Supreme Court No. 92268-3
(From Court of Appeals Div 1, No. 72258-1)

SUPREME COURT OF THE STATE OF WASHINGTON

SAK & ASSOCIATES, INC., a Washington corporation,

Petitioner-Appellant,

v.

FERGUSON CONSTRUCTION, INC., a Washington corporation,

Respondents.

PETITION FOR REVIEW UNDER RAP 13.4

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A. IDENTITY OF PETITIONER

Petitioner, SAK & Associates, Inc. ("SAK"), was Appellant below and Plaintiff in the initial underlying action. Further identification is included in the Statement of the Case, section D herein.

B. COURT OF APPEALS DECISION

SAK seeks review of the Court of Appeals Division I published opinion filed on August 10, 2015. *SAK & Associates, Inc. v. Ferguson Construction, Inc.*, No. 72258-1-I. A copy is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

The fundamental issue for review is whether "termination for convenience" is a legal term of art that must be construed as a legal phrase with limitations that have been established in caselaw, or, conversely, whether it is an ordinary phrase to be given a layperson meaning. If given ordinary meaning it will render termination "for cause" clauses as dead letters. If given ordinary meaning, contractors may terminate at their whim and abrogate established law regarding illusory contracts.

The Court of Appeals erred by not construing "termination for convenience as a legal term of art. "Consideration" for contract formation is a legal term of art. "Termination for convenience" is a term defined by caselaw and is also a legal term of art. Giving "convenience" ordinary meaning upends much established law and threatens to cause severe harm

in the construction industry. "[W]hen language to be construed is a legal phrase or term, the meaning is sought in the former or current decisions of the courts."[1] The Court of Appeals correctly recognized as follows:

> The concept of 'termination for convenience' in contracts dates back to the American Civil War. To avoid costly military procurements when changes in war-time technology or cessation of conflict rendered them unnecessary, the federal government included termination for convenience clauses in its contracts. Under certain circumstances, the government terminated wartime contracts that were no longer necessary and settled with the contractor for partial performance.[2]

Despite acknowledging the origin of the legal doctrine, the court failed to give the term its legal meaning and failed to recognize that it has particular legal parameters and, instead, erroneously upheld a termination based on whim even while factual questions plainly existed as to whether any changes in the project had rendered the terminated work unnecessary.

Although the Opinion started by correctly identifying that the doctrine of termination for convenience arose from exigent circumstances where changes affected contracts and "rendered them unnecessary," and that the contracts terminated for convenience were in circumstances where the contracts "were no longer necessary," the remainder of the Opinion failed to incorporate the evolved legal meaning for "convenience" and instead gave "convenience" the ordinary meaning that a layperson would use, allowing a termination based on pure discretion or whim.

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[1] *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826 (1945).
[2] Opinion, Case No. 72258-1-I, p3 (emphasis added) (citation omitted).

The Opinion identified that for this dispute: "The notice of termination referred to 'phasing restrictions, site logistics, and basic convenience.'"[3] The Opinion correctly identified Petitioner's contention:

> SAK complains that Ferguson's references to phasing, site logistics, and convenience were merely false and pretextual excuses for Ferguson's goal of increasing its profits from the project.[4]

But the Opinion then ignored factual disputes demonstrating that the terminated work was not rendered unnecessary and was simply performed by replacement contractors. Rather than recognize that terminations for convenience are intended for and appropriate only in "certain circumstance," the court failed to give convenience its legal meaning and held as follows: "Nothing in the termination for convenience clause required that the notice state any reason beyond 'convenience.'"[5]

The court ignored whether any changes had actually occurred on the project or whether phasing restrictions and site logistics were purely pretextual grounds to terminate and hire a new contractor after promising SAK a definite scope of work. The court simply upheld termination based on raw discretion and ignored both the stated grounds for termination and also the caselaw where the termination for convenience doctrine arose.

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[3] Opinion, Case No. 72258-1-I, p2 (citation omitted).
[4] Opinion, Case No. 72258-1-I, p12.
[5] Opinion, Case No. 72258-1-I, p12.

Although the termination notice had, consistent with the legal doctrine, implied that changes rendered the work unnecessary as a result of phasing restrictions and site logistics, the court gave an unrestricted free-pass to terminate with no restrictions and with no regard for circumstances. A decision from the Washington Supreme Court is desperately needed to reverse this Opinion and preserve contracting integrity in the construction industry. The specific, baleful ramifications for the construction industry are discussed further in Section E below.

Consequently, the pivotal issue is whether "termination for convenience" is a legal term of art that requires meaning consistent with a legal doctrine.[6] Answering this question in the affirmative requires reversal. That and ancillary issues for review are identified as follows:

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[6] When a term is familiar from caselaw, statute, or an evolved doctrine then it "is given its familiar legal meaning." *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041 (1976), citing *Bradley v. United States*, 410 U.S. 605, 609, 93 S.Ct. 1151 (1973). This treatment of "termination for convenience" clauses between arms-length contractors is unlike rules of interpretation for insurance policies where by rule policies are to be construed in favor of the disadvantaged insured, but even in that context it is true that legal meanings prevail "[i]f words have both a legal, technical meaning and plain, ordinary meaning,...[and] it is clear that both parties intended the legal technical meaning to apply." *Kitsap Cty v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998), citing *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990). Parties to a construction contract containing termination "for cause" clauses cannot have intended "termination for convenience" to allow unrestricted terminations at whim. Such an interpretation renders termination clauses "for cause" as superfluous and meaningless. Moreover, "terms must interpreted in light of reasonable industry custom and usage." *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 255, 510 P.2d 221 (1973). The usage and custom in the construction industry for terminations for convenience have been determined by established caselaw, and not the layperson meaning of "convenience."

1. The Court of Appeals erred by failing to give "termination for convenience" any legal meaning and instead gave "convenience" layperson or ordinary meaning, to wit, discretion or whim.

2. The Court of Appeals erred by holding: "Nothing in the termination for convenience clause required that the notice state any reason beyond 'convenience.'"[7] The Opinion had correctly identified: "'Reasonable notice' is 'notice or information of a fact as may fairly and properly be expected or required in the particular circumstance."[8] However, despite the fact that this "particular circumstance" involved purported grounds tying the notice to phasing restrictions, site logistics, and statement that SAK's services were no longer needed (grounds that implicates the legal meaning of "convenience"), the court ignored the particular circumstances and allowed an allegation of mere "convenience" as sufficient to terminate without definition, without restriction, and despite other stated grounds that proved to be false.

3. The Court of Appeals erred by not finding a mixed question of law and fact as to whether the notice of termination was reasonable: "Whether particular notice was reasonable is ordinarily a question of fact for the jury."[9] A proper resolution would involve the courts establishing the legal meaning and parameters for the proper exercise of a termination for convenience clause in order to avoid rendering the usage illusory, followed by a factual determination by a jury or judge as to whether the facts and particular circumstances resulted in reasonable notice as applied.

4. The Court of Appeals erred by holding: "The termination for convenience clause requires written notice to the subcontractor, but does not specify the content of the notice."[10] By saying the court again ignored that "termination for convenience" is a legal term of art. Having made that mistake, the court placed no burden on the terminating party to accurately state the grounds for termination or to invoke the termination for convenience clause only in appropriate circumstance. The court's ruling that no meaningful

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[7] Opinion, Case No. 72258-1-I, p12.
[8] Opinion, Case No. 72258-1-I, p11.
[9] *See Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 767, 145 P.3d 1253 (2006).
[10] Opinion, Case No. 72258-1-I, p12.

notice was required is directly contrary to this Court's ruling that: "'Reasonable notice' is 'notice or information of a fact as may fairly and properly be expected or required in the particular circumstances."[11] The court erred by giving the terminating party a free pass to execute an unrestricted, undefined notice of termination with no regard to either the "particular circumstances" or the legal meaning of termination for convenience.[12]

5. The Court of Appeals erred by ruling that what occurred was "simply a termination for convenience, which was contemplated by the parties in the clear language of the contract."[13] The Court of Appeals has ignored that the terminating party itself contemplated that terminations for convenience involved changes to the project because the terminating party based the notice on purported phasing restrictions and site logistics. The court ignored that the terminated party understood the termination for convenience clause to have a legal meaning and that it has industry meaning established by caselaw. The court unfortunately assumed its conclusion by stating that the termination occurred as contemplated by the contract. To the contrary, first the legal meaning and limits of "termination for convenience" must be established before a conclusion can be reached as to whether the termination was as contemplated by the contract. Mixed questions of law and fact exist as to whether that was the case here.

