99158-8

No. 78543-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SCARSELLA BROTHERS, INC.,

Petitioner,

v.

FLATIRON CONSTRUCTORS, INC., et al.,

Respondents.

PETITION FOR REVIEW

Meghan A. Douris, WSBA #44495
Ryan M. Gilchrist, WSBA #50629
Oles Morrison Rinker & Baker, LLP
One Convention Place
701 Pike Street, Suite 1700
Seattle, WA 98101
(206) 623-3427

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioner
Scarsella Brothers, Inc.

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A. IDENTITY OF PETITIONER

Petitioner Scarsella Brothers, Inc. ("Scarsella") seeks review of the Court of Appeals decision terminating review set forth in Paragraph B.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division I, unpublished opinion was filed on September 28, 2020. It is set forth in the Appendix at pages A-1 through A-30.

C. ISSUES PRESENTED FOR REVIEW[1]

1. Where Scarsella was compelled to litigate to obtain a recovery of $2.7 million on its breach of contract, bond, and retainage lien foreclosure claims, was it entitled to an award of its attorney fees under applicable equitable and statutory principles?

2. Was Scarsella is entitled to prejudgment interest on the $2.7 million, a liquidated sum, where Flatiron had the prolonged use value of Scarsella's money?

D. STATEMENT OF THE CASE

Division I's opinion is largely correct, albeit brief, in its recitation of the facts and procedure in this case. Op. at 3-5. Certain facts pertinent to Scarsella's issues for this Court bear emphasis.

This case results from Flatiron Constructors, Inc's, ("Flatiron"), failure to pay its subcontractor, Scarsella, for its work. Scarsella performed

[1] Scarsella disagrees with Division I's treatment of its contractual, extra work, and *quantum meruit* claims, but it focuses this petition on Division I's treatment of the fee and prejudgment interest issues.

earthwork for Flatiron on the I-405 toll lane expansion project (the "Project"), owned and operated by the Washington State Department of Transportation ("WSDOT"). Scarsella completed its contract work and submitted monthly payment applications. Flatiron directed Scarsella to do extra work, to fix Flatiron's design errors and to correct problems caused by Flatiron and other subcontractors. Scarsella included the extra work in its monthly pay applications.

Two years into the Project, Flatiron stopped paying Scarsella for contract work and then conjured a multi-million-dollar counterclaim alleging Scarsella delayed the Project to support its breach of contract.

The trial court found Flatiron breached its contract by failing to pay Scarsella more than $2.7 million for contract work and by delaying the Project. The court also found Flatiron's $10.8 million counterclaim without merit. Nevertheless, the trial court denied Scarsella a fee award or prejudgment interest on the $2.7 million Flatiron wrongfully withheld.[2]

The trial court erroneously ruled "it would be inequitable to declare Scarsella to be the prevailing party, when the $2,731,437.97 that Scarsella is no more than what Flatiron has recognized as being due to Scarsella, but

[2] Subsequent to the entry of judgment, Scarsella was paid nearly $760,000 of funds Flatiron retained from its subcontractors like Scarsella. That payment would not have occurred but for Scarsella's successful efforts in the litigation.

for the parties' dispute." CP 2327. But, in fact, Flatiron withheld $2,731,437.97 based on its ultimately meritless delay counterclaim. *See, e.g.*, CP 1303; Ex. 1257, ¶ 56.[3] It argued at trial that it owed Scarsella *nothing*. Indeed, it argued that Scarsella owed it money as noted above. Flatiron flatly told Scarsella "it would not pay Scarsella unless Scarsella sued Flatiron." CP 1663. But for this lawsuit, Flatiron and its sureties would not have paid Scarsella the $2.7 million. They *forced* Scarsella to sue to recover what was due to Scarsella from them. As a result of the lawsuit, Scarsella recovered $2,731,437.97 on breach of contract from Flatiron and its sureties, and Flatiron recovered nothing.

E. ARGUMENT FOR ACCEPTING REVIEW

(1) Scarsella Is Entitled to an Award of Attorney Fees Against Flatiron

The trial court here erred in denying Scarsella a fee award from Flatiron under any of the multiple theories for recovery of fees present here.[4]

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[3] "Due to the withholding of payment pursuant to ongoing disputes…not all of the approved payable amounts [had] been paid to Scarsella.") Ex. 1257, ¶ 150 ("These amounts [$2,741,886.40] would be payable if not for Flatiron's withholding pursuant to ongoing disputes, including the dispute regarding Scarsella's liability for delays to the Project."

[4] Scarsella has *three* grounds for such an award. If it prevails on *any* of the three it is entitled to fees at trial and on appeal. The statutes at issue here do not constitute an exclusive remedy for fees for the same reasons this Court concluded in *King County v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 627-32, 398 P.3d 1093 (2017) that RCW 39.04.240 did not abrogate the common law fee remedy afforded by *Colorado Structures*.

Division I held that the trial court was correct in determining that Scarsella was not the "prevailing party" in securing a $2.7 million judgment, even though that analysis is not required under the *Olympic Steamship* equitable exception nor under RCW 39.08.030. Where the prevailing party analysis is required under RCW 39.04.250/RCW 39.76.040, the court misapplied it. Review is merited. RAP 13.4(b).

(a) Scarsella Is Entitled to Fees under RCW 39.08.030

The trial court denied Scarsella's request for attorney fees under RCW 39.08.030, CP 2320, and Division I agreed, again concluding that Scarsella did not prevail on its bond claim. Op. at 24. But it erred because RCW 39.08.030(1)(b) *nowhere* requires a party to formally "prevail" to recover from sureties.[5] *See* Appendix. Review is merited. RAP 13.4(b)(2).

The statute allows recovery of fees from the defendant contractor and/or its sureties. *Kellogg v. Nelson*, 146 Wash. 572, 575, 264 Pac. 15 (1928). This Court has indicated that the purpose of the fee provision in RCW 39.08.030(1)(b) is to prevent sureties from using their superior financial position to litigate and thereby frustrate payment to contractors. *Brear v. Wash. State Highway Comm'n*, 67 Wn.2d 308, 316, 407 P.2d 423

[5] In determining legislative intent this Court looks to the actual plain language of the statute as the "bedrock principle" of interpretation. *Federal Home Loan Bank of Seattle v. Credit Suisse Securities (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019).

(1965) ("Corporate sureties may desire to litigate certain issues for reasons beyond the potential losses involved in the particular case before the court because the contract provisions and procedures may become very important with regard to other potential claims.").

The statute's express language does not require a prevailing party analysis. The only requirements for an award under the statute are that a surety contests the right to recover under the bond and a claimant litigates to get paid on the surety's bond, as Scarsella was required to do here. An award of fees to a subcontractor is *mandatory*, as the "shall" language in the statute evidences. *Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 574, 145 P.3d 399 (2006), *review denied*, 161 Wn.2d 1019 (2007); *Campbell Crane & Rigging Servs., Inc. v. Dynamic Int'l AK, Inc.*, 145 Wn. App. 718, 727, 186 P.3d 1193 (2008).[6]

[6] To satisfy the requirement that the surety did not act in adverse manner to the claimant to contest the obligation to pay, the surety need only deny the allegations in the claimant's complaint, *Diamaco*, 135 Wn. App. at 577, or fail to unconditionally pay the claimant. *U.S. Filter Distrib. Group Inc. v. Katspan, Inc.*, 117 Wn. App. 744, 750, 72 P.3d 1103 (2003). This is not a case like *Lakeside Pump & Equipment, Inc. v. Austin Constr. Co.*, 89 Wn.2d 839, 576 P.2d 392 (1978), where the surety did not answer the claimant's complaint. Here, there is no doubt that the sureties fully adopted Flatiron's active effort to resist paying the $2.7 million; they *stipulated* to that fact. CP 287-89 ("The sureties contend that the potential liability of the Sureties in the Construction Dispute Trial is derivative of the potential liability of their bond principals, Scarsella and Flatiron. In short, it is the position of the Sureties that they will only be liable if, and to the extent, their respective principals are determined to be liable for their obligations secured by the bonds."). The sureties denied coverage to Scarsella by failing to pay it throughout the lengthy course of this litigation, never offering to pay Scarsella what it was due from Flatiron, although Flatiron admitted it owed Scarsella money. Ex. 1257, ¶¶ 56, 150. The sureties were adverse to Scarsella.

