that the trial court erroneously required it to give ConocoPhillips notice of abandonment. When finding that Haskell was contractually estopped to claim abandonment, the trial court observed that it did not give ConocoPhillips any notice of abandonment during the course of the project, but led the refinery owner to believe that the opposite was true. The trial court's comment strikes us more as a recitation of the evidence leading it to find estoppel rather than a requirement of an abandonment of notice. However, we need not determine that matter. As we need not reach the issue of estoppel in order to uphold the finding of a lack of abandonment, this trial court comment does not undermine the basis of our conclusion. Haskell reasons that even a contractor that is unaware of its abandonment remedy may recover in quantum meruit if the two elements of fact of abandonment are established. As we conclude that one of these key elements was *not* established, Haskell has not proven any reversible error flowing from any trial court requirement of notice.

⁵ *Peterson, supra*, 172 Cal.App.3d 628 makes no mention of any such language in the change orders. It did not rely on this type of language in its determination. In support of this claim of error, Haskell cites an appellate brief in *Peterson*. This briefing was not before the trial court when it rendered its decision, but was referenced when Haskell sought a new trial. The order denying the motion for new trial did not respond to this request for judicial notice. Haskell has asked us to take judicial notice of this information, but we denied that motion for lack of good cause.

Finally, Haskell contends that the trial court made several mistakes when evaluating the second element of abandonment—that of a materially different project. Abandonment requires a finding of a material change in the contract. (See *Amelco*, *supra*, 27 Cal.4th at p. 239.) As we have upheld the trial court’s finding of a lack of abandonment based on the first element of a lack of intent to abandon, any error in interpreting this second element of abandonment is necessarily harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Haskell has not established that any of the challenged trial court findings could conceivably lead to a more favorable result on appeal. As none of these challenges undermines our confidence in the evidence supporting the trial court’s finding of a lack of intent to abandon the contracts, Haskell’s abandonment theory was properly rejected.⁶

III. INTERPRETATION OF CONTRACT

A. *Need for Pre-performance Change Order*

As we have upheld the trial court’s finding of a lack of abandonment of the contracts, these contracts serve as the guide to resolve the remaining key issues in the case. Haskell contends that the trial court misinterpreted the contracts in various ways. First, it contends that the contractual limitation on disputed costs to “cost plus 15%” applied only if *Bechtel* or *ConocoPhillips* executed a change notice or change order *before* the work was performed. It bases this conclusion on its interpretation of the change clause of the contracts.⁷ The interpretation of a written contract is an issue of law

⁶ In light of this conclusion, we need not address the other abandonment issues that Haskell raises on appeal, including his request for a new trial on this theory.

⁷ General Condition 32 on changes provided, in part: “BECHTEL may, in its capacity as Agent for OWNER, at any time, without notice to the sureties if any, by written Change Notice unilaterally make any change in the Work within the general scope of this contract, including but not limited to changes: [¶] 1. In the drawings, designs or specifications; [¶] 2. In the method, manner, or sequence of CONTRACTOR work; [¶] 3. In BECHTEL or OWNER-furnished facilities, equipment, materials, services or site(s); [¶] 4. Directing acceleration or deceleration in performance of the

that we determine de novo on appeal. (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1727; *McCorkle v. State Farm Ins. Co.* (1990) 221 Cal.App.3d 610, 614.)

Citing the clause providing that all modifications other than those that Bechtel initiated by change notice or emergency oral order confirmed by a later change order required a written amendment to the contract signed by Haskell and ConocoPhillips, Haskell reasons that the contracts required Bechtel to initiate any amendment to the contract. This interpretation ignores the aspect of the change clause that invokes *Haskell's* responsibility to request a change notice for proposed changes. In essence, it would require us to consider parts of the change clause in isolation, which we are not

Work; and [¶] 5. Modifying the Contract Schedule or the Contract Milestones. [¶] In addition, in the event of an emergency, which BECHTEL determines endangers life or property, BECHTEL may use oral orders to CONTRACTOR for any work required by reason of such emergency. CONTRACTOR shall commence and complete such emergency work as directed by BECHTEL. Such orders will be confirmed by Change Notice/Order. [¶] All other modifications to this contract shall be by written Agreement signed by the CONTRACTOR and OWNER. [¶] If at any time, CONTRACTOR believes that acts or omissions of BECHTEL or OWNER constitute a change to the Work not covered by a Change Notice, CONTRACTOR shall within five (5) calendar days of discovery of such act or omission submit a written Change Notice Request to BECHTEL explaining in detail the basis for the request. BECHTEL will either issue a Change Notice/Order or deny the request in writing. [¶] If any change under this clause directly or indirectly causes an increase or decrease in the cost of, or the time required for, the performance of any part of the Work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified accordingly. [¶] If the CONTRACTOR intends to assert a claim for an equitable adjustment under this clause it must, within five (5) calendar days after receipt of a Change Notice/Order, provide written notification of such intent and within a further five (5) calendar days, pursuant to [SC-16, the pricing adjustment clause], submit to BECHTEL a written proposal setting forth the nature, schedule impact and monetary extent of such claim in sufficient detail to permit thorough analysis and negotiation. [¶] . . . [¶] Failure by OWNER and CONTRACTOR to agree on any adjustment shall be a dispute within the meaning of [GC-33, the dispute clause]. [¶] CONTRACTOR shall proceed diligently with performance of the Work, pending final resolution of any request for relief, dispute, claim, appeal, or action arising under the contract, and comply with any decision of BECHTEL or OWNER.”

permitted to do. Instead, we must view the language of the contract clause as a whole. (Civ. Code,⁸ § 1641.)

Having done so, we conclude that the change clause did not require Bechtel or ConocoPhillips to initiate a pre-performance change order or change notice. The contracts *allow* Bechtel to initiate the process by a change notice. They require that all other modifications of the contracts be made by written amendment signed by ConocoPhillips and Haskell. They also state that if Haskell believed that ConocoPhillips's or Bechtel's acts or omissions constituted a change to the work not covered by a change notice, it was *required* to submit a written change request to Bechtel, which was then obligated either to issue a change order or to deny the request. Thus, the contracts provided that an amendment could be initiated by *either* Bechtel or Haskell. Read together, these provisions provide that if there was a change in the work and Bechtel did not initiate a contract amendment, Haskell was required to do so.