6. The Court of Appeals erred by making a premature finding that the termination was consistent with "'the objective manifestations' of the intent of the parties."[14] As discussed above, the objective manifestations of the intent of the parties demonstrates a mixed question of law and fact because the terminating party manifested an intent to base termination on changes in work by invoking phasing restrictions and site logistics as the grounds for termination, and further stating that SAK's services were no longer

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[11] *Lano v. Osberg Constr. Co.*, 67 Wn.2d 659, 663, 409 P.2d 466 (1966) (quoting Black's Law Dictionary 1211 (4th ed. 1951)).

[12] The Opinion went so far as to state: "Nothing in the termination for convenience clause required that the notice state any reason beyond 'convenience.'" Opinion, Case No. 72258-1-I, p12. This abrogates the rule from *Lano* that notice must be "reasonable notice," and the rule from *Cascade Auto Glass* that whether "particular notice was reasonable is ordinarily a question of fact."

[13] Opinion, Case No. 72258-1-I, p12.

[14] Opinion, Case No. 72258-1-I, p10.

needed. Because this matter was decided on summary judgment by the trial court, it's premature for the court to have made a ruling about the objective manifestations of the intent of the parties because that too is a factual question on which genuine issues of material fact plainly existed.[15]

7. The Court of Appeals erred by avoiding giving the term legal meaning, avoiding analyzing the particular circumstances in which the term was invoked, and instead saying: "The parties could have negotiated other limitations or terms of payment upon a termination for convenience, but they did not do so."[16] This places a burden on contracting parties that does not exist to incorporate a body of legal doctrine into their contract language when instead parties are entitled to rely on the belief that courts will interpret contract clauses consistent with their legal meanings. The terminated party was entitled to rely on the belief that a termination for convenience clause would be exercised consistent with its legal meaning, only in certain circumstances, and that it would not be exercised in a way that renders the clause illusory.

8. Washington law establishes that a contract clause becomes illusory and should not be enforced when performance is "optional with the promisor;"[17] however, the court erred by allowing a termination that was unrestricted, not based on the factual circumstances, and purely "optional" by the promisor exercising the clause.

9. The Court of Appeals erred by declining to incorporate, utilize, and rely upon an established body of caselaw where the "termination for convenience" doctrine arose and instead short-circuited the analysis for the following purported reason: "There is very limited authority addressing termination for convenience clauses in private contracts."[18] Rather than give meaning to the body of law where

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[15] "[I]ntent is a factual question." *Columbia Asset Recovery Group, LLC v. Kelly*, 177 Wn. App. 475, 485, 312 P.3d 687 (2013). "Because intent is a factual question that was not resolved in the trial court, the ...argument is contingent upon the fact finder's determination of what the parties intended and should therefore be considered by the trial court only after the intent of the paties...is determined." *Id.* at 485-86.

[16] Opinion, Case No. 72258-1-I, p10.

[17] *See Mithen v. Board of Trustees of Central Wash. St. College*, 23 Wn. App. 925, 932, 599 P.2d 8 (1979) (cited with approval in *King County v. Taxpayers of King County*, 133 Wn.2d 584, 600, 949 P.2d 1260 (1997) (*en banc*)).

[18] Opinion, Case No. 72258-1-I, p4.

the legal doctrine arose and evolved, the court erred by following two poorly reasoned state court decisions that likewise ignore that "termination for convenience" has a legal meaning and limits.[19]

10. The Court of Appeals erred by misapplying a partial performance doctrine to these facts as a basis for finding consideration in what would otherwise be an illusory application of a termination for convenience. That doctrine would only apply to prevent SAK from seeking to declare the contract illusory after SAK had partially performed. With no citation to Washington authority and citation to only two commentators, the court asserted: "It is well recognized that partial performance provides adequate consideration for enforcement of what otherwise might be an illusory provision granting unilateral control to one party."[20] Indeed, the limited partial performance by SAK would constitute consideration for SAK's acceptance of the contract clause that might otherwise be illusory and would prevent SAK from seeking to terminate the contract on the ground of it being illusory. However, the court turns partial performance on its head by saying the terminating party is then free to terminate the contract in an illusory fashion, with no restriction. To the contrary, our Washington courts have defined when the right to terminate is not illusory: "Agreements that permit one party to cancel or terminate the undertaking are not illusory <u>if there is some restriction upon the power</u> to terminate."[21] By its own explicit holdings, the court removed any restriction to terminate holding that "[n]othing" was

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[19] Opinion, Case No. 72258-1-I, p4. In a footnote, the Opinion cited a Maryland case that asserted "[T]he federal government stands in a position entirely uncomparable to that of a private person;" and a Florida court that said "[W]e find limited value in these federal procurement cases." Washington should not join those states that have declined to acknowledge that "termination for convenience" is a legal doctrine. And Washington should not take the same easy and unprincipled "out" that those two state courts took by declining to give significance to the very body of law where the doctrine arose and evolved. It is poor reasoning to make an artificial distinction between private or government contracts. The only germane question is whether "termination for convenience" is a legal doctrine. Even in the context of private contracting, contracts cannot be interpreted in a manner that renders a clause illusory so when a "termination for convenience" clause is utilized in a private contract to have any meaning it still must be subject to the parameters that accompany the legal doctrine (which was developed in the context of government contracting).

[20] Opinion, Case No. 72258-1-I, pp7-8 (absent a single citation to Washington law).

[21] *See Omni Group, Inc. v. Seattle-First Nat'l Bank*, 32 Wn. App. 22, 28, 645 P.2d 727 (1982) (emphasis added).

required other than a statement of "convenience."[22] By failing to recognize that a restriction must exist on the right to terminate to prevent it from being illusory, and by misapplying the partial performance doctrine in favor of the wrong party, the court turned our law on illusory contracts into tautology.[23]

11. The Court of Appeals erred by wading into and weighing factual determinations on a case that had been decided on summary judgment when it concluded that the "level of performance provides adequate consideration."[24] Delving into factual considerations, the court explained: "Here, SAK completed 24 percent of the project, and Ferguson paid a proportionate amount of the fixed contract price."[25] SAK had put into evidence that its contract pricing was based not on 24 percent of the work but on the total work scope promised; hence the failure in consideration by being deprived the amount of work on which the price was based. The court had no basis to make a factual line-drawing conclusion about when enough work has been performed.

12. The Court of Appeals erred by relying upon or finding support from the inapplicable holding in *Myers v. State*, 152 Wn. App. 823, 828, 218 P.3d 241 (2009). In that case the validity of the "termination for convenience" clause was not even challenged or the subject of the appeal. Moreover, that case involved a services contract for an indefinite period of time and for such a contract a termination for convenience clause is a superfluous clause serving

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[22] Opinion, Case No. 72258-1-I, p12.

[23] "An 'illusory promise' is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance." *Interchange Assoc. v. Interchange, Inc.*, 16 Wn. App. 359, 360-61, 557 P.2d 357 (Div. 1, 1976) (reh'g denied 1977); *see also Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 458, 287 P.2d 734 (1955). It is undisputed that Ferguson promised SAK a fixed-sum contract for an identified, agreed scope of work and that SAK's pricing was based on the full scope promised. If Ferguson is allowed to terminate that scope without restriction (i.e,, changes to the project consistent with the termination for convenience doctrine), then the promise of an agreed scope is illusory and in the application of the termination for convenience clause invalid. To say that partial performance prevents SAK from seeking to have the contract declared illusory is a different scenario, but to say that SAK's partial performance then creates consideration for Ferguson to cease performance abrogates both the requirement of consideration for both parties and turns the partial performance doctrine on its head.

