Supreme Court No. 98753-0
Court of Appeals No. 80649-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF PUYALLUP,

Petitioner,

vs.

CONWAY CONSTRUCTION COMPANY,

Respondent.

PETITIONER CITY OF PUYALLUP'S ANSWER TO CONWAY CONSTRUCTION COMPANY'S PETITION FOR REVIEW

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I. INTRODUCTION

The purpose of RCW 39.04.240 "is to encourage settlements." *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 629, 398 P.3d 1093, 1098 (2017) (quoting H.B. REP. ON ENGROSSED S.B. 6407, at 2, 52d Leg., Reg. Sess. (Wash. 1992)). Unfortunately, Conway Construction Company ("Conway") strategically and repeatedly refused to settle this matter because it felt that it had a free ticket to attorneys' fees, and that it could avoid the statutory requirements of RCW 39.04.240. Conway should not be rewarded for this behavior. The Court of Appeals correctly determined that RCW 39.04.240 is not waivable, and that failure to follow its statutory process is fatal to the right to fees (except for an *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) equitable award.)

If Conway's argument is taken to its logical conclusion, parties to a contract could functionally waive the requirements of RCW 39.04.240 and avoid the goal of encouraging settlement. As the Court of Appeals did not diverge from this Court's established precedent, Conway's Petition for Review should be denied.

II. ISSUES PRESENTED FOR REVIEW

1. Attorneys' Fees.

Did the Court of Appeals correctly determine that "[w]hen a party does not make an offer of settlement in a lawsuit involving a public works contract, it cannot recover attorney fees"? Answer: Yes.

III. STATEMENT OF THE CASE

On July 10, 2020, the City filed a Petition for Review for other issues that are not the focus of Conway's Petition for Review. The City's Petition for Review is incorporated herein by reference, and the City will only focus on the facts and arguments relevant to Conway's Petition for Review.

On January 23, 2017, pursuant to RCW 39.04.240, the City made a timely offer of settlement.[1] Conway did not make any offer of settlement as required by RCW 39.04.240 and RCW 4.84.280. Rather, Conway claimed that RCW 39.04.240 did not apply to the dispute and that a competing Contract provision was an alternate means for Conway to be awarded all of its fees.[2]

[1] City Amended Offer [CP 3155-3157]
[2] Conway Reply Re Fee Award [CP 3197-3203].

After the trial court entered its initial judgment, it heard arguments on Conway's motion for attorney fees. Conway asserted that it was the "prevailing party" because it "did not wholly lose any motion" and because it prevailed in obtaining "88.2% of the damages requested at closing argument."[3]

The City objected because Conway failed to meet the requirements of RCW 39.04.240 which requires offers of settlement to be made in any lawsuit involving a public works contract:

> (1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.
> (2) **The rights provided for under this section may not be waived by the parties to a public works contract** that is entered into on or after June 11, 1992, and **a provision in such a contract that provides for waiver of these rights is void as against public policy**. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration."[4]

[3] Conway Construction Company's Petition for Fees and Costs [CP=2717].
[4] RCW 39.04.240 (emphasis added).

In response, Conway relied upon the recent *King County v. Vinci Construction* case where this Court considered the following issue:

> Therefore, in order to find that RCW 39.04.240 provides the exclusive means for recovering attorney fees in this action, we must find either that the legislature explicitly intended such exclusivity or that RCW 39.04.240 is so inconsistent with *Olympic Steamship* that they both cannot simultaneously apply.[5]

Conway based its claim for attorney fees and costs upon a fee shifting provision in the Contract by which the "prevailing party" is entitled to its "cost of defense" and which can only be assessed as a separate judgment against the plaintiff or as a setoff against the plaintiff's judgment, i.e. a unilateral fee shifting provision.[6]

The trial court determined that the Contract's fee shifting provision read as a whole is ambiguous and constitutes a unilateral attorney fee provision but that it should still be enforced against the City:

> 3. The Court finds and concludes that Special Provision §1-09.11 awards reasonable attorney fees and specifically-defined costs to the prevailing party, whether plaintiff or defendant and whether prosecuting or defending contract claims, for the following reasons at a minimum: (a) the first paragraph of the clause applies mutually on its fact to "either of said parties" that may prevail in a lawsuit; (b) the term "Cost of Defense" cannot be read unilaterally

[5] *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 628, 398 P.3d 1093, 1098 (2017) (holding that RCW 39.04.240 does not displace *Olympic Steamship*).

[6] Project Manual Special Provision 1-09.11, Trial Ex. 2, p.223, App. I (emphasis added.)