The pricing adjustments clause provided that if the parties were unable to agree on a price adjustment for change work, the price of the disputed change would be as set out in that clause—costs plus 15 percent profit. This clause specifically refers to both the change and disputes clauses of the contracts. It also stated that it was to apply if, “for any reason” Bechtel and Haskell were unable to agree on a contract price adjustment. When the language of a contract is clear and explicit, that language governs its interpretation. (§ 1638; *Hotels Nevada, LLC v. Bridge Banc, LLC* (2005) 130 Cal.App.4th 1431, 1435; *Zubia v. Farmers Ins. Exchange* (1993) 14 Cal.App.4th 790, 796.) The plain meaning of the contracts' language applies the pricing adjustment provision to any dispute that arose in the course of the contract. The pricing calculation set out in the pricing adjustment clause was expressly deemed to constitute full consideration for all impacts of the claim.⁹

⁸ All subsequent statutory references are to the Civil Code unless otherwise indicated.

⁹ Special Condition 16 on pricing of adjustments provided in part: “If for any reason BECHTEL and CONTRACTOR are unable to agree on a contract price adjustment the following provisions [establishing and defining allowable costs and rates

Giving effect to every part of the contracts, we are satisfied that the price adjustment clause was intended to apply to the dispute before us.

B. Pricing of Unresolved Change Requests

Haskell also contends that this pricing adjustment clause does not apply at all to its unresolved change requests. It bases this claim of error on its assertion that ConocoPhillips never issued any pre-performance change notices directing the work was the subject of these change orders. As we have rejected Haskell's underlying contention that a pre-performance change order from ConocoPhillips or Bechtel was required to trigger application of the pricing adjustments clause of the contracts, this claim of error necessarily fails. (See pt. III.A., *ante*.)

C. Record-keeping Requirements

Third, Haskell contends that the contracts did not require it to maintain records to document lost productivity or what it characterizes as "untrackable" costs. The records and audit clause of the contracts expressly required that Haskell maintain records and accounts to accurately document incurred direct and indirect costs, "of whatever nature."¹⁰ The trial court found that Haskell failed to fully comply with this contractual obligation.

for other accounts] . . . shall also define allowable costs and rates for a determination by BECHTEL [including wages for labor, incurred equipment costs, materials and subcontract costs]. [¶] . . . [¶] In addition [to payments for overhead and profit included in the labor, equipment, materials and subcontract costs], OWNER will also pay an amount equal to fifteen percent (15%) of total direct labor . . . for changes resulting in a contract price adjustment, excluding this percentage markup, of less than \$25,000, or will pay ten percent (10%) for changes resulting in adjustments of \$25,000 or more. [¶] This amount will be deemed to be full consideration for all overhead, interest and profit, for all additional costs e.g., supervision and tools, and for all impacts of the change on all elements of the Work whether or not changed."

¹⁰ General Condition 34 on records and audit stated in part that: "CONTRACTOR shall maintain records and accounts in connection with the performance of this contract which will accurately document incurred costs, both direct and indirect, of whatever nature for a period of [two or four] years from the expiration of the CONTRACTOR'S warranty unless otherwise specified by applicable law. BECHTEL, OWNER, and their representatives shall have the right to examine and copy, at all reasonable times and with

Haskell challenges this finding. While it acknowledges that it did not segregate its costs in a manner that would allow it to allocate costs to specific changes and impacts, it argues that the contracts required only that it track costs in a global manner, which it contends that it did. Haskell also asserts that the contracts did not require it to document impact costs in any particular manner.

The plain wording of the records and audits clause compels us to reject these contentions. The purpose of the record-keeping requirement was to allow Bechtel and ConocoPhillips to verify requests for payments based on costs and to evaluate the reasonableness of proposed contract price adjustments. As the party seeking additional compensation, Haskell was obligated to support its change requests with specific information verifying its costs or risk not being compensated for them. The clause expressly applied to indirect costs, which would include impact costs. We are satisfied that the contracts required Haskell to track costs of direct costs and impacts in order to verify its change requests.

D. Effect of January 2005 Settlement

1. Accord and Satisfaction

Next, Haskell contends that the change order executed in January 2005 did not constitute an accord and satisfaction barring turnaround and post-turnaround cumulative impact claims. The trial court found that the unambiguous terms of that change order prohibited any further cumulative impact claims. In the original draft of the settlement, Haskell waived the right to submit any further cumulative impact claims for all three periods of the contract—pre-turnaround, turnaround and post-turnaround. This language was modified to waive Haskell’s right to seek “any further cumulative impact costs related to pre-turnaround.” Haskell reasons that these interlineations modifying the draft

advance notification, such records and accounts for the purpose of verifying payments or requests for payment when costs are the basis of such payment and to evaluate the reasonableness of proposed contract price adjustments and claims. . . .”

language of the settlement establish that it was still entitled to seek pre-turnaround cumulative impact costs that occurred during turnaround or post-turnaround.¹¹

To reach this conclusion would require us to ignore the next clause of the settlement, stating that all costs, including impact costs, must be included in Haskell's quoted price for each change for the remainder of the contract—the turnaround and post-turnaround periods. (See § 1641.) Read together, the two provisions barred Haskell from seeking any further cumulative impacts costs flowing from pre-turnaround work, but permitted it to seek impact costs for turnaround and post-turnaround work under specified conditions. To be compensated for impact costs incurred as a result of turnaround and post-turnaround change work, the change order required Haskell to link its impact costs to the direct costs incurred after pre-turnaround. This requirement assured ConocoPhillips that Haskell's impact claims would be related to turnaround and post-turnaround change works, not pre-turnaround changes that were settled in the January 2005 change order.

Haskell admitted at trial that none of its \$10.6 million cumulative impact claim had been included in the change requests it submitted. Thus, none of these claims had been linked to direct costs in any turnaround or post-turnaround change request, as the January 2005 change order required. Haskell settled its \$3.2 million pre-turnaround impact costs in the January 2005 change order. By failing to comply with the requirement that turnaround and post-turnaround impacts be included with the related direct costs in post-January 2005 change requests, Haskell waived its right to seek recovery for its remaining \$7.4 million impact claim, too.