[24] Opinion, Case No. 72258-1-I, p8.

[25] Opinion, Case No. 72258-1-I, p8.

no purpose because when no contract duration is promised there is no restriction on the ability of a party to terminate the duration of a contract. That decision is patently inapplicable to the issues presented for review.

13. Absent Washington authority discussing the birth, evolution, and parameters for the "termination for convenience" doctrine, the Court of Appeals erred by failing to recognize and utilize the well-reasoned decision in the seminal decision *Torncello v. United States*, 681 F.2d 756, 758 (Ct. Cl. 1982). In that case, a party was awarded a contract and after partial performance had a portion of the contract removed and awarded to other contractors, making the facts squarely analogous to those presented in this case. Like SAK, the contractor argued that the effect of the termination for convenience was to allow Defendant to "walk away from plaintiff's contract with impunity." *Id.* at 760. The court agreed noting, as argued here that: "as one of the most elementary propositions of contract law ... a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void...." *Id.* The ruling was based not on government contract law, but on elementary propositions of contract law. The *Tornecello* court engaged in a lengthy discussion of the history of termination for convenience provisions, ultimately determining that they were appropriately used as "an allocation of risk of changed conditions." *Id.* at 736-66 (discussion of history of termination for convenience provisions) (emphasis added). The court concluded that: "When a party seeks to restrict to itself an unlimited right to escape its promises, as termination on knowledge acquired before the contract award surely is, it risks violating one of contract law's most fundamental principles, that all contracts must be supported by consideration." *Id.* at 768 (citation omitted). In order to save the contract from being void, the court restricted the availability of the clause to situations where the circumstances of the bargain or parties' expectations changed sufficiently that the provision served "only to allocate risk." In other words, the provision did not apply in this circumstance and the terminating party was in breach of the contract. *Id.* at 757, 771. An issue presented for review is whether Washington should provide clarity to the industry by actually giving legal meaning to the "termination for convenience" doctrine. *Torncello* is the most instructive case available, is on all

fours factually with the case being petitioned, is soundly reasoned, is consistent with Washington's own contract law holdings, is consistent with the parties manifest anticipations here because allegations were made about changes to the project in terms of phasing restrictions and site logistics (which proved false), and should be considered in establishing Washington law on this important question.

14. Having failed to reverse the trial court, the Court of Appeals erred by not reversing the trial court's award of fees to Ferguson and by awarding fees and costs to Ferguson on appeal, and by not awarding fees to SAK which should occur when SAK prevails.

D. STATEMENT OF THE CASE

This case arises out of a termination for convenience by Ferguson Construction, Inc. ("Ferguson") of its subcontract with SAK. On April 19, 2012, SAK and Ferguson entered into a Subcontract in connection with a Quad 7 Redevelopment project in Seattle.[26] Subcontractor SAK bid the project according to the agreed volume and was to provide materials and services to the project totaling $836,744.00 for the general contractor Ferguson.[27] SAK entered an agreement to provide cement concrete paving services with its pricing based on a scope of work established by Exhibit C to the Subcontract.[28]

SAK performed all set-up and mobilization tasks necessary to start the project and successfully utilized its means and methods to timely and

[26] CP 89–102 (Subcontract)
[27] CP 136-38, 331; CP 89-102
[28] CP 136-44

satisfactorily complete approximately 24% of the contractual work.[29] While SAK performed work at the beginning of the project, Ferguson was able to observe the means and methods utilized by SAK to perform this project. During that same time, rather than simply honor its contract commitments to SAK, Ferguson started to bid-shop by obtaining "confirmations" of bids for concrete work.[30]

After SAK completed one portion of the contractual work scope, Ferguson had SAK's work slow to a stand-still while hiding from SAK the actual reason for the slow-down and instead reporting that Ferguson was not ready for SAK's work.[31] At that time, unbeknownst to SAK, Ferguson was taking internal steps to prepare to bid shop and eventually terminate SAK despite the fact that SAK was performing as required. On July 11, 2012, Ferguson sent SAK an email telling SAK to not order any more dowel rods, tie bars or baskets.[32]

In a draft letter dated July 17, 2012, which was obtained only through discovery, Ferguson used language suggesting that termination of SAK was "in the Owner's and our best interest." That letter was never sent to SAK.[33] A similar draft was prepared on July 25, 2013. In

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[29] CP 137, 331
[30] CP 328-29; 332-37
[31] CP 328-29
[32] CP 329-30, 346-47
[33] CP 329, 348-50

the midst of working on drafts of termination letters, an internal email states the plan to "get July's payment request submitted asap (by Wednesday of next week)."[34] Rather than communicate openly with SAK about decisions affecting SAK's contract, Ferguson was confirming other bids and secretly planning to terminate SAK for its own self-interest. On July 27, 2013, Ferguson unilaterally issued a Notice of Termination terminating SAK. The Notice of Termination abandons the contention that termination is in the best interest of the "Owner" and stated factual reasons for termination:[35]

> Ferguson Construction has determined that SAK's services for this project are no longer required. Due to overall phasing restrictions, site logistics, and basic convenience, it has become apparent that it is in the best interest of the project to complete the site concrete paving with Ferguson's own forces. This decision is ***not*** based upon SAK's work performed to date.
> Pursuant to Section 7 of the Subcontract General Conditions, the subcontract is terminated, effective immediately. . . .

The recited reasons for termination are contested. Evidence in discovery tended to show that upon terminating SAK during a stand-still, Ferguson immediately commenced activities on concrete work.[36]

From the notice, SAK understood that its contracted-for scope of work had been substantially reduced due to phasing restrictions and site

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[34] CP 330, 351-52
[35] CP 104. [emphasis in original]
[36] CP 330-31, 361-67 (daily reports showing Ferguson resumed concrete activities by 7/31 and had King Concrete on site by 8/3)

logistics, and that, accordingly, Ferguson would complete whatever work was still to be performed without completing the entire project. It was that change to the project that equated to "convenience" consistent with the termination for convenience doctrine. SAK later learned that there are substantial questions about the accuracy of Ferguson's representations and even whether they were genuine.[37]

Ferguson has since admitted that SAK's "work was not being deleted from the project."[38] In response to Requests for Admission Ferguson admitted the following[39]:

> No. 6: Admit that after it terminated SAK for convenience Ferguson proceeded to self-perform or re-procure the work scope terminated from SAK.
> Answer: ...Ferguson admits only that after it terminated SAK's subcontract for convenience, Ferguson self-performed some of the remaining concrete work on the project and subcontracted with others for some of that work.

Contrary to representing that changes to the project had occurred in terms of phasing restrictions and site logistics, it became apparent that Ferguson had simply taken the work promised to SAK and given it to someone else.

A. The Subcontract

Ferguson unilaterally terminated SAK claiming it was for convenience. The Subcontract provides:[40]

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[37] CP 328-331
[38] CP 232
[39] CP 330, 353, 357-58

> In addition to the rights listed above, Contractor may, after providing Subcontractor with written notice, terminate (without prejudice to any right or remedy of Contractor) the Subcontract, or any part of it, for its own convenience and require Contractor to immediately stop work. In such event, the Contractor shall pay the Subcontractor for the work actually performed in an amount proportionate to the total Subcontract price. Contractor shall not be liable to the Subcontractor for any other costs, including anticipated profits on work not performed or unabsorbed overhead.

This clause presumes a valid invocation and proper circumstances.

B. Summary Judgment

On May 23, 2014 Ferguson filed a second motion for summary judgment after having had its first motion and a motion for reconsideration denied.[41] Ferguson argued termination was proper and all that was required was written notice that the contract was being terminated for convenience.[42] Neither Ferguson nor the trial court addressed the false information in the Notice of Termination, its pretextual nature, nor the limitations for invoking a terminations for convenience clause.[43] SAK argued that false and pretextual notice cannot be proper notice and that under the circumstances enforcement of the termination for convenience provision renders the contract illusory because its use is unrestricted.[44] On June 27, 2014 the court filed a summary order granting Ferguson's motion

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[40] CP 94
[41] CP 271-84
[42] *Id.*
[43] *Id.*; CP 386-88
[44] CP 307-26

and dismissing SAK's Complaint.[45] The trial court explained its decision only by noting it:

> has duly considered whether the implied covenants of good faith and fair dealing would render the termination for convenience clause, and notice given here, illusory or invalid. No WA appellate case so concludes, especially in contracts between private entities. See, also, Vila & Son vs. Posen Const., 99 So. 3d 563.[46]

The trial court provided no further opinion.