Division I's analysis of RCW 39.08.030(1)(b), erroneously adds a requirement not found in the statute, is contrary to well-recognized authorities, and undercuts the protection of RCW 39.08 for contractors statewide. Review is merited. RAP 13.4(b)(1, 2, 4).

(b) Scarsella Is Entitled to Fees under RCW 39.04.250/39.76.040, the Prompt Payment Act

The trial court ruled Scarsella was not entitled to attorney fees and costs under RCW 39.04.250/RCW 39.76.040, the Washington Prompt Payment Act. CP 2320. The trial court ruled neither party prevailed on its own claim. CP 2324. This is inconsistent with the trial court's own findings.[7] Scarsella prevailed on the same damages, on three separate grounds, relating to two separate sources of possible payment: breach of contract, for $2,731,437.97 against Flatiron generally; and foreclosure of lien against performance and payment bond, for $2,731,437.97 against the sureties.

Division I also concluded that Scarsella was not the prevailing party under the Prompt Payment Act because Flatiron was entitled to withhold the funds from Scarsella by statute. Op. at 22-23. It erred because Scarsella was, in fact, the prevailing party below and Flatiron's authority to withhold

[7] The trial court found for Scarsella on its breach of contract and bond claims. CP 1317-18, 1321-22; RP 3942 ("I have concluded that for Scarsella's claim, it can be granted, and it has been proved only insofar as Flatiron has agreed that amounts are owing…").

funds in good faith does not excuse it from paying interest and fees on funds wrongfully withheld. As with RCW 39.08.030, RCW 39.04.250 provides that a contractor is entitled to interest on any funds wrongfully withheld by a contractor from a subcontractor. RCW 39.04.250(3). If the subcontractor is compelled to bring an action to collect that interest, it is entitled to an award of fees if it prevails in the collection of interest, regardless of the state of mind of the withholding contractor.

The attorney fee provisions of the Prompt Payment Act have not been construed by this Court and only two Court of Appeals cases address those fee provisions. In *Thompson v. Peninsula Sch. Dist. No. 401*, 77 Wn. App. 500, 892 P.2d 760 (1995), Division II held that the school district in an action involving the failure to timely pay prevailing wages on a school fields project, despite a reasonable defense to doing so, mandated that the district pay interest on the wages not fully paid, and RCW 39.76.040 required payment of the contractor's fees as well. *Id*. at 506-07. In *Basin Paving Co. v. Mike M. Johnson, Inc.*, 107 Wn App. 61, 27 P.3d 609 (2001), *review denied*, 145 Wn.2d 1018 (2002), the contractor was denied added compensation and was not a prevailing party under RCW 39.04.240/RCW 39.76.040. Neither case is particularly illuminating on the prevailing party

question so that a resort to more general treatment of when a party "prevails" is appropriate.[8]

Charitably put, Washington jurisprudence defining what constitutes a prevailing party is a hash that requires this Court to give it clear definition. While not a "sexy" topic, the question of the entitlement to fees is an important one, often involving tens of thousands of dollars of more. Unlike the merits of a controversy, however, courts all too often give fee issues short shrift. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) ("Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.") (Court's emphasis.) And Division I's analysis does not help to clear up the confusion in this area of the law. Op. at 19-22.

In general, a prevailing party is "the party in whose favor a final judgment is rendered." RCW 4.84.330. Similarly, this Court stated in *Riss v. Angel*, 131 Wn.2d 612, 633-34, 934 P.2d 669 (1997) that "in general, a prevailing party is who receives an affirmative judgment in his or her favor." *See also*, *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760,

[8] Flatiron claimed below that this Court in *Elcon Construction, Inc. v. Eastern Washington University*, 174 Wn.2d 157, 273 P.3d 965 (2012), implicitly acknowledged that attorney fees under RCW 39.76.011 are specifically on prevailing as to the associated statutory claims. Flatiron Br. at 29-30. Not so. In *Elcon*, *all* of the petitioner's claims were denied, including its claim for attorney fees. 174 Wn.2d at 171. The Court made no ruling, implicit or otherwise, as to whether a party prevailing on an RCW 39.76.011 interest claim is entitled to attorney fees when that same party did not prevail overall.

772, 115 P.3d 349 (2005). The trial court recognized this standard. CP 2321. There is no question here that Scarsella received a judgment in its favor, albeit not in as great an amount as it sought. But that does not detract from its status as the prevailing party.[9] And it is equally clear that Flatiron would have retained the $2.7 million contract payments plus the $760,000 retainage but for Scarsella's lawsuit.

Despite that simple formulation, Washington courts have developed often conflicting principles for departing from it. Some cases note that if neither party wholly prevails, then the party who *substantially* prevails is the prevailing party. That determination turns on the extent of the relief awarded to the parties on their respective claims. *Crest, Inc.*, 128 Wn. App. at 772. In some instances, courts offset fees incurred by parties recovering on claims against those incurred by parties recovering on cross-claims. *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 219-20, 130 P.3d 892 (2006); *Marassi v. Lau*, 71 Wn. App. 912, 915-16, 859 P.2d 605 (1993).[10] In even other instances, our courts have held that if both parties

[9] "A party need not recover its entire claim in order to be considered the prevailing party." *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 774, 677 P.2d 773, *review denied*, 101 Wn.2d 1021 (1984).

[10] The divisions of the Court of Appeals have sniped at each other over the applicable rule. Division I criticized Division III's refusal to apply its *Transpac*/*Marassi* offset rule in *Hertz v. Riebe*, 86 Wn. App. 102, 106, 936 P.2d 24 (1997). *Transpac*, 132 Wn. App. at 218-19; *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 9, 970 P.2d 343 (1999). *See also*, *Hawkins v. Diel*, 166 Wn. App. 1, 269 P.3d 1049 (2011) (Division II's treatment of *Hertz*).

prevail on substantial aspects of the case, there is no prevailing party at all. *American Nursery Products, Inc v. Indian Wells Orchards*, 115 Wn.2d 217, 235, 797 P.2d 477 (1990); *Sardam v. Morford*, 51 Wn. App. 908, 911, 756 P.2d 174 (1988); *Rowe v. Floyd*, 29 Wn. App. 532, 629 P.2d 925 (1981). There is no clear cut standard for deciding when these formulations for departing from the general rule adopted by this Court in *Riss.*

Even under the most extreme formulation of rule (both parties prevail – no fees), however, there are ample grounds to support the assertion that Scarsella prevailed. Flatiron forced Scarsella to sue and pursue lengthy and costly litigation to recover $2,731,437.97. Scarsella secured $760,000 from the retainage post-judgment. Scarsella also defended and defeated Flatiron's counterclaim that sought in excess of $10.8 million in damages. Flatiron *admitted* it refused to pay without a lawsuit. Scarsella prevailed.