2. Change Order Process

Haskell also cites another reason for its contention that the January 2005 settlement did not bar its turnaround cumulative impact claims. It contends that the

¹¹ In support of this claim of error, Haskell cites authorities relating to government contracts. The California Supreme Court has made it clear that private and public contracts are subject to different standards. (See *Amelco, supra*, 27 Cal.4th at pp. 238-239.) Thus, Haskell's cited sources are of limited use to us.

settlement applied only to change requests that were actually accepted by Bechtel or ConocoPhillips.

During November 2004 negotiations leading up to the January 2005 settlement, Bechtel explained that delay and impact costs were to be evaluated on an item-by-item basis, rather than in a cumulative manner. It also stated that—with regard to RFIs and change requests—category B3. of the ConocoPhillips change request form would constitute a full and final settlement of all cost and schedule impacts. Category B3. of the change request form instructs the contractor to proceed with the work, agrees that the proposed change is outside the scope of the contract, and accepts the price and schedule impact. It obligates Bechtel or ConocoPhillips to prepare a change order for these accepted change requests. Haskell reads these sources as limiting the application of the January 2005 settlement to change requests that Bechtel accepted according to category B3. of its change request form. Haskell contends that the January 2005 settlement did not limit those change requests that were not accepted according to category B3.

When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. (§ 1639; *Zubia v. Farmers Ins. Exchange, supra*, 14 Cal.App.4th at p. 796.) The language that Haskell focuses on is not contained in the final settlement itself. Instead, the settlement provided that the payment Haskell received constituted a full and final settlement of all its pre-turnaround delay and schedule recovery costs; that it waived the right to submit any further impact claims flowing from pre-turnaround; and that any future impact claims would be set out as part of the price for each change request.

Extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912, fn. 4; see *Barnhart Aircraft, Inc. v. Preston* (1931) 212 Cal. 19, 22.) Extrinsic evidence may not be used to show that the parties to a contract meant something other than what they said, but only to show what they meant by what they said. (*Barnhart Aircraft, supra*, at pp. 22-23.) The November 2004 communication Haskell cites does not meet this standard. We decline to

read into the express terms of the settlement a limitation that is not contained in it. By its terms, the January 2005 settlement was meant to apply to all Haskell change requests, whether or not Bechtel accepted them.

3. ConocoPhillips Estoppel

Haskell also contends that ConocoPhillips may not invoke any benefit of the modified change order process set out in the January 2005 settlement because it jettisoned that process during turnaround. In essence, Haskell argues that ConocoPhillips cannot invoke a contractual process that it abandoned. The trial court found no abandonment of the underlying contracts, and we have upheld that determination on appeal, based on our reading of the January 2005 settlement. (See pt. II., *ante*.) As such, this claim of error is meritless.¹²

IV. EVIDENCE

A. *Fork in the Road*

Next, Haskell contends that the trial court committed various evidentiary errors that reinforce the propriety of a new trial on abandonment. Haskell criticizes the trial court for not allowing it to reopen evidence to support its offer of proof challenging the trial court's view that Haskell should have walked or sued. This contention is related to the estoppel basis of the trial court's finding of a lack of abandonment. As estoppel does not form the basis of our conclusion that the trial court properly found a lack of abandonment, any error resulting from the denial of an opportunity to put on additional evidence about it was necessarily harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also pt. II., *ante*.)

¹² Haskell also contends that the trial court erred by finding that it was estopped from making various claims. The trial court found that ConocoPhillips had proved by a preponderance of evidence that Haskell was contractually and equitably estopped from claiming abandonment. This was one of several alternative bases of the trial court's findings supporting a lack of abandonment. As we have upheld that finding on an alternative basis—one that does not depend on any estoppel theory—we need not address this issue on appeal.

B. Rebuttal Evidence on Abandonment Issues

Haskell also asserts that the trial court rejected evidence that would have rebutted its mistaken interpretation of the *Peterson* line of abandonment cases. We have already concluded that we need not reach these issues, because we have upheld the trial court's finding of lack of abandonment on an alternative ground. (See pt. II., *ante*.) Thus, any error in rejecting this evidence was harmless. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

C. Entire Project Proof

Haskell also contends that the trial court erroneously excluded proof relating to ConocoPhillips's and Bechtel's duty to coordinate the entire project among its contractors. It reasons that evidence that project work performed before Haskell appeared at the jobsite to do its contractual work would have supported its claim that the overall project was poorly designed and suffered from other defects. This claim of error relates to Haskell's contention that material changes had been made to the project, supporting the second element of abandonment. As we have concluded that Haskell did not establish the *first* element of abandonment—actions implying an intent to abandon—any error related to this characterization of the underlying contracts was necessarily harmless.¹³

V. OTHER CAUSES OF ACTION

A. Superior Knowledge

Haskell also contends that the trial court erred by rejecting its superior knowledge cause of action. The trial court reasoned that the cause of action was barred on three grounds—because of the exclusive remedy provision of the contracts; because Haskell was estopped by its acceptance of the January 2005 settlement from claiming superior

¹³ Haskell contends that the trial court's many errors in interpreting the contracts and the January 2005 settlement require that we grant it a new trial on damages for breach of contract. As we have rejected the predicates of this claim of error, no new trial on damages for breach of contract is required.

knowledge after that time; and because the remedy Haskell would receive for a superior knowledge claim was subsumed within the damages it received for the breach of contract claim. We need address only the issue of the bar of the exclusive remedies clause.

The trial court found that to the extent the superior knowledge claim sounded in tort, the disputes clause of the contracts provided an exclusive remedy in contract and barred any tort claims.¹⁴ In our view, the superior knowledge cause of action sounded in tort, as it turned on Haskell's allegations that ConocoPhillips omitted material facts that it had a duty to provide to Haskell.

On appeal, Haskell asserts that—as a matter of law—statutory law renders this contractual bar unenforceable. If a contractual provision has as its purpose to exempt anyone for responsibility for fraud, willful injury to the person or property of another, or violation of law, it is against public policy. (§ 1668.) This statute bars a party from contracting away liability for fraud, intentional acts, or negligent violations of statute. This provision does not invalidate a contract exempting a party from liability for ordinary negligence, if no public interest is involved and no statute expressly forbids it. (*Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471-1472.) The superior knowledge cause of action that Haskell pleaded is one for ordinary negligence, not fraud, intentional acts, or statutory violation. The language of the disputes clause is mandatory, rather than permissive, clearly conveying its intent that contract—not tort—is the exclusive remedy. (See *Nelson v. Spence* (1960) 182 Cal.App.2d 493, 497.) Section 1668 does not invalidate the disputes clause of the contracts.