C. Opinion from the Court of Appeals, Division 1.

On August 10, 2015, Division 1 of the Washington Court of Appeals issued its opinion, No. 72258-1-I. (Accompanying as Appendix A). Their Opinion affirmed the dismissal of SAK's Complaint on summary judgment. While providing more reasoning than the trial court, the Court of Appeals made the same fundamental error of failing to treat "termination for convenience" as a doctrine with legal meaning. Instead, the court allowed a termination based on discretion and whim, unrestricted and without regard for the stated grounds for termination or the particular circumstances of the termination.

The court gave Ferguson a free-pass to terminate SAK at Ferguson's discretion after sending a notice alleging undefined "convenience."[47] That is not a restriction, but a license. Having made the

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[45] CP 386-88
[46] CP 387
[47] Opinion, Case No. 72258-1-I, p12.

wrong core decision by failing to recognize termination for convenience as a defined legal doctrine with restrictions, the court made numerous errors. Petitioner has provided lengthy discussion and assignment of errors in Section C above and relies on that discussion.

In several instances, the court started correct analyses but failed to see them through to the appropriate conclusions:

> The concept of 'termination for convenience' in contracts dates back to the American Civil War. To avoid costly military procurements when changes in war-time technology or cessation of conflict rendered them unnecessary, the federal government included termination for convenience clauses in its contracts. Under certain circumstances, the government terminated wartime contract that were no longer necessary and settled with the contractor for partial performance.[48]

Despite acknowledging the background for terminations for convenience, and that it applies in particular circumstances, the Opinion imposed no limitations on the invocation of such a clause and relied on none of the instructive authorities, in particular *Torncello* which is squarely analogous to the facts at issue here, well-reasoned, and consistent with Washington law.[49] Likewise, the Opinion acknowledged that "Washington courts will not give effect to interpretations that would render contract obligations illusory;"[50] yet failed to restrict Ferguson's use of the clause and adopted an interpretation that rendered the clause illusory even while recognizing:

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[48] Opinion, Case No. 72258-1-I, p3 (emphasis added) (citation omitted).
[49] Torncello v. United States, 681 F.2d 756, 758 (Ct. Cl. 1982).
[50] Opinion, Case No. 72258-1-I, p5, citing *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997).

"Agreements that permit one party to cancel or terminate the undertaking are not illusory if there is some restriction upon the power to terminate."[51] It was a fundamental error to not restrict the power to terminate based on the circumstances and/or changes to the project.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Construction contracts, including the one at issue, customarily contain clauses allowing termination "for cause" and separate clauses "for convenience." The Opinion swallows and makes superfluous terminations "for cause" because now any contractor can terminate for convenience without restrictions regardless of circumstances, as long as the contractor recites that it is terminating for "convenience." That is a catastrophic legal holding.[52] "Termination for cause" and "termination for convenience" clauses easily work in harmony. All that is needed is restriction on the application of termination for convenience. Those restrictions have already evolved in the caselaw where the doctrine arose. Those restrictions—changes to projects and work being rendered unnecessary—also save our caselaw on illusory contracts, with is otherwise abrogated by the Published Opinion.

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[51] Opinion, Case No. 72258-1-I, p7 (emphasis added) citing *Omni Group, Inc. v. Seattle-First Nat'l Bank*, 32 Wn. App. 22, 28, 645 P.2d 727 (1982).

[52] Albeit not for the elated general contractors now entitled to constantly bid-shop and terminate at whim.

Under RAP 13.4(b), a petition for review will be accepted when one or more of the following criteria are met:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Review is justified under (1) and (2). By abrogating our law on notice requirements, illusory contracts, and factual determinations for mixed questions of law and fact, the Opinion conflicts with a panoply of sound caselaw from both our Supreme Court and Court of Appeals.[53] Review is justified under (4) because of the far-reaching effects in the construction industry where termination "for convenience" and "for cause" clauses are ubiquitous. That implicates a substantial public interest.[54] Washington

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[53] Without including important foreign authorities, at least the following Washington cases conflict with the Opinion: *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997); *Omni Group, Inc. v. Seattle-First Nat'l Bank*, 32 Wn. App. 22, 28, 645 P.2d 727 (1982); *Interchange Assoc. v. Interchange, Inc.*, 16 Wn. App. 359, 360-61, 557 P.2d 357 (Div. 1, 1976) (reh'g denied 1977); *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 458, 287 P.2d 734 (1955); *Mithen v. Board of Trustees of Central Wash. St. College*, 23 Wn. App. 925, 932, 599 P.2d 8 (1979) (cited with approval in *King County v. Taxpayers of King County*, 133 Wn.2d 584, 600, 949 P.2d 1260 (1997) (*en banc*)); *Lano v. Osberg Constr. Co.*, 67 Wn.2d 659, 663, 409 P.2d 466 (1966); *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 767, 145 P.3d 1253 (2006); *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826 (1945); *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 255, 510 P.2d 221 (1973); and *Columbia Asset Recovery Group, LLC v. Kelly*, 177 Wn. App. 475, 485, 312 P.3d 687 (2013).

[54] Even by the time of the deadline for a Petition for Review, a County Bar Journal already has an article criticizing the Opinion. While the article has its eccentricities, its dissatisfaction and concern for the state of Washington contracting will be representative

law does not have much guidance on the termination for convenience doctrine, but this Published Opinion poses severe jeopardy to our construction industry by inviting unfettered mischief from general contractors inclined to terminate for convenience. The Opinion begs for review and correction.

F. CONCLUSION

This Petition for Review should be granted. Petitioner has pursued this trusting that the law will be correctly applied, even while incurring liability on attorney fee awards at trial and appellate levels after being wrongfully terminated. There are circumstances when termination for convenience is proper and circumstances where it is abused and renders contracts illusory. To allow its use without restriction is to make the "for cause" clauses dead letters, because the terminating contractor can do whatever it wants, whenever it wants, regardless of what it promised. That is not sound contracting law.

DATED this 9th day of September, 2015

THE COLLINS LAW GROUP, PLLC

By _____
Jami K. Elison WSBA # 31007
Attorneys for Petitioner SAK&Associates, Inc.

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of public reaction to the Opinion. It is attached as Appendix B. Additional public interest is anticipated. Counsel for Petitioner is a former member of the American Subcontractor Association and former member of other Washington industry associations that are likely to be harmed by the Opinion and are likely to marshal support for reversal.

PROOF OF SERVICE

I certify under penalty of perjury that on the 9th day of September, 2015, I caused to be served a copy Petition for Review via email per agreement of the parties on the following:

Douglas R. Roach, Esq.
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Dated at Renton, Washington this 9th day of September, 2015.

Jami K. Elison

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SAK & ASSOCIATES, INC., a Washington corporation,	)	No. 72258-1-I
Appellant/Cross Respondent,	)	
v.	)	
FERGUSON CONSTRUCTION, INC., a Washington corporation,	)	PUBLISHED OPINION
	)	FILED: August 10, 2015
Respondent/Cross Appellant.	)	

VERELLEN, A.C.J. — Subcontractor SAK & Associates contends general contractor Ferguson Construction, Inc. wrongfully terminated their contract by invoking an illusory termination for convenience clause and failing to give proper notice of the termination. There are no Washington cases addressing such clauses in private construction contracts. A termination for convenience clause is enforceable when supported by adequate consideration. Here, partial performance provides adequate consideration. Ferguson also gave SAK adequate notice of termination.

Accordingly, we affirm.

FACTS

In April 2012, SAK entered into a fixed sum contract with Ferguson to provide concrete materials and paving services for the construction of hangars at an airport. SAK performed work under the subcontract from April 18, 2012 to July 27, 2012.