Simply put, Washington case law is inconsistent on identifying a prevailing or substantially prevailing party, "distinct and severable" contract claims, or how "substantial" the result must be for parties not to recover fees. As to that specific aspect of RCW 39.76.040, this Court should grant review to resolve inconsistencies in Washington law. RAP 13.4(b)(1, 2, 4).

(c) Scarsella Is Entitled to *Olympic Steamship* Fees against Both Flatiron and the Sureties Because It Was Forced to Bring Suit to Recover the Benefit of the Bond

The trial court denied Scarsella's claim for attorney fees under the *Olympic Steamship* exception to the American Rule on fees because it erroneously determined that Scarsella was not the "prevailing party" against Flatiron. CP 2328. Division I agreed, confining its lackadaisical "analysis" to a single paragraph. ("Because we determined Scarsella is not the prevailing party, it is not entitled to recovery under *Olympic Steamship*."). Op. at 24-25. *Olympic Steamship* does not require an insured to "prevail;" that decision *only* requires an insured to file suit to successfully obtain the benefit of the surety bond, which Scarsella did here. Division I's opinion contravenes this Court's jurisprudence applying this equitable principle. Review is merited. RAP 13.4(b)(1).

This Court has recognized an equitable exception to the American Rule on fees "[w]hen insureds are forced to file suit and obtain the benefit of their insurance contract, they are entitled to attorneys' fees." *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991). *Accord*, *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 35-36, 904 P.2d 731 (1995) (recognizing *Olympic Steamship* as an equitable exception to the American Rule). This principle applies as well to claims against

sureties. *Colo. Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 598, 167 P.3d 1125 (2007). "[T]he relative positions of the contractor and the surety compel, pursuant to *Olympic Steamship*, an award of attorney fees when the surety wrongfully denies coverage." *Id*. at 626. *See also*, *Vinci*, 188 Wn.2d at 625-26 (sureties' argument that *Colorado Structures* should be overruled rejected by this Court).

None of these cases issued by this Court require an analysis of whether the insured or bond claimant was a "prevailing party." The *only* questions are whether the surety denied coverage and the bond claimant was forced to litigate to be paid. The adversity or forced-to-litigate element is satisfied when a surety adopts the entirety of the contractor's defenses against breach as here, making the breach claim and the bond claim essentially indistinguishable. As this Court noted in *Colorado Structures* when the contractor is required to seek a "ruling regarding the meaning of the parties' contract," it is a coverage dispute. 161 Wn.2d at 606. Division I erroneously condoned the addition of a prevailing party element to this Court's *Olympic Steamship* analysis, an element this Court has *never* adopted. That requires review by this Court. RAP 13.4(b)(1).

Here, the sureties refused to pay Scarsella under Flatiron's bond. Scarsella sued the sureties, and ultimately the trial court ruled that "Scarsella is entitled to recovery against Flatiron and the Defendant

Sureties" for $2,731,437.97. CP 1321-22. As such, Division I erred in adding the requirement that a trial court undertake a separate "prevailing party" analysis. Review is merited. RAP 13.4(b).

(2) Division I Erred in Denying Scarsella's Request for Prejudgment Interest

Division I erred when it denied Scarsella prejudgment interest based on the Prompt Payment Act, or common law prejudgment interest principles.

(a) Scarsella Is Entitled to Interest under the Prompt Payment Act

The trial court found that "Flatiron [and the Defendant Sureties are] statutorily exempt from having to pay prejudgment interest on the amount that it withheld pursuant to the parties' dispute" because Flatiron prevailed on Scarsella's Prompt Payment Act claims. CP 2328-29. That court ignored Scarsella's common law right to prejudgment interest.

As befits its name, the Prompt Payment Act is designed to encourage general contractors and their sureties to quickly pay subs.[11] The statute

[11] RCW 39.04.250/RCW 39.76.040 were enacted in Laws of 1992, Ch. 223 that dealt with both statutory retainage and prompt payment. SHB 1736 recognized "[t]here [was] no requirement in Washington that funds paid for a construction project to the person in charge of the project be used to pay for the materials or labor used in the project," and sought to establish a method "to force payment to contractors, subcontractors, materials suppliers, or persons providing labor or services for a project." House Bill Report, HB 1736. The Legislature's intent was to benefit subcontractors by compelling general contractors to pay them for services rendered in connection with construction projects.

here, RCW 39.76.011, is clear in stating that "if the prime contractor does not comply with the notice and payment requirements…the contractor *shall* pay the subcontractor interest on the withheld amount…" (emphasis added).[12] Division I agreed with the trial court in denying prejudgment interest to Scarsella because RCW 39.04.250(3) afforded Flatiron a "safe harbor" to withhold payment to Scarsella without consequence, even though that withholding was ultimately wrongful. Op. at 28-29. Division I's analysis of the statute undercuts the purpose of the Prompt Payment Act and requires this Court's review. RAP 13.4(b)(4).

Under Division I's analysis, despite the clear legislative purpose to benefit subcontractors on projects by compelling general contractors to promptly pay them, this "safe harbor" notion gives the general contractor an added tool to deprive subs of payments they are due. That would set the purpose of the statute on its ear. This case is a perfect example of how a general contractor can manipulate this "safe harbor" provision if Flatiron is correct – it can refuse to pay, delay a project, and posit a spurious counterclaim and avoid any consequences for such conduct depriving the subcontractor of prompt payment for its services.

[12] RCW 39.04.250 states "any person from whom funds have been withheld in violation of this section shall be entitled to receive from the person wrongfully withholding the funds…interest at the highest rate allowed under RCW 19.52.025." (emphasis added).

A better reading of RCW 39.04.250(2) is that a general has the right to withhold funds if there is a *bona fide*, good faith dispute over payments due. The fact that the general withholds the funds is not, in and of itself, actionable. But if a court ultimately concludes the withholding is wrongful, and the sub is due payment that the general withheld, the sub is entitled to interest, and fees under RCW 39.76.040 if it is forced to litigate what it is due. This is consistent with the "use value" analysis for common law pre-judgment interest to be discussed *infra*.

In any event, there are no published cases construing this statute and its constriction is a matter of first impression for this Court. This Court should definitively construe such a statute so crucial to contractors throughout the state. By statute, because Scarsella prevailed on its breach of contract theory against Flatiron, it was entitled to prejudgment interest. Review is merited on this issue. RAP 13.4(b)(1, 2, 4).

(b) Scarsella Is Entitled to Prejudgment Interest Because Scarsella Prevailed on a Liquidated Claim

When damages sought in an action are liquidated, a court must award prejudgment interest to a party prevailing on a breach of contract claim. *Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 166-167, 240 P.3d 790 (2010). This rule has its origins in the fact that it would be inequitable to allow a party to have the "use value" of another's money to

which it was not entitled. *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). A claim is liquidated when the amount of prejudgment interest can be computed with exactness from the evidence, without reliance on opinion or discretion. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).[13]

This Court has had little difficulty in concluding that claims were liquidated even when some calculation of the amount at issue was involved or a party opposed that calculation.[14] Here, *Flatiron* was able to calculate the amount to which Scarsella was entitled, and did so before, during, and after the Project work.

Division I erred in concluding that the damages at issue were unliquidated. Op. at 27-28. Flatiron *conceded* at trial that Scarsella had

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[13] Where no contractual rate of prejudgment interest for a liquidated sum is specified, the prejudgment interest rate is 12 percent per annum. RCW 19.52.010; *TJ Landco, LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 346 P.3d 777, *review denied*, 184 Wn.2d 1003 (2015) (prejudgment interest at 1% per month).