The trial court found that Haskell's superior knowledge cause of action may also be considered a contract claim. Even if we assume *arguendo* that there is a contract aspect to this claim, we would reject Haskell's contention that the trial court improperly subsumed its superior knowledge claim into the breach of contract claim. When

¹⁴ The pertinent part of General Condition 33 on disputes stated: "CONTRACTOR shall not be entitled to claim nor shall OWNER be liable to CONTRACTOR or its lower-tier suppliers or subcontractors in tort (including negligence), or contract except as specifically provided in this contract."

calculating the damages for breach of contract, the trial court declined to credit ConocoPhillips with \$1.7 million as compensation for Haskell's additional costs incurred when ConocoPhillips unreasonably failed to delay the start of the project. Haskell argues that the two claims require different measures of damages—that the remedy for breach of contract is limited to contract damages, while the superior knowledge claim would allow recovery based on additional costs attributable to the opposing party's misrepresentations. The statement of Haskell's preferred measure of damages—relying as it does on ConocoPhillips's misrepresentations—again implies that the claim sounds in *tort*. (See *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 293-295 [fraudulent concealment].) Even so, if a superior knowledge claim might also sound in *contract*, we are convinced that the problem for Haskell was not that it was denied a different remedy, but that it was unable to prove any loss greater than that which it was ultimately awarded. The application of an equitable remedy still requires the plaintiff to prove its damages. (See *id.* at p. 301.) Haskell failed to track its costs, and its record-keeping lapses—combined with the finding that it intentionally inflated its claims—doomed its attempts to recover moneys it believed it spent, but which it did not establish to the satisfaction of the trial court.¹⁵

B. *Lien*

1. Legal Errors

a. *Intent to Defraud*

The trial court granted ConocoPhillips's motion for judgment on the lien cause of action. (See Code Civ. Proc., § 631.8.) Concluding that a mechanic's lien can only include the lesser of the price agreed on or the reasonable value of services, the trial court found Haskell's \$23 million lien filed against ConocoPhillips was excessive. It dismissed the lien foreclosure claim, discharging the lien in its entirety, having found that Haskell acted in bad faith by not reducing the amount of the lien.

¹⁵ In light of this conclusion, we need not address Haskell's other superior knowledge claims of error.

On appeal, Haskell contends that the trial court erred in dismissing this lien cause of action, on various grounds. First, it argues that the trial court made three errors of law in its determination of this claim. As each of these asserted errors requires an interpretation of statute, we review those questions of law anew on appeal. (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 753.) We review the statutory backdrop of Haskell's claims of error.

One who willfully includes in a lien a claim for labor, services, equipment, or materials not furnished, forfeits that lien. (§ 3118.) By contrast, a mistake or error in the demand does not invalidate the lien unless the court finds that the error was made with an intent to defraud. (§ 3261.) Reading these provisions together, courts have held that a lien is forfeited in total only if there is clear and convincing evidence of an intent to defraud. (See *Callahan v. Chatworth Park, Inc.* (1962) 204 Cal.App.2d 597, 607-608 [applying predecessor statutes]; *Henley v. Pacific Fruit etc. Co.* (1912) 19 Cal.App. 728, 734 [same].) This presents an issue of fact for the trial court to determine. (See *Henley* at p. 734.) As the lien claimant, Haskell had the burden of establishing the overall validity of the lien. (See *Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1485.)

On appeal, Haskell asserts that the trial court failed to make a required finding of an intent to defraud warranting application of the lien forfeiture statute. We disagree. By finding that Haskell filed an excessive claim in *bad faith*, the trial court necessarily concluded that Haskell had willfully included improper amounts in its lien with an intent to defraud. A finding of bad faith implies an intent that is fraudulent or designed to mislead. (See, e.g., *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 762.) Thus, the trial court's bad faith finding satisfies us that the trial court found that Haskell acted with an intent to defraud ConocoPhillips.

In a related claim, Haskell contends that the trial court did not make this finding by the appropriate standard of proof. It urges us to find that the dismissal of the lien cause of action should be reversed because the trial court found that Haskell inflated its claims by a preponderance of evidence, not by clear and convincing evidence. Assuming

arguendo that the trial court erred by failing to make this finding by the higher standard of proof, we conclude that reversal of this aspect of the judgment is not required, for several reasons. First, Haskell failed to raise this evidentiary issue in its opening brief. It is unfair for an appellant to raise issues for the first time on appeal in a reply brief, as it deprives the respondent of any opportunity to respond. (See *Smith v. Board of Medical Quality Assurance* (1988) 202 Cal.App.3d 316, 329, fn. 5; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 723, pp. 790-791.)

Second, the record on appeal does not demonstrate that Haskell raised this issue before the trial court. The trial court's tentative decision included similar references to the preponderance of evidence standard and the finding of bad faith supporting the lien forfeiture as those contained in the final statement of decision. Haskell's objections to the tentative decision contained in the record it provided for us on appeal do not cite this claimed error. By failing to raise the issue in the trial court, Haskell deprived that court of an opportunity to correct its assumed error.

Most significantly, we are satisfied that a reversal of the lien dismissal is not required because there is no reasonable likelihood of a different result if the matter were remanded for reconsideration of the lien findings based on the clear and convincing evidence standard. Haskell's moving papers and evidence at trial compel the conclusion that its \$23 million lien filed in September 2005 was excessive. Its original cross-complaint filed the same month sought \$23.2 million. Two years later in its August 2007 amended cross-complaint, that amount sought had been reduced to \$15 million. At trial in August 2008, its expert offered evidence in support of a claim of only \$12.9 million. Belatedly, it sought an opportunity at trial to amend the \$23 million lien, conceding that the lien was greater than the evidence of its right to recover. Haskell's bad faith was clearly inferable from these established facts and admissions. (See *Henley v. Pacific Fruit etc. Co.*, *supra*, 19 Cal.App. at p. 734.) If the matter were remanded, it is not reasonably likely that the trial court would find that the evidence of Haskell's bad faith failed to satisfy the clear and convincing evidence standard. Thus, we are satisfied that any assumed error was harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

For all these reasons, we reject Haskell’s objections to the findings that imply that it acted with an intent to defraud.

b. Statutory Authority

Haskell contends that the trial court made another legal error by applying the wrong statutory provision to determine the lien claim. It asserts that the trial court applied subdivision (b) of section 3123,¹⁶ when it should have applied subdivision (a).¹⁷ Subdivision (b) would apply if the parties had abandoned the underlying contracts; subdivision (a) controls when a contract is in force. (See § 3123, subs. (a) & (b); see *Basic Modular Facilities, Inc. v. Ehsanipour, supra*, 70 Cal.App.4th at pp. 1484-1485.) As there was no abandonment of the contract, the trial court properly applied the terms of subdivision (a) of this statute. (See pt. II., *ante*.)