On July 27, 2012, Ferguson terminated SAK from the project. The notice of termination referred to "phasing restrictions, site logistics, and basic convenience," citing section 7 of the subcontract.[1] Section 7 permits Ferguson to terminate the subcontract "for its own convenience and require Subcontractor to immediately stop work."[2] Upon termination, Ferguson paid SAK $181,044.77 for the work actually performed.

On May 10, 2013, SAK sued Ferguson for damages of $226,650.68, alleging that Ferguson breached the subcontract by unilaterally terminating "without cause."[3] Ferguson moved for summary judgment based on SAK's failure to comply with the claim procedures set forth in the subcontract. The trial court denied that motion, as well as Ferguson's subsequent motion for reconsideration.

SAK filed a motion for partial summary judgment, contending the termination for convenience provision was invalid as a matter of law. The trial court denied the motion. Ferguson then filed its second motion for summary judgment, contending it properly exercised the termination for convenience provision in the subcontract, which was enforceable as a matter of law. The trial court granted the motion and dismissed SAK's claims with prejudice. The trial court also awarded Ferguson $44,114.25 in attorney fees.

SAK appeals the court's order granting summary judgment and the attorney fee award. Ferguson cross appeals the amount of the attorney fee award.

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[1] Clerk's Papers (CP) at 104.

[2] CP at 94.

[3] CP at 2.

DISCUSSION

SAK contends that the trial court erred because the termination for convenience clause is an illusory promise and therefore is unenforceable. SAK also contends that there are genuine issues of material fact whether the notice of termination was reasonable, asserting that Ferguson's notice was "false and pretextual."[4] We find no merit in either contention.

Summary judgment is proper when there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law.[5] We construe the evidence in the light most favorable to the nonmoving party and review the ruling on the record before the trial court at the time of the summary judgment motion.[6]

Termination for Convenience Clause

The concept of "termination for convenience" in contracts dates back to the American Civil War. To avoid costly military procurements when changes in war-time technology or cessation of conflict rendered them unnecessary, the federal government included termination for convenience clauses in its contracts.[7] Under certain circumstances, the government terminated wartime contracts that were no longer necessary and settled with the contractor for partial performance.[8] Today, termination

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[4] Appellant's Br. at 17.

[5] CR 56(c).

[6] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); RAP 9.12; Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163, 849 P.2d 1201 (1993).

[7] Krygowksi Constr. Co. v. United States, 94 F.3d 1537, 1540 (1996).

[8] Id.

for convenience clauses are required by regulations for most government procurement contracts.[9]

The use of termination for convenience clauses has migrated to the private setting, notably in construction and high technology contracts.[10] Most standard form construction contracts include such clauses.[11] There is very limited authority addressing termination for convenience clauses in private contracts.[12]

Here, the subcontract provides for termination for convenience:

> In addition to the rights listed above, Contractor may, after providing Subcontractor with written notice, terminate (without prejudice to any right or remedy of Contractor) the Subcontract, or any part of it, for its own convenience and require Subcontractor to immediately stop work. *In such event, the Contractor shall pay the Subcontractor for the work actually performed in an amount proportionate to the total Subcontract price.* Contractor shall not be liable to the Subcontractor for any other

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[9] Id. at 1541.

[10] Ryan P. Adair, *Limitations Imposed by the Covenant of Good Faith and Fair Dealing upon Termination for Convenience Rights in Private Construction Contracts*, 7 J. AM. C. CONSTRUCTION LAW. 127, 127-28 (2013).

[11] Id. at 161 ("several standard form construction contracts . . . provide insight into the customary treatment of [termination for convenience] clauses," referencing the American Institute of Architects, the Associated General Contractors of America, the American Subcontractors Association, the Engineers Joint Contract Documents Committee, and the Design-Build Institute of America).

[12] Id. at 128. The extensive jurisprudence governing termination for convenience provisions in government contracts is grounded in the particular role played by government agencies. But "the case-law supporting such a broad right in federal contracts obviously is of limited value when interpreting a contract between private parties. . . . [T]he federal government stands in a position entirely uncomparable to that of a private person." Questar Builders, Inc., v. CB Flooring, LLC, 410 Md. 241, 271, 978 A.2d 651 (2009); see also Vila & Son Landscaping Corp. v. Posen Constr., Inc., 99 So. 3d 563, 567 (2012) ("[W]e find limited value in these federal procurement cases and look instead to common law contract principles as articulated by Florida's courts."). We do not find the federal case law on government contracts helpful in analyzing the private contract issues presented in this appeal.

> costs, including anticipated profits on work not performed or unabsorbed overhead.[13]

SAK argues that this clause is an invalid illusory promise and that Ferguson breached the subcontract by invoking the clause.[14] In Washington, whether a promise is illusory generally turns on whether there is adequate consideration.

An enforceable contract requires consideration.[15] "If the provisions of an agreement leave the promisor's performance entirely within his discretion and control, the 'promise' is illusory. Where there is an absolute right not to perform at all, there is an absence of consideration."[16] Thus, if a promise is illusory, there is no consideration and no enforceable obligation.[17] Washington courts "will not give effect to interpretations that would render contract obligations illusory."[18]

In construction contracts, consideration usually consists of reciprocal promises of the contractor and the owner, or the subcontractor and the general contractor, to

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[13] CP at 94 (emphasis added).

[14] Ferguson contends that SAK's argument that the contract is illusory actually defeats its breach of contract claim because if the contract is unenforceable, there can be no breach. But SAK does not appear to argue that the clause renders the entire contract invalid, just that the termination for convenience clause is illusory and therefore unenforceable.

[15] King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994).

[16] Felice v. Clausen, 22 Wn. App. 608, 611, 590 P.2d 1283 (1979).

[17] Omni Group, Inc. v. Seattle-First Nat'l Bank, 32 Wn. App. 22, 24-25, 645 P.2d 727 (1982).

[18] Taylor v. Shigaki, 84 Wn. App. 723, 730, 930 P.2d 340 (1997); see also Kennewick Irrigation Distr. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) ("'Preference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory.'" (quoting Shakey's Inc. v. Covalt, 704 F.2d 426, 434 (9th Cir. 1983))).

perform work and to pay for that work.[19] The form construction contract provisions governing compensation upon a termination for convenience are particularly varied. For example, American Institute of Architects (AIA) form A201 (2007) generously includes compensation for overhead and profit on work not completed.[20] Because it is so favorable to the terminated contractor, this AIA compensation provision "is frequently revised or negotiated out of the final contract documents."[21, 22] Other form contracts, such as the Design-Build Institute of America document 530 (2d ed. 2010), contemplate one fee to be paid for termination before commencement of work and a different fee after commencement of work "endors[ing] the principle that partial performance may provide consideration in support of broader termination for convenience rights."[23] It is also clear that some termination for convenience clauses provide only for proportionate payment for the work performed through the date of termination.[24]

SAK specifically contends that because the termination for convenience clause allows Ferguson to terminate the contract at its discretion, it lacks consideration and is

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[19] Adair, *supra*, at 130.

[20] Id. at 161.

[21] Stephen M. Seeger & Ben Patrick, *Terminations for Convenience—"You Want Me to Pay You What?"*, Address at the American Bar Association Forum on the Construction Industry 2013 Midwinter Meeting 24 (Jan. 31 & Feb. 1, 2013), http://www.imageserve.com/naples2013/papers/WorkshopB.pdf.

[22] Notably here, the owner and Ferguson modified their AIA A-201 termination for convenience clause to delete any overhead or profit for work not completed. See CP at 83.

[23] Adair, *supra*, at 163.

[24] See id. at 141-42 ("Monetary consideration may be furnished by either payment of damages or partial performance.").

therefore illusory and unenforceable. Because partial performance provides adequate consideration, we disagree.

Agreements that permit one party to cancel or terminate the undertaking are not illusory if there is some restriction upon the power to terminate.[25] Generally, the right to cancel or terminate is not illusory where it can be exercised only upon the occurrence of specified conditions, such as providing notice.[26] *Williston on Contracts* observes that "the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting a legal detriment sufficient to satisfy the requirement of consideration[,] for example, . . . upon written notice."[27] While some courts have upheld termination for convenience clauses based upon written notice requirements,[28] others cast doubt upon the adequacy of consideration resulting from a notice provision.[29] Here, the contract provides for termination for convenience immediately upon written notice of termination. We need not determine whether the written notice requirement provides adequate consideration for the termination for convenience clause.