[14] For example, in *Forbes*, an attorney could recover pre-judgment interest on the contingent fee due on a settlement even when the client placed disputed funds in the court registry. 170 Wn.2d at 167-68. Similarly, in *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010), this Court emphasized that damages, including prejudgment interest, must make the wronged party whole in allowing prejudgment interest on the settlement offer made to the injured party in a legal malpractice case that could have been recovered but for the attorney's negligence. *Accord*, *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340, *review denied*, 132 Wn.2d 1009 (1997) (prejudgment interest on attorney's entitlement to a reasonable fee). In *Scoccolo Constr., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 145 P.3d 371 (2006), this Court emphasized that a claim is liquidated if there is evidence furnishing data, if believed, that makes it possible to compute the amount without reliance on opinion or discretion; usually that opinion or discretion is that of a judge or jury. *Id*. at 519.

earned $2,731,437.97. CP 2330.[15] The fact that Flatiron's admitted entitlement amount evolved somewhat over the course of two years does not alter the fact that the claim was liquidated, i.e. capable of mathematical calculation. These additional items recognized by Flatiron were *always calculable*, and Flatiron calculated them. Flatiron simply disputed that it had to pay them.

Flatiron *admitted* to being capable of doing final Project-wide takeoffs in January 2015 and represented to Scarsella it had "performed a jobwide takeoff for all bid items" on April 13, 2015. RP 3095-96, 2590-

[15] Flatiron employees worked on a "Scarsella Force Account Analysis" (Ex. 1265), which was a summary of several calculation methods used to cross-check Flatiron's determination of the value of Scarsella's force account work. CP 2330-31. That document summarized different methods for determining admitted entitlement to individual force account tickets, which, in turn, altered the same calculation Flatiron used throughout. RP 3216-17. Flatiron calculated quantities owed to Scarsella throughout the Project. The trial court itself found:

> During the Project, Flatiron provided quantity measurements for bid item work via the tracker spreadsheets on at least a monthly basis. *The tracker spreadsheets included Flatiron's measured quantities arranged by location, sourced from Flatiron's takeoffs*, for work already performed as well as work not yet performed.
>
> On each monthly Pay Estimate, Flatiron provided a list of the approved quantities of work performed for each bid item, *as determined by Flatiron's counts and measurements derived from its ongoing tracking of bid item work*.

CP 1302 (FF 158-159) (emphasis added). Flatiron performed final takeoffs for the job during the Project and well before trial. CP 3095-96; Ex. 1257. These were mathematical calculations.

91.[16] Flatiron retained the use benefit of Scarsella's money *for more than two years*.

The trial court's ruling that the undisputed amount owed to Scarsella was unliquidated flies in the face of the fact that Flatiron calculated it as early as January 2015, and transmitted it to Scarsella in April 2015. That Flatiron disputed amounts in the case did not alter the fact that quantities were calculable based on the subcontract, plans, and physical measurement. As this Court noted in cases like *Prier*, *Scoccolo*, or *Forbes*, admitted sums are generally liquidated, and because there is no dispute that the subcontract here defined measurement and payment, and such measurement and payment was available based on both actual, physical quantities and final plans, the amount at issue was liquidated.

Under the common law, Scarsella was entitled to prejudgment interest on the amounts admittedly owed by Flatiron accruing from June 25, 2015 at the rate of 12% per annum. Review is appropriate on this issue. RAP 13.4(b)(1, 2).

[16] Out of an abundance of caution and to allow for minor Flatiron revisions to entitlement in the final payment process, Scarsella did not use January 2015, or even the admitted date of April 13, 2015 as the date on which prejudgment interest should accrue. Instead, it asserts prejudgment interest should run from June 25, 2015, which was the date of the last lien release executed by Scarsella (for which payment was never received). CP 1297 ("The conditions precedent to payment of amounts approved on Pay Estimate No. 28 were satisfied as of June 25, 2015."). Scarsella did not perform contract work following this Pay Estimate, and because the work found that Flatiron could determine amounts due with certainty monthly, this amount is liquidated.

F. CONCLUSION

Division I's analysis of the fee and prejudgment interest issues here was erroneous and merits review. RAP 13.4(b)(1, 2, 4).

This Court should reverse the trial court's decisions on attorney fees and interest and remand to the trial court for a determination as to the amount of reasonable fees and costs and prejudgment interest. Costs, including attorney fees on appeal,[17] should be awarded to Scarsella.

DATED this 27th day of October, 2020.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Meghan A. Douris, WSBA #44495
Ryan M. Gilchrist, WSBA #50629
Oles Morrison Rinker & Baker, LLP
One Convention Place
701 Pike Street, Suite 1700
Seattle, WA 98101
(206) 623-3427

Attorneys for Petitioner
Scarsella Brothers, Inc.

[17] Scarsella sought fees at trial and on appeal in the Court of Appeals. Br. of Appellant at 74; reply br. at 60. RAP 18.1 authorizes it to recover such fees in the trial court and this Court.

APPENDIX

RCW 39.04.250:

(1) When payment is received by a contractor or subcontractor for work performed on a public work, the contractor or subcontractor shall pay to any subcontractor not later than ten days after the receipt of the payment, amounts allowed the contractor on account of the work performed by the subcontractor, to the extent of each subcontractor's interest therein.

(2) In the event of a good faith dispute over all or any portion of the amount due on a payment from the state or a municipality to the prime contractor, or from the prime contractor or subcontractor to a subcontractor, then the state or the municipality, or the prime contractor or subcontractor, may withhold no more than one hundred fifty percent of the disputed amount. Those not a party to a dispute are entitled to full and prompt payment of their portion of a draw, progress payment, final payment, or released retainage.

(3) In addition to all other remedies, any person from whom funds have been withheld in violation of this section shall be entitled to receive from the person wrongfully withholding the funds, for every month and portion thereof that payment including retainage is not made, interest at the highest rate allowed under RCW 19.52.025. In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to costs of suit and reasonable attorneys' fees.

RCW 39.08.030(1)(b):

. . . in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items specified in this section, the claimant is entitled to recover in addition to all other costs, attorneys' fees in such sum as the court adjudges reasonable.

RCW 39.76.040:

In any action brought to collect interest due under this chapter, the prevailing party is entitled to an award of reasonable attorney fees.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

SCARSELLA BROTHERS, INC., a Washington Corporation,

Appellant/ Cross-Respondent,

v.

FLATIRON CONSTRUCTORS, INC., a Delaware Corporation; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; LIBERTY MUTUAL INSURANCE COMPANY (Bond No. 015035206); TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA (Bond No. 105688202); FIDELITY AND DEPOSIT COMPANY OF MARYLAND/ZURICH AMERICAN INSURANCE COMPANY (Bond No. 9070286); FEDERAL INSURANCE COMPANY (Bond No. 82292503), THE CONTINENTAL INSURANCE COMPANY (Bond No. 929539824), and XL SPECIALTY INSURANCE COMPANY (Bond No. SUR7401972),

Respondent/ Cross-Appellant.