The trial court determined that ConocoPhillips had breached the contract, which could arguably have entitled Haskell to seek a lien amount determined under subdivision (b), at least insofar as those amounts related to that breach. In those circumstances, the amount of the lien would have been limited to the reasonable value of the labor, services, equipment, and materials that Haskell furnished. (§ 3123, subd. (b).) The trial court determined that amount to be approximately \$1.7 million for ConocoPhillips’s breach of contract—far less than Haskell’s \$23 million lien claim. Thus, we are satisfied that the trial court did not err in applying subdivision (a).

¹⁶ Subdivision (b) of section 3123 states: “This section does not preclude the claimant from including in the lien any amount due for labor, services, equipment, or materials furnished based on a written modification of the contract or as a result of the rescission, abandonment, or breach of the contract. However, in the event of rescission, abandonment, or breach of the contract, the amount of the lien may not exceed the reasonable value of the labor, services, equipment, or materials furnished by the claimant.”

¹⁷ Subdivision (a) of that code states: “The liens provided for in this chapter shall be direct liens, and shall be for the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, whichever is less. The lien shall not be limited in amount by the price stated in the contract as defined in Section 3088, except as provided in Sections 3235 and 3236 and in subdivision (c) of this section.”

c. Impact Damages

Haskell also contends that the trial court erred by concluding that impact damages were not subject to lien. Finding that a mechanic's lien includes only labor and materials, the trial court found that Haskell's lien improperly included claims for delay and impact costs. That legal conclusion matches our own. A mechanics lien is intended to compensate a contractor for the value of "labor, services, equipment, or materials. . . ." (§ 3123, subd. (a).) It does not permit a lien for delay or other impact costs. (*Abbett Electric Corp. v. California Fed. Savings & Loan Assn.* (1991) 230 Cal.App.3d 355, 360; *Lambert v. Superior Court* (1991) 228 Cal.App.3d 383, 388-389.) To the extent that Haskell's contention turns on its attempts to distinguish between impact costs and acceleration costs for schedule recovery, we find that distinction does not warrant a different result. (See *Lambert, supra*, at pp. 388-389 [claims for delay, disruption, and acceleration not included within § 3123].) At trial, Haskell's evidence established that \$10.6 million of the damages it sought were for impact costs. Clearly, those costs should not have been included within the lien. (§§ 3118, 3123, subd. (a), 3261.)

2. Sufficiency of Evidence

Even if the trial court committed no legal errors, Haskell contends that there was insufficient evidence to support the dismissal of its lien cause of action. It bases this assertion on its underlying claims that the contract was abandoned, that subdivision (b) of section 3213 applied, and that its interpretation of the pricing adjustments and record requirements clauses of the contracts and the January 2005 settlement should prevail. As we have rejected each of these underlying assertions, this claim of error necessarily fails.¹⁸ (See pts. II., III.B.-D., V.B.1.b., *ante*.)

¹⁸ We also reject Haskell's contention that the ConocoPhillips defaults on the contract suspended *its* obligation to pay the subcontractor and remove their liens until a judicial determination of sums due was made. (See pt. VI. D.-E., *post*.)

VI. SAFECO JUDGMENT

A. Legal Standard

In Safeco's appeal, it contends that the trial court had no basis to enter judgment against it for breach of the payment bonds. The trial court found for ConocoPhillips on its breach of contract claim against Safeco, concluding that Safeco's failure to pay ConocoPhillips's subcontractors and/or to discharge liens against ConocoPhillips as required by the payment bonds resulted in \$1,109,868 in damages. ConocoPhillips was also awarded more than \$200,000 in prejudgment interest from Safeco, calculated from the dates of ConocoPhillips's own payments to the subcontractors. Ultimately, the total award of \$1.3 million was offset against the damages awarded to Haskell for ConocoPhillips's own breach of contract.

To establish its breach of contract cause of action, ConocoPhillips was required to prove that it did all or substantially all that the contract required it to do; that Safeco failed to do some contractually required act; and that Safeco's failure to meet its contractual obligation was a substantial factor causing damage to ConocoPhillips. (See *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 871.) The trial court found that ConocoPhillips established all these elements. Specifically, it found that ConocoPhillips performed all or substantially all of the contractual requirements *of the bonds*;¹⁹ that Safeco failed to pay Haskell's subcontractors and/or to discharge their liens against ConocoPhillips's property as required by the bonds; and that this failure was a substantial factor causing \$1,109,068 harm to ConocoPhillips. If substantial evidence supports these findings, we must uphold the breach of contract judgment on appeal. (See *Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1290-1293; *Chapple v. Big Bear Super Market No. 3* (1980) 108 Cal.App.3d 867, 876 [damages].)

A surety bond is construed strongly against the surety and in favor of all persons for whose benefit the bond was given. (§ 3226.) The bond is interpreted according to the

¹⁹ On another cause of action, the trial court also found that ConocoPhillips substantially performed all of its significant obligations *under the construction contracts*.

same rules applying to the interpretation of other contracts. (§ 2837; *First National Ins. Co. v. Cam Painting, Inc.* (2009) 173 Cal.App.4th 1355, 1365; *Amwest Surety Ins. Co. v. Patriot Homes, Inc.* (2005) 135 Cal.App.4th 82, 86.) On appeal, we seek to determine the intent of the parties, based primarily on the words of the bond. If the facts are undisputed, we conduct an independent review on appeal to determine the meaning of the bond language. (*First National Ins. Co., supra*, at p. 1365; *Amwest Surety Ins. Co., supra*, at pp. 86-87.)