It is well recognized that partial performance provides adequate consideration for enforcement of what otherwise might be an illusory provision granting unilateral control

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[25] Omni Group, 32 Wn. App. at 28.

[26] Id.

[27] 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7.13, at 316-19 (4th ed. 2008).

[28] See Vila & Son, 99 So. 3d at 568 (provision requiring written notice in a termination for convenience clause provided sufficient consideration to prevent the promise from being illusory under Florida law) (cited here by trial court).

[29] See Questar Builders, 410 Md. at 279 n.24 ("We decline to speculate whether a contract reserving the right to terminate for any reason, upon two days' notice, would be enforceable.").

to one party.[30] We are not faced with an attempt to invoke a termination for convenience clause before the commencement of any work or only after a nominal amount of work. Here, SAK completed 24 percent of the project, and Ferguson paid a proportionate amount of the fixed contract price. This level of partial performance provides adequate consideration. Accordingly, SAK fails to establish the termination for convenience provision is illusory for lack of consideration.

Although not argued by SAK, some courts read an implied covenant of good faith and fair dealing into a contract that grants one party the discretionary authority to determine a contract term.[31] And some jurisdictions read a duty of good faith and fair dealing as a limit upon the exercise of a termination for convenience provision.[32] "But covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract."[33] Rather, "as a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a

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[30] 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 68.9, at 247-48 (rev. ed. 2003) ("The reservation of such a power neither invalidates the contract nor renders a promise given as consideration illusory. As long as the party with the reserved power to terminate is irrevocably bound for any period of time or has materially changed any of its legal relations or otherwise rendered some performance capable of operating as a consideration, consideration has been given and the other's promise is enforceable."); Adair, *supra*, at 142 ("Partial performance accomplishes the same as payment of damages.").

[31] Myers v. State, 152 Wn. App. 823, 828, 218 P.3d 241 (2009).

[32] Although not cited by the parties, in Questar Builders, 410 Md. at 279, the Maryland Court of Appeals held that a termination for convenience provision in a private subcontract is limited by the duty of good faith and fair dealing. But the clause was exercised when no work had been performed by the subcontractor, and it appears that Maryland law on illusory promises is not consistent with Washington law. See also Vila & Son, 99 So. 3d at 568-69 (rejecting theory that duty of good faith restricts exercise of termination for convenience clause).

[33] Myers, 152 Wn. App. at 828.

contract according to its terms."[34] In Washington, the only case touching on the subject held that the implied duty of good faith and fair dealing does not restrict the use of an express and unambiguous termination for convenience clause.

In Myers v. State, the court held that the Department of Social & Health Services (DSHS) properly terminated a contract with a caregiver based on a termination for convenience provision, recognizing that the covenants of good faith and fair dealing do not trump express contract terms.[35] The contract allowed DSHS to terminate for default upon a finding of neglect. It further provided that "[i]f it is later determined that the [c]ontractor was not in default, the termination shall be considered a termination for convenience."[36] DSHS terminated the caregiver's contract after an investigation resulted in a finding that she neglected a vulnerable adult. The neglect finding was ultimately reversed and the caregiver sued DSHS for breach of contract, but the trial court dismissed the claim.[37]

This court affirmed, upholding the termination for convenience provision and concluding that "the plain language of that provision authorizes termination even when a finding of neglect is later determined to be unfounded."[38] The court recognized that "[t]he contract grants DSHS broad authority to terminate the contract, regardless of the outcome of the administrative process," explaining:

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[34] Badget v. Security State Bank, 116 Wn.2d 563, 570, 807 P.2d 356 (1991).

[35] 152 Wn. App. 823, 828, 218 P.3d 241 (2009).

[36] Id.

[37] Id. at 827.

[38] Id. at 829.

> Ms. Myers makes a persuasive case that she, essentially, did nothing wrong here. Indeed, the administrative process vindicated her. She, however, ignores the termination for convenience provision of her contract and offers no statute or administrative rule with which it might conflict. She raises questions of fact. But they are not material questions of fact. DSHS had authority under this contract to terminate the contract on a finding of neglect by Adult Protective Services and, failing that, it could do so for convenience. The trial court properly dismissed her suit on summary judgment.[39]

Similarly here, Ferguson properly invoked the termination for convenience clause to which both parties agreed. SAK argues that Myers should be distinguished because it involved services for an indefinite period of time and because Myers did not expressly contest the validity of the termination for convenience clause. But Myers expressly holds that an unambiguous termination for convenience clause is not limited by the implied duty of good faith and fair dealing.

Enforcing the termination for convenience provision here is also consistent with our focus upon "the objective manifestations" of intent of the parties.[40] Ferguson and SAK objectively manifested their intent that the contract may be terminated for convenience by Ferguson upon written notice, requiring only a proportionate payment of the contract price. A proportionate payment based upon the amount of work completed in a fixed price contract necessarily includes a proportionate share of any overhead and profit that SAK built into the negotiated fixed price. The parties could have negotiated other limitations or terms of payment upon a termination for convenience, but they did not do so. There is no assertion that the contract is procedurally or substantively

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[39] Id. at 829-30 (citations omitted).

[40] State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783, 211 P.3d 448 (2009).

unconscionable. The parties partially performed their contract. The implied duty of good faith and fair dealing does not allow one party to reshape or evade the bargain that was mutually agreed. On these facts and this briefing, the termination for convenience clause is not illusory or otherwise unenforceable.

Notice of Termination

SAK also contends that Ferguson did not give SAK proper notice of the termination. We disagree.

"Whether particular notice was reasonable is ordinarily a question of fact for the jury. But when reasonable minds could reach only one conclusion, the court can determine reasonableness as a matter of law."[41] "Reasonable notice" is "'notice or information of a fact as may fairly and properly be expected or required in the particular circumstances.'"[42]

Section 7 of the subcontract provides for notice of termination for convenience on written notice:

> In addition to the rights listed above, Contractor may, after providing Subcontractor with written notice, terminate (without prejudice to any right or remedy of Contractor) the Subcontract, or any part of it, for its own convenience and require Contractor to immediately stop work.[43]

Ferguson sent the following notice of termination:

> Ferguson Construction has determined that SAK's services for this project are no longer required. Due to overall phasing restrictions, site logistics, and basic convenience, it has become apparent that it is in the

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[41] Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 135 Wn. App. 760, 767, 145 P.3d 1253 (2006) (citations omitted).

[42] Lano v. Osberg Const. Co., 67 Wn.2d 659, 663, 409 P.2d 466 (1966) (quoting BLACK'S LAW DICTIONARY 1211 (4th ed. 1951)).

[43] CP at 94.

> best interest of the project to complete the site concrete paving with Ferguson's own forces. This decision is *not* based on SAK's work performed to date.
>
> Pursuant to Section 7 of the Subcontract General Conditions, the subcontract is terminated, effective immediately. SAK will be compensated for work performed based on the agreed upon unit price as stated in the Subcontract Agreement.[44]

The termination for convenience clause requires written notice to the subcontractor, but does not specify the content of the notice. The undisputed facts are that Ferguson gave such notice. SAK complains that Ferguson's references to phasing, site logistics, and convenience were merely false and pretextual excuses for Ferguson's goal of increasing its profits from the project. But as noted above, the termination for convenience clause is valid so long as a written notice is given and payment for work performed is made proportionate to the total fixed price of the subcontract. Nothing in the termination for convenience clause required that the notice state any reason beyond "convenience."

SAK's reliance on Lano v. Osberg Construction is misplaced.[45] There, the subcontractor was given notice that it had one business day and a weekend to meet a list of demands or its contract would be terminated. The court concluded that under the circumstances, such notice was "patently not enough time to permit a reasonable attempt to meet the demands."[46] But here, the termination was not contingent upon meeting a list of demands; it was simply a termination for convenience, which was contemplated by the parties in the clear language of the contract.