No. 78543-5-I

DIVISION ONE

UNPUBLISHED OPINION

LEACH, J. — The Washington State Department of Transportation (WSDOT) contracted with Flatiron Constructors, Inc. (Flatiron) to be the prime contractor on a

"design-build project" known as the I-405 Bellevue to Lynnwood Project. Flatiron subcontracted with Scarsella Brothers, Inc. (Scarsella) for earthwork. Flatiron and Scarsella both appeal the trial court's decision made after a lengthy bench trial. Scarsella challenges the trial court decisions that the prime contract notice and claim provisions applied to its claims, the denial of its claims that Flatiron waived enforcement and is estopped from enforcing the notice and claim provisions, and the denial of its claims for quantum meruit recovery, foreclosure of its retainage lien, attorney fees and costs, and for prejudgment interest. Flatiron challenges the trial court's decision that it breached the Scarsella subcontract and awarded judgment against its payment bond.

We affirm.

FACTS

The Project and Parties

On January 11, 2012, WSDOT contracted with Flatiron to serve as the prime contractor on a design-build project to widen and add express toll lanes to a segment of I-405 from Bellevue to Lynnwood. On July 21, 2012, Flatiron subcontracted with Scarsella to perform earthwork, retaining wall installation, and drainage construction. The value of the subcontract was $14,865,476.68. The subcontract identifies three categories of work: (1) bid item work; (2) extra work; and (3) force account work.

Sureties on Flatiron's "Contract Bond and Retainage Bond" include Liberty Mutual Insurance Company, Travelers Casualty and Surety Company of America, Fidelity and Deposit Company of Maryland/Zurich American Insurance Company, Federal Insurance Company, The Continental Insurance Company, and XL Specialty

Insurance Company. Liberty Mutual Insurance Company is the surety on Scarsella's "Performance and Payment Bonds."

Payment Procedures

Flatiron required Scarsella to submit monthly "pay applications" with supporting documentation showing the work it performed for the month. From August 2012, to January 2015, Flatiron reviewed each pay application, met with Scarsella to discuss discrepancies, negotiated payment for quantities and extra work using force account worksheets, and would issue a determination about Scarsella's work and payment. During that time, Flatiron's engineers reviewed the pay estimates and verified Scarsella's work. Flatiron used Scarsella's pay applications to prepare its own monthly pay applications to WSDOT. After WSDOT paid Flatiron, Flatiron paid Scarsella a "progress payment."

Payment Dispute

In November 2014, Flatiron exercised its subcontract right to withhold Scarsella's payment. Flatiron claimed Scarsella did not document its work, follow required procedures, maintain documentation, substantiate force account billings, and substantiate pay applications as the subcontract required. Flatiron also claimed Scarsella caused project delays in breach of the subcontract. Before withholding payments, Flatiron raised these issues with Scarsella. Scarsella gave Flatiron some of the required documentation but not all. Flatiron told Scarsella it intended to pursue damages and intended to withhold payments because Scarsella did not provide full documentation.

For Scarsella's work on the project, Flatiron approved a total value of $17,788,284.60. Flatiron withheld $1,849,196.55 for bid item work; $194,150.01 for non-force account extra work, and $709,362.35 for force account work.

Procedural History

On August 14, 2015, Scarsella delivered a "Notice of Claim Lien" to WSDOT, Flatiron, and the sureties. Scarsella claimed $5,680,598.94 plus fees and costs.

On December 11, 2015, Scarsella sued Flatiron and the sureties. Scarsella claimed breach of contract, recovery against the payment bond, foreclosure on the lien against retainage, estoppel and waiver of prime contract provisions, breach of a covenant of good faith and fair dealing, and violation of RCW 39.76.011. Scarsella sought $12,135,173 plus prejudgment interest, attorney fees, and costs. Flatiron counterclaimed arguing Scarsella significantly delayed the completion of the project.

Trial occurred from July 5, 2017 to September 26, 2017. During trial, Flatiron acknowledged it withheld $2,731,437.97 in earned payments from Scarsella.

Type of Work	Amount Withheld
Force account work	$709,362.35
Non-force account extra work	$194,150.01
Bid item work	$1,849,196.55
Minus back charges	$(21,270.94)
Total	$2,731,437.97

On November 2, 2017, the trial court determined that subcontract section 2.6 authorized Flatiron to withhold payments, and Flatiron acted in good faith when it did so. The trial court decided Scarsella could not recover additional compensation for force account work and extra work because of its noncompliance with section 1-04.5(1) of the

Prime Contract. The trial court ordered Flatiron to pay Scarsella $2,731,437.97 for its work. It denied Scarsella's claims that Flatiron waived compliance with and was estopped from enforcing the prime contract notice and claim provisions. It denied Scarsella's claims against the retainage as premature. The trial court also found Scarsella's documentation inconsistent and unreliable, and that Scarsella did not substantiate its work and claims. The trial court denied Flatiron's claim that Scarsella caused substantial project delays.

On January 19, 2018, Scarsella and Flatiron independently filed requests for entry of judgment, attorney fees and costs, and prejudgment interest. On May 14, 2018, the trial court partially granted Scarsella's and Flatiron's requests.

Scarsella appeals and Flatiron cross-appeals.

STANDARD OF REVIEW

We review a trial court's decision in a bench trial for whether substantial evidence supports the trial court's findings of fact and whether those findings support the court's conclusions of law.[1] Substantial evidence is evidence sufficient to persuade a fair-minded person of its truth.[2] We review questions of law and statutory interpretation de

[1] Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 243, 23 P.3d 520 (2001); Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006).

[2] Hegwine, 132 Wn. App. at 555-56.

novo.[3] So, we review a trial court's conclusions of law about contract interpretation de novo.[4]

ANALYSIS

Prime Contract Notice and Claim Provisions

Scarsella argues the prime contract notice and claim provisions do not apply to its claims for extra work. We disagree.

"If the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract."[5] A prime contract incorporated by reference in a subcontract is binding on the subcontractor.[6]

The subcontract between Scarsella and Flatiron provides, "Subcontractor assumes toward Contractor all obligations that Contractor assumes toward Owner, insofar as applicable to the Work to be performed under this Subcontract."[7] As the subcontractor, Scarsella assumed toward Flatiron all obligations applicable to its work that Flatiron assumed under the prime contract toward WSDOT for Scarsella's work.

[3] In re Estate of Jones, 152 Wn.2d 1, 8-9, 93 P.3d 147 (2004); Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

[4] Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712, 334 P.3d 116 (2014); Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000).

[5] Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 801, 225 P.3d 213 (2009).

[6] Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co., 176 Wn.2d 502, 518, 296 P.3d 821 (2013).

[7] Subcontract Attachment B, Art. 1, § 1.6.

The prime contract also provides procedures for Flatiron to submit notices, claims, and protests to WSDOT:

> If in disagreement with anything required in a Change Order, or any other written order from the WSDOT Engineer, including any direction, instruction, interpretation, or determination by WSDOT, the Design-Builder shall:
>
> 1. Immediately give a signed written notice of protest to WSDOT before doing the Work;
> 2. Supplement the written protest within 30 Calendar Days with a written statement and supporting documents [. . .]; and
> 3. If the protest is continuing, the information required above shall be supplemented monthly until the protest is resolved.

Because Scarsella assumed these same obligations toward Flatiron, Scarsella was required to comply with the prime contract's notice, claim, and protest provisions.

Next, Scarsella argues it did not waive certain claims when it did not follow the prime contract notice and claim provisions. We disagree.

Section 1-04.5 of the prime contract states, "By not protesting as this section provides, the Design-Builder also waives any additional entitlement and accepts from WSDOT any written order (including directions, instructions, interpretations, and determinations)."