> and must be applied reciprocally to either prevailing party to define the costs the parties mutually intended for the prevailing party to recover; and (c) **the clause as a whole (when reading the first and second paragraphs in concert) is ambiguous and therefore construed against the City as drafter**.[7]

The trial court ruled that Conway was the "substantially prevailing party."[8] The trial court further held that RCW 39.04.240 is not an exclusive remedy and "does not preempt the parties' private agreement authorizing the recovery of attorney fees and costs" citing *Vinci* for authority.[9]

The Court of Appeals, Division I overturned the trial court, noting that

> Our legislature has determined that government entities should receive an early opportunity to settle public works contract litigation by requiring an early settlement offer from a claimant who wishes to preserve a claim for attorney fees. And, the legislature has declared void any contract provision waiving the government entity's right to receive an early settlement offer before being exposed to an attorney fee claim as part of the consequences of losing a lawsuit involving a public works contract. The statute is unambiguous. So, because Conway did not make a timely settlement offer, it was not a prevailing party for purposes of awarding attorney fees.

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[7] Order Awarding Fees And Costs ¶4 [CP 3397] (emphasis added).
[8] *Id*. at ¶4 [CP 3398].
[9] *Id*. at ¶5.

Conway Constr. Co. v. City of Puyallup, 13 Wn. App. 112, 125, 462 P.3d 885, 892 (2020). Conway now brings a Petition for Review. Conway's Petition should be denied.

IV. ARGUMENT

This Court should deny review as Conway fails to present any arguments that warrant any further consideration by this Court.

A. The Court of Appeals Decision is Consistent with Statutory Authority and Washington Case law - *Vinci* Does Not Allow Contracting Parties to Circumvent RCW 39.04.240.

The Petition for Review should not be granted under RAP 13.4(b)(1) and RAP 13.4(b)(4) because the Court of Appeals Decision is consistent with both RCW 39.04.240 and established Washington case law. Conway relies on *King County v. Vinci Construction Grands Projects/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 398 P.3d 1093 (2017), to argue that the statutory fee remedy under RCW 39.04.240 is not an exclusive means to recover attorneys' fees in public works contracts. Conway's reliance on *Vinci* is misplaced.

In *Vinci*, this Court considered whether King County was equitably entitled to attorneys' fees against an insurer under *Olympic Steamship* where "the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract." *Vinci*, 188 Wn.

2d at 625) (quoting *Olympic S.S.*, 117 Wn.2d at 53.) This Court specifically ruled on whether RCW 39.04.240 overruled the common law equitable rule announced in *Olympic Steamship*, holding that it will not allow a statute to "deviate from the common law unless the language of [the statute is] clear and explicit for this purpose." *Id.* at 627-38. This Court never even discussed RCW 39.04.240(2), the section controlling the non-waivability of the statute.

Stated differently, this Court determined that the nature of a coverage dispute differs fundamentally from disputes controlled by RCW 39.04.240:

> "By way of operation, RCW 4.84.250 does not apply to coverage disputes because such disputes are legal in nature: either there is coverage under the language of the insurance contract or bond or there is not. *See, e.g., Colo. Structures,* 161 Wash.2d at 606, 167 P.3d 1125 ("Since the question is a legal one, which required Structures to litigate to obtain a declaratory judgment ruling regarding the meaning of the contract, it is a coverage dispute."). **On the other hand, the statutory fee remedy clearly envisions a situation where the parties disagree about the *amount* owed rather than the legal question of whether performance has been triggered**."[10]

The *Vinci* decision addressed a narrow issue concerning the differences between an insurance coverage dispute subject to *Olympic*

[10] *Vinci*, 188 Wn.2d at 630.

Steamship and a breach of contract dispute subject to RCW 39.04.240. While this Court held that in the context of insurance coverage disputes, RCW 39.04.240 is not the exclusive fee remedy available, it did not hold that the language of RCW 39.04.240 can be altered or waived by contract.

B. <u>The Court of Appeals Decision is Congruent with Legislative Intent.</u>

As the language of RCW 39.04.240(2) is not ambiguous, it does not necessitate a legislative history inquiry. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724, 727 (2013). However, a review of the legislative history demonstrates that a settlement offer under RCW 39.04.240 is a condition precedent on the right of a plaintiff to seek fees. As Conway admits it chose to make no offer, it is not the prevailing party entitled to fees.

The language of RCW 39.04.240(2) has remained unchanged since the legislature passed ESB 6407 in 1992. LAWS OF 1992, ch. 171, *codified as amended at* RCW 39.04.240. When the bill was first introduced, on January 29, 1992, the proposed legislation read:

> (1) In an action arising out of a construction contract with a public owner, the court shall award to the prevailing party reasonable attorneys' fees, costs, and interest in connection with the action.

> (2) As used in this section, "costs" means reasonable and necessary expenses incurred in the prosecution or defense of an action.
>
> (3) As used in this section, "public owner" means the state of Washington, or a municipality, or other public body that contracts for public improvements or work.
>
> (4) As used in this section, "prevailing party" means the party in whose favor final judgment is rendered.
>
> (5) The rights provided for under this section are not subject to waiver by the parties to a contract that is entered into after the effective date of this act. A provision in such a contract or lease that provides for a waiver of attorneys' fees, costs, or interest is void as against public policy.