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[44] CP at 104.

[45] 67 Wn.2d 659, 409 P.2d 466 (1966).

[46] Id. at 664.

SAK also contends that Ferguson's notice was not reasonable because it did not allow SAK to take action to protect its rights under the contract. SAK argues that the content of the notice is critical to submitting a timely notice of a claim or dispute.[47] But SAK also acknowledges that there were no defects in performance that gave rise to the termination. Rather, the termination was simply based on convenience, against which SAK had no claim. Thus, this argument is without basis. Indeed, the trial court rejected Ferguson's argument that SAK was required to comply with the contract's claim requirements.[48] At most, SAK had a claim for the proportionate amount it was owed for the work performed to date, but the notice of termination was sufficient to allow SAK to make that claim.

Attorney Fees

SAK argues that the attorney fees award should be vacated because the summary judgment was improper, but we affirm the summary judgment. Ferguson cross appeals the attorney fees award, contending that the trial court abused its discretion by reducing Ferguson's requested fees when it was the substantially prevailing party. We disagree.

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[47] SAK refers to section 20 of the subcontract, which requires that the subcontractor give notice of a claim or dispute within 14 days of the occurrence of a problem, dispute, claim or delay event, or the claim will not be reimbursed.

[48] Ferguson asserts that the trial court's ruling on this issue (raised in Ferguson's first summary judgment motion) was error and offers this as another basis upon which to affirm the trial court. But Ferguson neither cross appealed nor assigned error to this ruling, which rejected Ferguson's argument that SAK's failure to comply with the notice and claim requirements barred SAK's lawsuit. Thus, this argument is not within the scope of our review. But see Realm v. City of Olympia, 168 Wn. App. 1, 8, 277 P.3d 679 (2012) (holding that contractor waived right to sue city by failing to comply with notice provisions in the contract that were precondition to litigation against the city).

We review the reasonableness of an award for attorney fees for an abuse of discretion.[49] The party seeking fees bears the burden of proving the reasonableness of the fees.[50] Using the lodestar method, the trial court "must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client."[51] This necessarily "requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims."[52]

Here, the contract's fee provision states, "If either party becomes involved in litigation or arbitration arising out of this Subcontract or the performance thereof, the court or arbitration panel in such litigation or arbitration or in a separate suit, shall award attorney fees to the substantially prevailing party."[53] Ferguson requested $58,819.72, the total amount of attorney fees billed. The trial court found that "Ferguson is the substantially prevailing party pursuant to the subcontract sec[tion] 40 and that most of Ferguson's fees are reasonable under the lodestar methodology."[54] The court ordered SAK to pay Ferguson attorney fees in the amount of $44,114.25.

SAK argued that the fee should be reduced to account for Ferguson's unsuccessful motion for summary judgment and motion to reconsider, but it is not clear

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[49] Cook v. Brateng, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014) (quoting Gander v. Yager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012)).

[50] Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

[51] Id.

[52] Id.

[53] CP at 102.

[54] CP at 442 (citing Berryman v. Metcalf, 177 Wn. App. 644, 312 P.3d 745 (2014)).

from the record that this is the basis upon which the trial court reduced the requested fees. The trial court's order simply states that SAK is ordered to pay attorney fees "in the amount of $44,114.25, given the proportional factor(s) as noted in Berryman v. Metcalf."[55]

The trial court's offered reason of "proportionality" under Berryman— the relationship between the amount at stake and the amount of fees—is not compelling here. But Ferguson fails to show that the trial court's fee award was an abuse of discretion. The amount the court ordered here was approximately $14,000 less than the amount requested, a discount of one-fourth of the total fees. Given that Ferguson did incur fees on unsuccessful motions for summary judgment and reconsideration, Ferguson fails to show that this discount was unreasonable and amounted to an abuse of discretion.

Ferguson contends that because there was only one claim, the breach of contract claim upon which it ultimately prevailed, it was entitled to all fees incurred in defending against that claim. But, as noted above, Washington case law recognizes that a reasonableness determination requires the court to exclude "any hours pertaining to unsuccessful *theories* or claims."[56] The summary judgment motions were based on two different theories, the first of which was unsuccessful. Accordingly, the court in its discretion could properly exclude the fees incurred on that unsuccessful theory. Ferguson fails to establish that the fee award was an abuse of discretion.

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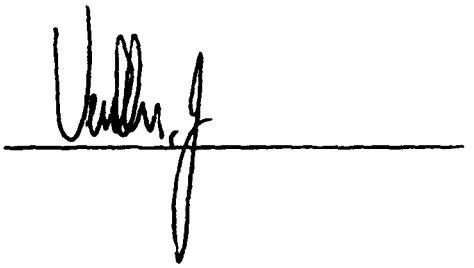
[55] CP at 442.

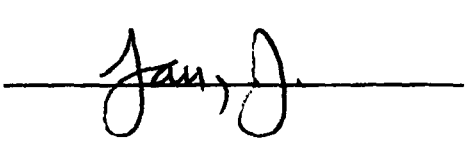
[56] Mahler, 135 Wn.2d at 434 (emphasis added).

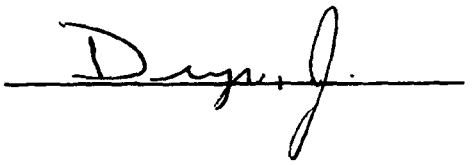
Ferguson also requests fees on appeal under RAP 18.1, as provided by the contract. When a contract provides for an attorney fee award in the trial court, the party prevailing before this court may seek reasonable attorney fees incurred on appeal.[57] Because Ferguson is the prevailing party, we award its reasonable fees on appeal upon compliance with RAP 18.1.

We affirm.



WE CONCUR:





[57] First-Citizens Bank & Trust Co. v. Reikow, 177 Wn. App. 787, 800, 313 P.3d 1208 (2013); RAP 18.1.

APPENDIX B

WHATCOM COUNTY BAR
JOURNAL

2015 www.whatcombar.org SEPTEMBER

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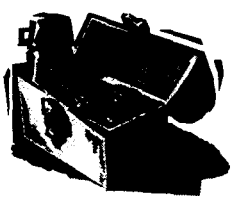
BAR LUNCH



On September 2nd! (2015) At High Noon!
At Northwood Hall, 3240 Northwest Avenue, B'ham.

Guest Speaker: Craig Mueller is a Project Engineer with the City of Bellingham, who will speak about the Padden Creek Daylighting Project. **Summary of Details on Pg. 5!**

Second Thoughts - Quantum Collapse in Contract

(SAK &Associates v. Ferguson Construction)[1]

By Michael Bersch
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Despite my gray hair, which I hope imparts a wise Solomon look, I am a neophyte in the study of law. I was 41 years old when I began law school. I graduated from The University of Alabama School of Law in 1995 and took the bar exam in February, 1996. At the time, I was employed by the university in a capacity having nothing to do with the practice of law (a two-bottles-of-wine story for another time). I practiced a little on the side, which led to mischief (politics and that two-bottles-of-wine story), but mostly, I have been a spectator.

To obtain a license here in Washington I needed to retake the bar exam, which I did last year in July. Now, a quick look at the dates and some simple arithmetic, one might suppose that I must have been the oldest person taking the exam last year, and such a supposition would be consistent with my perception at the time. So, regardless of having been admitted to the bar almost 20 years ago, it comes as no surprise to me, or anyone else that I find many of the subtleties of law fascinating, confusing, and often unfair.

Being an older neophyte can have its advantages. Not being imbued in the law, one must draw on other subjects and experiences outside the legal realm. And age is granted a certain tolerance for speculative musing. So I take the liberty of musing on whether exploring the finer subtleties of law is a bit like exploring the finer subtleties of nature; the logic of our everyday experience breaks down when we examine the world in very fine detail. Newtonian mechanics gives way to quantum mechanics. Perhaps something similar happens in law.