In NOVA Contracting, Inc. v. City of Olympia, the Washington State Supreme Court upheld an identical protest provision.[8] It determined the phrase "waives any additional entitlement" applies to "'all' claims related to the 'protested [w]ork'" including damages.[9]

[8] 191 Wn.2d 854, 865, 426 P.3d 685 (2018) (citing Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 391, 78 P.3d 161 (2003)).

[9] NOVA Contracting, Inc., 191 Wn.2d at 866.

Because the subcontract incorporated the prime contract, Scarsella assumed toward Flatiron the same procedural obligations Flatiron owed WSDOT. So, under section 1-04.5 of the prime contract, Scarsella waived its right to protest if it did not comply with the prime contract's protest provisions.

Scarsella also argues the plain language of the subcontract replaces the prime contract notice and claim provisions because the subcontract provides a specific mechanism for calculating payments including payment for extra work.

The subcontract provides:

> Extra work without a Bid Item that is directed by Flatiron will be marked up cost plus 10%. Extra work directed by WSDOT will be marked up according to the Contract Documents. Extra work shall be authorized by Flatiron personnel and quantities shall be mutually agreed to prior to performing work.

But, this provision does not provide procedures for submitting notices, claims, and protests or describe the consequences of not following those procedures. It does not replace or supersede section 1-04.5 of the prime contract.

Scarsella also argues that Flatiron's breach of the subcontract bars it from enforcing its compliance with the prime contract provisions and that Flatiron prevented it from complying with the prime contract provisions. Scarsella's briefs do not cite to the record or otherwise demonstrate that it raised these issues. Because Scarsella did not raise them below, we do not consider them on appeal.[10]

[10] RAP 2.5(a).

Waiver and Estoppel

Scarsella argues that Flatiron waived the prime contract provisions and is estopped from enforcing those provisions. We disagree. Flatiron did not waive the prime contract provisions and Scarsella did not establish the elements of estoppel.

Waiver

"A party to a contract may waive a contract provision, which is meant for its benefit, and may imply waiver through its conduct."[11] Waiver by conduct "requires unequivocal acts of conduct evidencing an intent to waive."[12] We enforce procedural contract requirements unless the benefiting party waives the contract provision or the parties agreed to modify the contract.[13]

Here, the trial court determined:

> 55. Under Attachment B, ¶ 2.6 of the Subcontract, Flatiron had the right to deduct from payment due to Scarsella any amounts owed by Scarsella to Flatiron, and Flatiron was entitled to withhold payment from Scarsella in an amount sufficient to protect Flatiron from any actual or anticipated loss due to Scarsella's alleged breach of the Subcontract.
>
> 56. Scarsella has not proved by a preponderance of the evidence that Flatiron expressly waived the rights and powers specified above to deduct amounts paid to which Scarsella was not entitled under the Subcontract.

Scarsella argues that Flatiron waived compliance when it "(1) directed, demanded, acknowledged, and approved Scarsella['s] work, both before and after

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[11] Mike M. Johnson, Inc., 150 Wn.2d at 386 (citing Reynolds Metals Co. v. Electric Smith Const. & Equipment Co., 4 Wn. App. 695, 700, 483 P.2d 880 (1971)).

[12] 150 Wn.2d at 386 (citing Absher Const. Co. v. Kent School Dist. No. 415, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995)).

[13] 150 Wn.2d at 386-87 (citing American Sheet Metal Works, Inc. v. Haynes, 67 Wn.2d 153, 157, 407 P.2d 429 (1965)).

ceasing payment to Scarsella, and (2) continued negotiating and agreeing to bid item quantities with Scarsella."

Subcontract section 2.6 permits Flatiron to withhold payments, and prime contract section 1-04.5(1) requires Flatiron and Scarsella to protest changes using the notice and claim procedures. The payment and notice and claim provisions are distinct contract provisions. Here, Flatiron's continued directions to Scarsella did not waive the prime contract provisions.

We affirm the trial court's finding that Flatiron did not waive the prime contract notice and claim provisions.

Estoppel

Scarsella argues that promissory estoppel prevents Flatiron from enforcing the prime contract provisions.[14] We disagree.

Promissory estoppel has five elements:

> (1) a promise, (2) that promisor should reasonably expect to cause the promisee to change his position, and (3) actually causes the promisee to change position, (4) justifiably relying on the promise, (5) in such a manner that injustice can be avoided only by enforcement of the promise.[15]

[14] Scarsella also argues the trial court improperly shifted the burden of proof from Flatiron to Scarsella to show that Flatiron was estopped from withholding payment. Scarsella cites to Conclusion of Law number 56 and subcontract section 2.6 but does not cite to any legal authority. We decline to address this issue. Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996).

[15] McCormick v. Lake Washington School Dist., 99 Wn. App 107, 117, 992 P.2d 511 (1999).

"A promise is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'"[16]

The subcontract provides that "[n]o progress payment to Subcontractor shall operate as an approval or acceptance of Work done," and "Contractor may deduct from any amounts due to Subcontractor…any sum or sums owed by Subcontractor to Contractor under this Subcontract." The contract also provides, "the parties shall not be bound by, or be liable for, any statements, representations, promises, or agreements not specifically set forth in this Subcontract."

The trial court determined that "Scarsella could not reasonably rely on Flatiron's prior progress payments as a promise not to deduct payment from future progress payments if it discovered that amounts paid were not actually due to Scarsella." And, "Scarsella could not justifiably rely on Flatiron's direction to perform extra work as a promise not to enforce [the notice and claim] and independent provisions."

The plain wording of the subcontract defeats Scarsella's claim that it reasonably relied on Flatiron's prior payments or direction to perform extra work as promises not to deduct payment and not to enforce the contract provisions. Because Flatiron made no promise, Scarsella's estoppel claim fails. We affirm the trial court's determination that Scarsella could not reasonably rely on Flatiron's prior progress payments as a promise

[16] Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 172, 876 P.2d 435 (1994) (citing Restatement (Second) of Contracts § 2(1)).

not to deduct future progress payments and Flatiron was not estopped from deducting payments.

Breach of Subcontract

Flatiron argues the trial court should not have found that it breached the Scarsella subcontract and imposed liability against its payment bond because the trial court found that Flatiron withheld the payment from Scarsella in good faith.[17] Flatiron asserts the trial court improperly conflated the issues of (1) who was at fault for delaying the project and (2) Flatiron's right to withhold Scarsella's payments. We disagree.

"To prevail on a breach of contract claim, the plaintiff must show an agreement between the parties, a parties' duty under the agreement, and a breach of that duty."[18]

First, Flatiron argues substantial evidence does not support the trial court's finding that Flatiron breached the subcontract when it caused substantial project delays. Flatiron also argues it did not have a duty not to delay the project and instead had unilateral power to alter the project schedule.

Subcontract article 3, section 3.1 provides, "Contractor may at any time by written order of Contractor's authorized representative, and without notice to Subcontractor's sureties, make changes in, additions to and deletions from the Work, and Subcontractor shall promptly proceed with the Work so changed." And, section 3.2

[17] Flatiron also agues that even absent the subcontract's express withholding clause, it could withhold payments under the common law of contracts. Because Flatiron's withholding is separate from the issue of breach of contract, we decline to address it.

[18] Fidelity and Deposit Co. of Maryland v. Dally, 148 Wn. App. 739, 745, 201 P.3d 1040 (2009).

states that Scarsella waives its rights to assert claims against Flatiron for changes it makes when it provides Scarsella with five days notice. Under these subcontract provisions, Flatiron could breach the subcontract even if Scarsella waived its right to assert a claim for the breach.