S.B. 6407, 52nd Legis., Reg. Sess., *available at* http://lawfilesext.leg.wa.gov/biennium/1991-92/Pdf/Bills/Senate%20Bills/6407.pdf#page=1; 1 SENATE JOURNAL at 162 (52nd Legis., Reg. Sess. 1992). The bill was amended by the Committee on Commerce and Labor to insert a damages limitation of $250,000, which was adopted by the Senate on February 18, 1992. 1 SENATE JOURNAL at 285, 661 (52nd Legis., Reg. Sess. 1992). The House then proposed amendments incorporating the statutory scheme set forth in RCW 4.84.250-.280, which were ultimately adopted by the Senate. *See* 2 HOUSE JOURNAL at 1765-66 (52nd Legis., Reg. Sess. 1992). Ultimately, the legislature embraced the House's approach incorporating RCW 4.84.250-.280. LAWS OF 1992, ch. 171; *see also* 2 HOUSE JOURNAL at 2278-79 (52nd Legis., Reg. Sess.

1992); 2 SENATE JOURNAL at 1645-56 (52nd Legis., Reg. Sess. 1992). But importantly, the use of the term "rights" was always intended to encompass the exchange of settlement offers as a prerequisite to prevailing party status:

> The statutory procedures for awarding attorneys' fees to the prevailing party in actions for damages of $10,000 or less are made applicable to an action arising out of a public works contract in which a public body is a party. In using these provisions, the maximum amount of the claim is $250,000, rather than $10,000, and the parties are required to serve offers of settlement not less than 30 days and not more than 120 days after serving and filing the complaint, rather than at least 10 days before trial. *The plaintiff is the prevailing party if awarded as much or more than their settlement offer*. The defendant is the prevailing party if the plaintiff's eventual recovery does not exceed the defendant's settlement offer.
>
> *The parties may not waive these rights*, but the waiver prohibition is not to be construed as prohibiting the parties from mutually agreeing to a contract clause that requires submission of a dispute to arbitration.

FINAL B. REP., ESB 6407 (52nd Leg., Reg. Sess. 1992), *available at* http://lawfilesext.leg.wa.gov/biennium/1991-92/Pdf/Bill%20Reports/Senate/6407.FBR.pdf (emphasis added). This legislative history bolsters the conclusion that the legislature viewed the receipt of a settlement offer from a plaintiff as a "right" of a defendant in a public works lawsuit in order for the defendant to potentially pay attorneys' fees to its adversary.

The lone amendment to RCW 39.04.240 since its original passage 27 years ago occurred in 1999 with Substitute House Bill 1671. LAWS OF 1999, ch. 107, *codified at* RCW 39.04.240. That amendment did not in any way alter RCW 39.04.240(2), but instead eliminated the $250,000 cap on the cases to which RCW 39.04.240(1) would apply. *Id.* Thus, the legislative history behind ESB 6407 controls any ambiguity over RCW 39.04.240(2) and necessitates that an offer first be made.

As such, even if the Court were to view the term "rights" in RCW 39.04.240(2) as ambiguous, the term encompasses the right to receive a settlement offer from a plaintiff as a prerequisite to that plaintiff potentially acquiring prevailing party status in public works contract litigation. Consequently, that "right[] … may not be waived by the parties to a public works contract," meaning that the provision in the contract between Puyallup and Conway that "provides for waiver of these rights is void as against public policy." RCW 39.04.240(2).

C. Assuming Arguendo that the Contract Creates an Independent Right to Attorneys' Fees, the Unilateral Fee Provision of the Contracts Necessarily Implicates RCW 39.04.240 to Determine the "Prevailing Party."

RCW 39.04.240 applies the provisions of RCW 4.84.250 through RCW 4.84.280 to any action "arising out of a public works contract in

which the state or a municipality, or other public body that contracts for public works, is a party. . . ."[11] In turn, RCW 4.84.250 states that it overrides the provisions of all other provisions of Chapter 4.84 RCW:

> **Notwithstanding any other provisions of chapter 4.84 RCW** and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, **there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees**. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.[12]

Thus any application of RCW 4.84.330 which deals with unilateral contract clauses and determining the "prevailing party" as the "substantially prevailing party" is subordinated to RCW 4.84.250 through RCW 4.84.280 and thereby RCW 39.04.240. Under these interrelated statutes, any plaintiff in a public works dispute must make an offer of settlement in order to be considered the "prevailing party."