SAK & Associates (SAK), a subcontractor, entered into a fixed sum contract with Ferguson Construction (Ferguson) to provide materials and paving services for the construction of airplane hangars. SAK mobilized, began the work and was on schedule. When SAK had completed about 25% of the job, the company received a notice from Ferguson terminating the contract. The notice stated in part:

> Ferguson Construction has determined that SAK's services for this project are no longer required. Due to overall phasing restrictions, site logistics, and basic convenience, it has become apparent that it is in the best interest of the project to complete the site paving with Ferguson's own forces. This decision is not based upon SAK's work performed to date. ... Pursuant to Section 7 of the Subcontract General Conditions, the subcontract is terminated, effective immediately ....[2]

Section 7 of the subcontract contains a "termination for convenience clause:"

> In addition to the rights stated above, Contractor may, after providing Subcontractor with written notice, terminate (without prejudice to any right or remedy of Contractor) the Subcontract, or any part of it, for its own convenience and require Subcontractor to immediately stop work. In such event, the Contractor shall pay the Subcontractor for the work actually performed in an amount proportionate to the total Subcontract price. ....[3]

So, SAK assumed some problems had occurred that caused the project to be substantially reduced, packed up and left the job site. However, it turned out that when SAK moved out, other contractors moved in. What the heck? SAK sued for breach of contract. During discovery SAK found that Ferguson began bid-shopping the project after SAK began work. At trial court SAK claimed breach on two principal grounds: one, improper notice of termination, and two, the effect of the termination for convenience clause. Ferguson was granted summary judgment on both grounds and SAK appealed. The Court of Appeals paid little heed to the notice argument, stating that Ferguson gave

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notice and the termination for convenience clause required "notice," nothing more. Reasons for termination were not required.

My interest lies in the "termination for convenience clause." Now those readers who deal with government contracts or construction contracts are probably quite familiar with a "termination for convenience clause" (TFCC for short), but the phase was new to me. (I said I was a neophyte.) It turns out that a TFCC is really nothing more than a special type of alternative performance. Courts will generally uphold a promise where the promisor has alternative performance options as long as each alternative is supported by consideration. (Don't you love contract law language?) In this case the alternatives were that the Contractor would pay a fixed sum ($836,744) for SAK to provide materials and paving service, or terminate the contract and pay a proportionate price for the work performed.

SAK tried several arguments to defeat the termination for convenience clause. SAK initially argued that if the TFCC is valid then the contract is illusory.[4] The problem, as pointed out by Ferguson, is that if the argument is correct then the contract is void, it is unenforceable, and there cannot be a breach.[5] SAK also argued, and the court interpreted its argument as such, that the TFCC, as applied by Ferguson, was illusory.[6] As the court noted, a promise is illusory if there is no consideration, but here the TFCC required notice which alone is sufficient consideration, and Ferguson paid the proportionate amount of the fixed contract price for the work performed; partial performance also constitutes consideration. Thus, the TFCC was not illusory and was enforceable.

What about good faith and fair dealing? Although not argued, the Court of Appeal took it upon itself to address the duty of good faith and fair dealing as a limitation on the exercise of a TFCC. The court cited *Myers v. State*,[7] which "held that the implied duty of good faith and fair dealing does not restrict the use of an express and unambiguous termination for convenience clause."[8] The court noted that in this case the "parties could have negotiated other limitations or terms of payment upon a termination for convenience, but they did not do so. ... The implied duty of good faith and fair dealing does not allow one party to reshape or evade the bargain that was mutually agreed."[9] In effect, "SAK, you agreed to it. So, too bad, so sad; get out my face." [As a side note, it seems that SAK might have been more successful if it had sued for breach of the implied covenant of good faith and fair dealing of the entire contract, not just the TFCC, because it appears that when Ferguson negotiated the contract it had no intention of abiding by the provisions regarding materials and service, rather it intended to rely on the TFCC to opt out of the contract when it deemed desirable.]

Second Thoughts:
So, what do we have? SAK entered into a contract on a fairly reasonable size job ($836,744), and began work, which proceeded satisfactorily. Unbeknownst to them, Ferguson decided that it could make more money if it dumped SAK and got other contractors to do the work or did the work itself. As far as I can tell, Ferguson never denied that it bid-shopped for a cheaper contractor after SAK began work. SAK felt like it got cheated. I think SAK got cheated.

Let's say we have a contract with alternative promises. For example, Subcontractor agrees to do Z, and Contractor agrees to do X, or in the alternative, to do Y. Then, in general, adequate consideration is given for both alternative promises by Contractor. The promises to do X, or to do Y, are not illusory. But, when the alternative promise, Y, grants discretionary authority to terminate the entire contract (a TFCC), then it seems to this neophyte that the promise made in alternative X is illusory because fulfillment of promise X is at the sole discretion of the promisor; the existence of alternative Y means the promisor is committed to nothing in alternative X.

"But Wait!" you say. "Alternative Y, the TFCC, is a valid promise." Possibly, but where the TFCC is invoked the Contractor would almost always be required to pay for work performed in quasi-contract. Even in SAK's case, where the TFCC requires payment for the proportionate amount of work done on a fixed-sum contract, Ferguson is only required to pay for the work done; something it would have been obliged to pay anyway. Thus in alternative Y,

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Contractor has not promised to do anything beyond that which he would be legally bound to do, except give notice. Neophyte I am, but I wonder: Is this how we want private contract law to evolve?[10] Usefulness of contract comes in security. A party who performs or wishes to perform can enforce performance of the other party. What if all contracts contained a clause which allowed one party to terminate the agreement as long as notice is given? "I'll give you a contract with all the promises you want, as long as I can terminate the contract if I tell you I am going to terminate the contract." What kind of contract is that?

Modern physics has discovered that matter has a dual nature: particle and wave. As such there is always doubt in the position of an object. However, when the object, the matter, is bigger than a few atoms the wave properties can be ignored and we routinely measure the "exact" position of things. But when we look at sub-atomic particles reality is much different. For example, in experiments electrons can be shot one at a time at a target with two small slits; when this is done an interference pattern is observed. It is as if each electron interferes with itself; the electron goes through both slits. The electron is in two alternative positions at the same time, superposition. If one tries to measure which slit the electron goes through, the alternative positions collapse into a single position and there is no interference pattern.

Now, let's look at the special case of a contract with alternative performance options, X and Y, with option Y a TFCC. Let's look at this as a contract in a quantum state. Both performance options exist in superposition, but as soon as substantial performance begins on one option then the other performance option collapses into the chosen option. Such an approach would render analysis of the subtleties of consideration for each performance option mute. There might be many performance options, but there need be consideration only for the contract as a whole. When one of the performance options is begun all the other possible performance options collapse into it, and the contract reduces to promises on a single performance option. In construction contracts, the principle of good faith and fair dealing would then impose upon the Contractor an implied promise to allow the Subcontractor to complete work on the remaining performance option. In the case of SAK, when SAK began substantial performance on the materials and service option, the other performance option, the TFCC, collapsed into the materials and service option, and SAK had the right to complete that option eliminating the unfairness.[11]

When compared to our everyday world, the logic of quantum mechanics seems weird, but its usefulness is unquestioned. The incorporation of quantum mechanical ideas like quantum collapse into law, here we might term it "Clause Collapse," may seem strange compared to traditional legal logic, but such reasoning may prove highly useful in subtle areas of law to restore fairness and save the principle of good faith and fair dealing. Such is the musing of an old neophyte.

Endnotes

1 *SAK & Associates v. Ferguson Construction*, No. 72258-1-I (Wash. Ct. App., August 10, 2015)
2 *SAK*, Brief of Appellant, p.6.
3 *SAK* at 4-5.
4 *SAK*, Brief of Appellant, Heading C.1, at 19.
5 Ferguson pointed out that contracts are not illusory, promises are illusory.
6 *SAK*, Brief of Appellant, Heading C.2, at 21.
7 *Myers v. State*, 152 Wn. App. 823, 218 P. 3d 242 (2009).
8 *SAK* at 9.
9 *Id.* at 10-11.
10 Government contracts with TFCCs are a different animal.
11 Another way to express this is that a bilateral contract with alternative options, one of which is a TFCC, collapses to a unilateral contract when one of the non-TFCC options is begun.