The trial court found:

> Based on the evidence presented by both parties, the court finds that, to the extent there were delays, such delays more probably than not were caused by Flatiron's failure to prepare timely and accurate construction plans, and its failure to properly plan, supervise and direct the sequence of work on the Project, including Scarsella's work.

In its order granting in part Flatiron's request for fees and costs, the trial court clarified, "if it is not clear from the court's earlier findings and conclusions, the court now finds and concludes that Flatiron breached the parties' contract by causing the substantial project delays that were the factual basis of Flatiron's counterclaim against Scarsella."

Failure to timely and accurately prepare construction plans, supervise, and direct the project, are not delays permitted under subcontract article 3, section 3.1. So, we affirm the trial court's finding that Flatiron breached the subcontract.

Second, Flatiron argues it did not have a duty to pay Scarsella $2,731,437.97. So, its withholding of that amount was not a contract breach. Flatiron conceded that it owed Scarsella $2,731,437.97 and the trial court found that Flatiron withheld that payment in good faith. But, the trial court did not rely on Flatiron's withholding to support its finding that Flatiron breached the subcontract. It relied on Flatiron's failure to prove at trial the factual basis for the withholding to support its decision that Scarsella

was entitled to recover the withheld amount. It relied on other conduct described above to support its finding that Flatiron breached the subcontract. Scarsella's claims based on these breaches failed because it did not comply with procedural requirements for asserting these claims.

Third, Flatiron asserts that "[e]ven if the subcontract authorized Flatiron to withhold payment only in the event of Scarsella's actual breach, Flatiron's withholding would not constitute breach because Scarsella *was* in actual breach" when it did not fulfill its scheduling and documentation obligations. But, the trial court found Flatiron did not meet its burden of proving Scarsella caused the delays. So, this claim is without merit. Substantial evidence supports the trial court's finding that Flatiron breached the subcontract.

Quantum Meruit Recovery

Scarsella argues the trial court incorrectly denied its claim for quantum meruit recovery because (1) Flatiron used Scarsella to perform work outside the scope of the subcontract; (2) the work was not within the method and manner contemplated by the parties; (3) the trial court incorrectly applied the force majeure standard; and (4) the trial court incorrectly determined the prime contract notice and claim provisions barred quantum meruit recovery. We disagree.

"Quantum meruit is an appropriate basis for recovery when substantial changes occur which are not covered by the contract and are not within the contemplation of the parties, and the effect of such changes is to require extra work or to cause substantial

loss to the contractor."[19] Quantum meruit is a mixed question of fact and law: Does the contract indicate the parties contemplated the changed conditions?[20] If the "contract unambiguously contemplates the changed conditions," the complaining party is not entitled to any quantum meruit recovery.[21] If the contract is ambiguous, "issues of fact would exist, and resolution of the question would be for the trier of fact."[22] Recovery is available when neither party could have reasonably anticipated the changed condition.[23]

In General Construction Company v. Public Utility District No. 2 of Grant County, we determined for work within the scope of a contract, a party must comply with the terms of the contract unless there is evidence the complaining party waived compliance with the contract's notice and claim requirements.[24] Notice and claim provisions are valid unless there is "unequivocal evidence of an intent to waive" the protection.[25] "For work outside of the contract, and changed work within the scope of the contract where [the party] satisfied the contractual notice and claim provisions, quantum meruit applies."[26]

First, Scarsella argues it is entitled to quantum meruit recovery because Flatiron directed it to perform work outside the scope of the subcontract. Flatiron argues

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[19] Hensel Phelps Const. Co. v. King County, 57 Wn. App. 170, 174, 787 P.2d 58 (1990).

[20] Hensel, 57 Wn. App. at 175-76.

[21] Hensel, 57 Wn. App. at 176.

[22] Hensel, 57 Wn. App. at 176.

[23] Basin Paving Co. v. Mike M. Johnson, Inc., 107 Wn. App. 61, 65, 27 P.3d 609 (2001), review denied, 145 Wn.2d 1018 (2002).

[24] 195 Wn. App. 698, 700, 709-10, 380 P.3d 636 (2016).

[25] General Construction Company, 195 Wn. App. at 709 (citing Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 391-92, 78 P.3d 161 (2003)).

[26] 195 Wn. App. at 709-10.

Scarsella cannot recover quantum meruit because the subcontract expressly included provisions for directing, authorizing, and compensating extra work.[27] The trial court determined the subcontract contemplated "extra work outside the scope of the bid items" and "specifies the measurement of payment for all such work." The subcontract states, "For work outside previously agreed upon the Subcontractor shall notify Contractor and agree upon quantities and scope before performing work." The price for extra work is marked up cost plus 10 percent. Because the contract unambiguously contemplates additional work, we affirm the trial court's decision not to award quantum meruit recovery.

Second, Scarsella argues it is entitled to recovery because the work did not proceed in the method and manner contemplated by the parties. The trial court determined Scarsella did not prove there were substantial changes that neither party could reasonably anticipate. Article 3 of the subcontract discusses changes and delays. In order to recover for defects in specifications, differing conditions, and delays, Scarsella was required to provide Flatiron with a written claim or else it would waive recovery. Because the contract reasonably contemplated changes, we agree with the trial court that Scarsella did not prove it could not reasonably anticipate the delays that affected the method and manner of the work.

Third, Scarsella asserts the trial court improperly applied the force majeure standard rather than the quantum meruit standard. The trial court stated, "I think

[27] Flatiron argues this court rejected an analogous argument in Hensel Phelps Const. Co. v. King County, 57 Wn. App. 170, 174, 787 P.2d 58 (1990).

quantum meruit might be applicable had we, for example, had a giant earthquake that created crevices and cracks and chasms across the freeway, or if there had been some totally unforeseen disaster that nobody had planned for." But, the trial court did not actually apply a force majeure standard. The trial court continued to explain the "extraordinary amount of delay" and "huge number of change orders" were not substantial changes not contemplated by the subcontract. Because the trial court properly applied the quantum meruit standard, Scarsella's argument fails.

Fourth, Scarsella asserts the trial court incorrectly determined the prime contract notice and claim provisions barred quantum meruit recovery. Flatiron asserts the trial court correctly determined that Scarsella's non-compliance with the subcontract's provisions bars it from quantum meriut recovery. The trial court denied Scarsella's request for quantum meruit recovery for work it performed but did not invoice before January 20, 2015. The trial court determined that when Scarsella did not comply with the provisions, it waived its rights to bring a claim. And, because it waived its rights, the trial court determined that Scarsella could not bring a claim for quantum meruit recovery. We agree and affirm the trial court's determination that Scarsella was not entitled to quantum meruit recovery.

Lien on Retainage

Scarsella argues the trial court should have allowed its claim under RCW 60.28 for recovery against the contract retainage held by WSDOT. We disagree.

RCW 60.28.030 provides that after a party files a claim against the reserve fund, it has four months to bring an action to foreclose a lien on retainage.

RCW 60.28.011(1)(a) provides that contract retainage may not exceed five percent. Here, the subcontract's retainage provision "provides that Flatiron may withhold 5 percent of all progress payments to Scarsella as retainage." RCW 60.28.011(3)(a)(b) and the prime contract provide that within 60 days of the project's final completion, the public body WSDOT must release the retainage. The subcontract provides that retainage is due "upon acceptance of the work by WSDOT," which occurs after the project's final completion.