B. Lack of Damages

On appeal, Safeco raises several challenges to the trial court's judgment. First, it reasons that because its insured Haskell was entitled to a *net* judgment, as a matter of law, ConocoPhillips suffered no damages from its failure to pay on the bonds. This argument is consistent with the position that Safeco took at trial—that it was not required to pay ConocoPhillips because ConocoPhillips still owed sums to Haskell. We disagree.

State law limits Safeco's defenses to performance of the bond. Safeco was not released from liability to those for whose benefit the bond was given by reason of any breach of contract between ConocoPhillips and Haskell, nor any change in the contracts between those parties. (See §§ 3225, 3226; *R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 156-157.) The subcontractors were unaffected by disputes between Haskell and ConocoPhillips, but had a right to look to Safeco to pay for labor and materials incurred when performing their work. (See *Patten & Davies Lbr. Co. v. McConville* (1933) 219 Cal. 161, 174.)

Safeco counters that this statutory limitation does not apply because it relates to its obligations to the *subcontractors*, not its duties to *ConocoPhillips*. It reasons that the payment bonds created separate duties to the subcontractors and ConocoPhillips. The payment bonds provided that Safeco owed ConocoPhillips a duty to make payment of all sums due to the subcontractors. Because Safeco breached *that* duty, ConocoPhillips's property was burdened by the mechanics' liens filed by those unpaid subcontractors. In order to remove those liens, ConocoPhillips paid the subcontractors the sums that Safeco refused to pay.

One who suffers detriment from the unlawful act or omission of another may recover damages from the party at fault. (§ 3281.) Forced to pay the subcontractors, ConocoPhillips incurred damage from Safeco's breach of the *payment bonds*, despite the fact that those damages were offset against the damages Haskell suffered because of ConocoPhillips's breaches of the *construction contracts*. The joint trial of the causes of action on breach of the construction contracts and breach of the payment bonds did not preclude a finding of damage on each cause of action.

C. No Duty to ConocoPhillips Breached

Safeco also asserts that it violated no duty to ConocoPhillips to pay subcontractors or to indemnify or defend ConocoPhillips. It reasons that the bonds only obligated Safeco to pay Haskell's subcontractors. Again, we disagree. Under the terms of the payment bonds, Safeco also owed ConocoPhillips a duty to pay all sums due to the subcontractors. By its refusal to pay, Safeco breached its duties to both the subcontractors *and* ConocoPhillips.

D. Subcontractor Payment Not Yet Due

Safeco also contends that the lien amounts claimed by the subcontractors were not due to them under the terms of the payment bonds. Those bonds obligated Safeco to pay all sums "due" to the subcontractors. Safeco reasons that the amounts due to Haskell and its subcontractors were interconnected, and that because ConocoPhillips disputed the amounts its contractor Haskell claimed were due, a judicial determination was required to resolve both that matter and the related matter of what sums were due to the subcontractors. It urges us to find that until the amount due to Haskell was determined by a court, no sum became due to the subcontractors within the meaning of the payment bonds.

This reasoning is both factually and legally flawed. Factually, it relies on Safeco's assertion that ConocoPhillips abandoned the change order process, requiring judicial resolution of the construction contract issues. The trial court found no abandonment and specifically found that, despite failure to pay some reasonable costs that Haskell sought under the construction contracts, ConocoPhillips substantially performed its significant

obligations under both the construction contracts and the payment bonds. Legally, Safeco’s reasoning would relieve it of any obligation to pay Haskell’s subcontractors under the terms of the payment bonds because of the construction contract dispute between ConocoPhillips and Haskell. As that legal argument is contrary to state law, we must reject it. (See §§ 3225, 3226; *R. P. Richards, Inc. v. Chartered Construction Corp.*, *supra*, 83 Cal.App.4th at p. 156-157; see also *Patten & Davies Lbr. Co. v. McConville*, *supra*, 219 Cal. at p. 174.)

E. ConocoPhillips’s Default

Finally, Safeco asserts that ConocoPhillips was in default on the construction contracts, thus relieving Safeco of its duties under the payment bonds. Those bonds provided that Safeco’s obligations to ConocoPhillips were null and void if (1) Haskell promptly made payments to the subcontractors *and* (2) Haskell held ConocoPhillips harmless for any subcontractors’ liens that ConocoPhillips promptly notified Haskell and Safeco about, provided that ConocoPhillips did not default on its obligations. Safeco contends that because ConocoPhillips failed to pay Haskell according to the terms of the construction contracts, ConocoPhillips was in default, nullifying Safeco’s obligations under the payment bonds.

The “null and void” clause of the payment bonds is conjunctive—it applies only if *both* conditions are met. (See *Pacific Caisson & Shoring, Inc. v. Bernard Bros. Inc.* (2011) 198 Cal.App.4th 681, 694; *County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 648.) Thus, even if ConocoPhillips’s breach of the construction contracts constituted a default on the bonds within the terms of the second condition, Safeco has not demonstrated that the first condition of bond nullification was met. The undisputed evidence at trial established that Haskell *refused* to pay the subcontractors.²⁰ As Haskell failed to pay the sums due to its subcontractors, Safeco’s obligations to ConocoPhillips under the terms of the bonds were *not* nullified. (See

²⁰ Instead, ConocoPhillips paid the subcontractors, which could be interpreted as an act to prevent any default on the payment bonds.

California Wildlife, supra, at p. 648.) The trial court properly found Safeco liable for breach of its payment bonds.

VII. POSTJUDGMENT ISSUES

A. *Prejudgment Interest*

1. Trial Court Award

Haskell and Safeco contend that the trial court erred as a matter of law by awarding ConocoPhillips \$201,176 in prejudgment interest. They do not dispute the amount awarded; their attack goes to ConocoPhillips's entitlement to any prejudgment interest.

The trial court's *tentative decision* found that the sums owed to Haskell and ConocoPhillips constituted liquidated damages, entitling each to prejudgment interest. The trial court based Haskell's prejudgment interest on its \$7.2 million award before offset, not its net award, and ran that interest from February 1, 2008. ConocoPhillips's prejudgment interest was to run from the dates of three payments it made to Haskell's subcontractors between December 2006 and May 2007.