The attorney fees provision in the Contract is clearly a unilateral fee provision because the Contract awarded "defense costs" but only as a judgment against plaintiff or as a setoff against the plaintiff. This is a "tails I win, heads you lose" provision:

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[11] RCW 39.04.240(1).

> **1-09.11 Disputes and Claims**
> The Owner and Contractor each agree that in the event either of said parties brings an action in any court arising out of this Contract, the prevailing party in any such lawsuit shall be entitled to an award of its cost of defense.
> "Cost of Defense" shall include, without limiting the generality of such term, expense of investigation of plaintiff's claims, engineering expense, expense of deposition, exhibits, witness fees, including reasonable expert witness fees, and reasonable attorney's fees. The obligation of payment under this clause shall be incorporated in any judgment rendered in such action either in the form of a judgment against plaintiff for any defendant or in the form of reduction of the judgment otherwise rendered in favor of plaintiff against any defendant, and shall be paid within thirty (30) days after entry of judgment.[13]

The provisions of RCW 39.04.330 require any unilateral attorney fees provision to be enforced bilaterally.[14]

This Court has stated that RCW 4.84.330 "must" be read into any contract containing a unilateral attorney fee provision:

> By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision. It does so by expressly awarding fees to the prevailing party in a contract action. It further protects its bilateral intent by defining a prevailing party as one that receives a final judgment. **This language must be read into a contract that awards fees to one party any**

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[12] RCW 4.84.250 (emphasis added).
[13] Project Manual, Special Provision §1-09.11 Disputes and Claims, [Trial Ex. 2, p.223] (emphasis added).
[14] RCW 4.84.330.

> **time an action occurs, regardless of whether that party prevails or whether there is a final judgment**. *Cf. Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 335, 494 P.2d 479 (1972) (holding that uninsured motorist statute expresses overriding public policy, "so that the intendments of the statute are read into and become a part of the contract of insurance").[15]

According to its unequivocal provisions, RCW 4.84.250 controls all other provisions of Chapter 4.84 RCW including RCW 4.84.330. Even if *arguendo* RCW 39.04.240 is not an exclusive fee remedy, RCW 4.84.250 still controls RCW 4.84.330 and in turn Special Provision §1-09.11 of the Contract. Thus, Conway is unable to be a prevailing party under the Contract because it did not send a settlement offer.

D. The Applicability of RCW 39.04.240 is Not Segregable.

For the first time on appeal, Conway argues that if RCW 39.04.240 is an exclusive fee remedy in any portion of the case, then it would only apply to the damages phase.

First, this argument should not be considered as it was not raised by Conway before the Court of Appeals. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350, 356–57 (1998) ("This court does not generally consider issues raised for the first time in a petition for review.")

[15] *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489–90, 200 P.3d 683, 687 (2009).

Second, under the Contract, the amounts ultimately due Conway turned upon whether the termination is one for default or one for convenience. Under the terms of the Std. Specs., a contractor terminated for default is subject to paying for the additional cost of completing the work required under the Contract.[16] If the contractor is ultimately determined to be not in default, the termination becomes one for convenience.[17] Under a termination for convenience, the contractor is entitled to recover payment for the "actual work performed."[18] Thus Conway was entitled to payment for work performed under either scenario and the question of whether Conway was properly terminated for default simply determined whether Conway was subject to counterclaims and set-offs for the City's cost to complete. The declaratory relief is inextricable from Conway's claim for amounts due. *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 634, 398 P.3d

[16] Std. Spec. 1-08.10(1), [Trial Ex. 1, p.1-81]. Under Std. Spec. 1-08.10(1) the contractor is not entitled to any additional payments until the Work has been completed. Once the Work is completed, the Contractor is responsible for any additional costs of completion.

[17] *Id*. "If a notice of termination for default has been issued and it is later determined for any reason that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Termination for Public Convenience in Section 1-08.10(2)."

[18] Std. Spec. 1-08.10(4), Trial Ex. 1, p.1-82.

1093, 1101 (2017) (citing *Fiore v. PPG Indus., Inc*., 169 Wn. App. 325, 352, 279 P.3d 972 (2012)).

V. CONCLUSION

The applicable statute to this issue is RCW 39.04.240. The statute specifically prohibits waiver of its provisions by contract because such waiver is against public policy. The statute is clear – Conway made no offer of settlement and therefore cannot be the prevailing party. The Petition for Review should be denied, or in the alternative, the Court of Appeals affirmed.

Respectfully submitted this 10th day of August, 2020.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By */s/ Christopher W. Pirnke*
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DECLARATION OF SERVICE

I, Christopher W. Pirnke, under penalty of perjury under the laws of the State of Washington, hereby declare that on August 10, 2020, the following documents were served on the following individuals in the manner indicated below:

1. *Petitioner City of Puyallup's Answer to Conway Construction Company's Petition For Review.*

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DATED this 10th day of August, 2020, at Redmond, Washington

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