In its *final statement of decision*, the trial court reaffirmed that the amounts Haskell and Safeco owed to ConocoPhillips on the payment bonds were liquidated damages. However, it made no finding that the damages that ConocoPhillips owed to Haskell on the construction contracts were liquidated. The trial court awarded prejudgment interest to both parties. ConocoPhillips's award of prejudgment interest ran from the date of its 2006 and 2007 payments to the subcontractors. Haskell's prejudgment interest was calculated from February 2008, soon after its expert made a revised claim to ConocoPhillips. The ConocoPhillips award and interest were offset against Haskell's award and interest, giving a net award to Haskell.

2. Timing of Offset

The trial court offset ConocoPhillips's award against Haskell's award *after* adding in prejudgment interest for each. On appeal, Haskell contends that the offset should have

occurred *before* any award of prejudgment interest to ConocoPhillips. It reasons that because the \$1.1 million award to ConocoPhillips was completely offset by the greater award that ConocoPhillips owed to Haskell, there was no balance on which to calculate *any* prejudgment interest for ConocoPhillips.

ConocoPhillips's damages from Safeco's breach of its payment bonds were liquidated damages. Prejudgment interest on a liquidated damages award is deemed to be an element of compensatory damages. (*Great Western Drywall, Inc. v. Roel Construction Co., Inc.* (2008) 166 Cal.App.4th 761, 767.) As ConocoPhillips was entitled to recover liquidated damages—damages that were certain or capable of being made certain by calculation as of a certain date—it was *entitled* to recover prejudgment interest on those damages calculated from that date. (See § 3287, subd. (a); *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 132 [courts broadly construe statute]; *Leff v. Gunter* (1983) 33 Cal.3d 508, 520 [prejudgment interest as matter of right].) By contrast, Haskell was awarded *unliquidated* damages for breach of its construction contracts. Haskell had no statutory *right* to prejudgment interest—the trial court exercised its *discretion* to award such interest. (See § 3287, subd. (b).)

When a party is entitled to prejudgment interest on liquidated damages but those damages are to be reduced by offset of damages on an unliquidated claim, prejudgment interest is awarded on the balance of the liquidated claim after deduction of the unliquidated setoff. (*Bentz Plumbing & Heating v. Favaloro* (1982) 128 Cal.App.3d 145, 152; *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 376; see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 891, p. 983.) In the cited cases, the liquidated damages are greater than the unliquidated damages, limiting prejudgment interest to the balance of the liquidated damages award. Our case is the converse—ConocoPhillips's \$1.1 million liquidated damages award is less than Haskell's \$2.3 million unliquidated damages.

On appeal, Haskell urges us to apply the offset principles and deny ConocoPhillips any prejudgment interest at all. As ConocoPhillips's liquidated damages award was fully offset by Haskell's unliquidated damage award, Haskell reasons that the offset left no

balance in ConocoPhillips's favor on which to calculate any prejudgment interest. We have found no cases addressing this factual circumstance, but various factors satisfy us that the trial court fashioned an appropriate determination of prejudgment interest in this matter.

One factor is that offsetting unliquidated damages does not render a liquidated damage award unliquidated. (*Great Western Drywall, Inc. v. Roel Construction Co., Inc.*, *supra*, 166 Cal.App.4th at pp. 768-770.) Even if there is an offset, prejudgment interest remains an element of compensatory damages on ConocoPhillips's liquidated damages claim. (*Id.* at p. 767.) Failing to award ConocoPhillips *any* prejudgment interest at all would defeat this basic principle of compensation.

Second, the cases requiring offset of awards and calculating prejudgment interest based only on the balance arose in the context of a claim and counterclaim made pursuant to the *same* contract. (See *Great Western Drywall, Inc. v. Roel Construction Co., Inc.*, *supra*, 166 Cal.App.4th at pp. 768-770; *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 285.) In our case, each award was made pursuant to a *different* contract. As the two awards were not grounded in the same contract, they were not as fully intertwined as those in the cited cases.

Third, it bears considering that while ConocoPhillips was *entitled* to an award of prejudgment interest, Haskell's award of interest was not a matter of right, but was *discretionary*.²¹ (§ 3287.) Finally, we consider that ultimately, ConocoPhillips's award and prejudgment interest were offset against Haskell's award and prejudgment interest. Considering all these circumstances, we are satisfied that the trial court properly awarded prejudgment interest to ConocoPhillips before offsetting its award against Haskell's damages.

²¹ Haskell's argument implies that a simple recalculation of the damages would cure any error. We disagree. If we reversed the trial court's award of prejudgment interest, we would remand the matter to the trial court to reconsider its prejudgment interest determinations, including whether it would exercise its discretion to award interest to Haskell if ConocoPhillips would not receive any interest.

B. Expert Witness Fees

After trial, ConocoPhillips sought more than \$540,000 in expert witness fees in its motion for costs, of which more than \$485,000 was designated as postoffer costs. It reasoned that as its \$2.9 million pretrial offer was greater than the \$2.3 million net award to Haskell, ConocoPhillips was statutorily entitled to these fees. (See Code Civ. Proc., § 998.) Haskell moved to tax costs, arguing that its \$3.6 million award before offset was greater than the pretrial offer. The trial court found—as a matter of law—that Haskell did *not* obtain a more favorable judgment than the pretrial offer. It awarded \$200,000 in expert witness fees to ConocoPhillips from Haskell. That amount was reduced by \$25,200 for preoffer costs to which Haskell was entitled as the prevailing party in its action against ConocoPhillips. The net cost award of \$174,800 was deducted from Haskell’s \$2.3 million net award.

As a general rule, Haskell—as the prevailing party in its action against ConocoPhillips—would have a right to recover its costs. (See Code Civ. Proc., § 1032; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 798.) However, costs may be shifted if a party refuses to settle. If the prevailing party at trial obtains a judgment less favorable than the pretrial settlement offer made by the other party, then the prevailing party may not recover its own postoffer costs and must pay the opposing party’s postoffer costs, which may include costs of expert witnesses. (Code Civ. Proc., § 998, subs. (a), (c)(1) & (e); *Barella, supra*, at p. 798.)

On appeal, Haskell²² challenges the trial court’s assessment that its award was less than ConocoPhillips’s pretrial offer. It contends that the trial court should have compared ConocoPhillips’s \$2.9 million offer with the \$3.6 million award Haskell won *before offset* of the \$1.3 million judgment for ConocoPhillips, rather than with Haskell’s \$2.3 million net award. It reasons that because the pretrial offer did not propose to release Safeco’s obligations to ConocoPhillips, the \$1.3 million judgment against Safeco could

²² Safeco’s argument that it was not required to pay ConocoPhillips’s expert witness fees was also rejected by the trial court. That court ordered Safeco to pay \$8,000 of ConocoPhillips’s costs. Safeco does not appear to challenge this ruling on appeal.

not be deducted from the overall award for purposes of determining whether that offer was greater than the judgment Haskell obtained after trial. (Code Civ. Proc., § 998.)

Haskell's reasoning turns on its underlying assertion that the ConocoPhillips offer was addressed to Haskell only, and made no express reference to Safeco. It urges us to find that Safeco was not bound by the terms of ConocoPhillips's pretrial offer, and thus that the \$1.3 million judgment against Safeco that was actually offset against Haskell's award should not be part of the assessment when determining which was greater—the ConocoPhillips offer or the Haskell judgment.

ConocoPhillips's pretrial offer was addressed to Haskell and made no express reference to Safeco. However, it was offered in full satisfaction of all claims asserted by ConocoPhillips and Haskell against each other in the underlying action. In this matter, Safeco acted as Haskell's surety. A surety promises to pay the debt of another—the principal. (§ 2787; *R. P. Richards, Inc. v. Chartered Construction Corp.*, *supra*, 83 Cal.App.4th at p. 154.) Once the principal has been released from liability, the liability of the surety also ceases. (Civ. Code, § 2810.) Thus, any ConocoPhillips release of Haskell's liability would also have exonerated Safeco by operation of law. (See Civ. Code, § 2819; *R. P. Richards, Inc.*, *supra*, 83 Cal.App.4th at pp. 154-155.)

Another factor persuades us that the trial court reached the proper result. By offering to dismiss its own action as part of the pretrial offer, ConocoPhillips also agreed to give up its right to recover \$1.1 million for the sums it was forced to pay Haskell's subcontractors. Thus, the total value of ConocoPhillips's offer was \$4 million—the \$2.9 million it offered to pay Haskell and the \$1.1 million in payments for which it would not seek reimbursement. That \$4 million offer was greater than Haskell's judgment, whether that judgment was measured before or after offset. We are satisfied that the trial court properly required Haskell to pay ConocoPhillips's postoffer expert witness fees. (See Code Civ. Proc., § 998.)

VIII.
UNAPPLIED CREDIT

In its cross-appeal, ConocoPhillips contends that the trial court erred by failing to credit it with \$1.7 million in costs that were resolved in the January 2005 settlement. The trial court began its calculation of Haskell's damages by concluding that Haskell incurred \$7.2 million in direct costs on disputed change orders. Of that amount, \$3.27 million was incurred during pre-turnaround. ConocoPhillips argued that \$1.7 million of that \$3.27 million was costs that were resolved in the January 2005 settlement and thus should be deducted from the \$7.2 million base amount of damages.

The trial court considered this possibility but ultimately declined to apply a \$1.7 million offset, opting instead to *exercise its discretion* to fashion a more equitable award. In support of this decision, the trial court cited the fact that the entire dispute began because ConocoPhillips failed to inform Haskell to delay the start of work until foundation work by other contractors had been completed. By failing to make alternative arrangements with Haskell, the trial court concluded that ConocoPhillips owed some additional compensation to Haskell. The trial court also weighed in the fact that it had discounted Haskell's claim for impact damages and had not allowed it any of the normal markup on the costs it reported. Ultimately, it concluded that a net \$2.3 million recovery for Haskell that did not include a \$1.7 million credit for ConocoPhillips was fair and just.

On appeal, ConocoPhillips argues that the trial court had no equitable authority to do anything but apply the contractual terms of the settlement. Even if it had this equitable power, ConocoPhillips contends that the trial court erred in denying the proposed offset, reasoning that Haskell's falsification of its claims made it ineligible for any equitable benefit. We see two flaws in this analysis.

First, ConocoPhillips's claim of error assumes that the trial court failed to award it a \$1.7 million damages credit to which it was entitled because of *Haskell's* conduct. The trial court's statement of decision reveals that its exercise of discretion not to credit this sum was an attempt to compensate Haskell for *ConocoPhillips's* unreasonable conduct. ConocoPhillips failed to advise Haskell to delay the start of its work until the work site

was ready for Haskell’s workers. It compounded this failure by refusing to pay reasonable additional compensation for the consequences of its own misconduct. The record supports the trial court’s conclusion that *each party* bore *some* responsibility for the construction contract dispute. Our review of the record satisfies us that the trial court set \$1.7 million as an appropriate measure of damages to compensate Haskell for ConocoPhillips’s failure to pay a reasonable sum for the additional work that its own failings created. By not awarding ConocoPhillips the credit it sought, the trial court effectively awarded those damages to Haskell for ConocoPhillips’s misconduct. We conclude that the trial court, sitting as the trier of fact in this court trial, had the authority to assess these damages against ConocoPhillips.

ConocoPhillips’s *agreement* that the trial court had authority to make an equitable calculation of damages constitutes an alternative ground to uphold the trial court’s assessment. At trial, ConocoPhillips and Haskell each estimated the damages—or lack of them—based on “all or nothing” assumptions of their views of the case. Neither side offered the trial court any middle ground on damages, leaving the court to attempt what it termed “rough justice” in fashioning an award. When asked, ConocoPhillips *agreed* that the trial court could apply equitable principles to calculate a damage award for breach of contract.

When a party’s own conduct induces the commission of an error, the error is deemed to be invited, barring that party from asserting it as grounds for reversal on appeal. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501 [waiver]; *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166 [estoppel]; see 9 Witkin, Cal. Procedure, *supra*, Appeal, §§ 389, 394, pp. 447-448, 452-453.) Even if we were not satisfied that the trial court’s calculation of damages was proper,

ConocoPhillips may not challenge the trial court's equitable determination of breach of contract damages.

The judgment and the cost order are affirmed.

Reardon, Acting P.J.

We concur:

Sepulveda, J.*

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.