"[P]arties may contractually select as the date of completion of the work either the date of substantial completion or the date of final completion."[28] "Unless otherwise defined by the contract to mean 'final completion[,]' the date on which the work is 100 [percent] complete 'completion' ordinarily is understood to mean 'substantial completion' - the date on which all material elements of the work are sufficiently complete in conformance with the contract so that the owner can use the work for its intended purpose."[29]

The trial court found the project was substantially completed by October 31, 2015, but the contract date of completion had not arrived by the time of trial. It determined that "[b]ased on the evidence presented at trial, it [wa]s not possible for the court to reach a conclusion as to whether or when the retainage will be due to Scarsella." It explained,

> I'm assuming that the retainage will be paid when the time comes, but I don't have enough evidence, and the project had not been completed by

[28] State Construction, Inc. v. City of Sammamish, 11 Wn. App. 2d 892, 911, 457 P.3d 1194 (2020).

[29] State Construction, 11 Wn. App. 2d at 911.

> the time of trial, at least not so far as I was told. So it would have been premature to rule on the retainage claim.

It determined because the date of completion had not arrived by the time of trial, Scarsella's claim for foreclosure of the lien on retainage was premature.

We agree. Because Scarsella prematurely asserted its claim, we affirm the trial court's denial of this claim.[30]

Prevailing Party

Scarsella and Flatiron request attorney fees and costs under various statutes.[31] Their competing claims require determining whether either party is the prevailing party. None of the statutes relied on define "prevailing party." So, we must consider "case law governing the determination of a prevailing party with respect to other statutes governing attorney fees and costs."[32]

"In Washington, the prevailing party is the one who receives judgment in that party's favor."[33] "A party need not recover its entire claim in order to be considered the prevailing party."[34] "However. . . where both parties prevail on major issues, neither is

[30] Flatiron argues the absence of a finding on the issue of retainage is a presumptive negative finding on that issue under Taplett v. Khela, 60 Wn. App. 751, 759, 807 P.2d 885 (1991). Because the issue was premature, we do not reach Flatiron's claim.

[31] RCW 60.28.030, RCW 39.08.030, RCW 39.04.250, RCW 39.76.040, RCW 39.76.011.

[32] In re Marriage of Nelson, 62 Wn. App. 515, 518-19, 814 P.2d 1208, 1211 (1991).

[33] Sardam v. Morford, 51 Wn. App. 908, 911, 756 P.2d 174 (1988) (quoting Blair v. Washington State University, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987)).

[34] Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn. App. 762, 774, 677 P.2d 773 (1984).

entitled to attorney fees."[35] And, under RCW 4.84.330, where each party prevails on a major issue, "there is no 'prevailing party.'"[36]

In re Marriage of Nelson provides that because one party properly received an award of back child support under RCW 26.18.160, that party prevailed over the other party.[37] In Sardam v. Morford, the trial court concluded that because neither party was the prevailing party, it would not award attorney fees under a landlord-tenant statute.[38] Division III of this court affirmed the trial court's conclusion because it "would be inequitable to award substantial fees" where both parties successfully defended against each other's major claims.[39]

In Crest Inc. v. Costco Wholesale Corp., we explained that under a contractual provision, rather than a statutory provision,

> [I]f neither party wholly prevails,. . . then the party who substantially prevails is the prevailing party. . . When there are several conflicting claims at issue, a defendant is awarded attorney fees for those claims it successfully defends, and plaintiff is awarded attorney fees for those claims upon which it prevails, and the awards should be the offset.[40]

Here, the trial court determined that "Scarsella and Flatiron each prevailed on major issues," but "[n]either party prevailed. . . on its own respective claims." So, neither was the "prevailing party."

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[35] Sardam, 51 Wn. App. at 911.
[36] Tallman v. Durussel, 44 Wn. App. 181, 990, 721 P.2d 985 (1986); Rowe v. Floyd, 29 Wn. App. 532, 535-36, 629 P.2d 925 (1981).
[37] 62 Wn. App. at 518-19.
[38] 51 Wn. App. at 910 (citing RCW 59.18.290, RCW 4.84.330).
[39] Sardam, 51 Wn. App. at 911.
[40] 128 Wn. App. 760, 772, 115 P.3d 349 (2005).

Scarsella argues the trial court incorrectly relied on Sardam in finding it was not the prevailing party.[41] Flatiron and the sureties argue the trial court properly referenced Sardam to explain how it would avoid inequitable results by denying attorney fees where neither party was the prevailing party.

Using the approach where each party prevails on a major issue, "there is no 'prevailing party,'"[42] neither Scarsella nor Flatiron is the prevailing party. The trial court determined that Scarsella failed on its claims for breach of contract, additional compensation, quantum meruit, retainage, waiver and estoppel, breach of good faith and fair dealing, and violation of payment statutes. It determined Scarsella was entitled to labor and material payment bonds totaling $2,731,437.97 because of Flatiron's concession. It also determined Flatiron failed on its claims for damages for breach of contract and performance bonds.

Scarsella argues the $2,731,437.97 award against Flatiron's labor and material payment bonds make it the "prevailing party."

The trial court disagreed,

> Even though Flatiron conceded at trial that Scarsella had earned $2,731.437.97 more than Flatiron had paid Scarsella, Flatiron's concession does not allow Scarsella to request an award of attorneys' fees incurred in recovering that amount pursuant to RCW 39.04.250 or RCW 39.76.040, because Flatiron withheld that sum from Scarsella in good faith.
>
> Based upon the trial court record, the court finds and concludes that neither Scarsella nor Flatiron is the "prevailing party."

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[41] 51 Wn. App. 908, 911, 756 P.2d 174 (1988).

[42] Tallman v. Durussel, 44 Wn. App. 181, 990, 721 P.2d 985 (1986); Rowe v. Floyd, 29 Wn. App. 532, 535-36, 629 P.2d 925 (1981).

We agree with the trial court. Because the labor and material payment bonds issue was not a "major issue" in the case, Scarsella was not the "prevailing party." Scarsella also failed on eight out of nine of its claims, and Flatiron failed on both of its claims. So, the trial court correctly determined neither was the prevailing party.

Attorney Fees and Costs at Trial

Scarsella argues the trial court should have considered whether to award fees under RCW 60.28.030, RCW 39.08.030, and Olympic S.S. Co., Inc. v. Centenniel Ins. Co.[43] Flatiron and the sureties argue this court should affirm the trial court's order denying Scarsella's request for attorney fees and costs. Flatiron also argues it is entitled to reasonable attorney fees and costs it incurred defending itself because it prevailed under RCW 39.04.250. We disagree. Neither Scarsella nor Flatiron is entitled to trial fees and costs.

"We apply a two-part standard of review to a trial court's award or denial of attorney fees: '(1) we review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.'"[44]

First, Scarsella argues the trial court incorrectly denied recovery of attorney fees under the Prompt Payment Act, RCW 39.04.250, RCW 39.76.040, and in determining the Prompt Payment Act was an exclusive remedy.

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[43] 117 Wn.2d 37, 811 P.2d 673 (1991).

[44] In re Washington Builders Ben. Trust, 173 Wn. App. 34, 83, 293 P.3d 1206 (2013).

RCW 39.04.250 provides, "In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to costs of suit and reasonable attorneys' fees." RCW 39.76.040 provides, "In any action brought to collect interest due under this chapter, the prevailing party is entitled to an award of reasonable attorney fees."

Here, the trial court explained:

> It bears repeating that, although Flatiron conceded at trial that it withheld $2,731,437.97 from Scarsella as an offset against the $8,940,962 counterclaim that Flatiron was pursuing against Scarsella, Flatiron's concession does not expose Flatiron to a claim for attorneys' fees and costs or interest pursuant to RCW 39.04.250 or RCW 39.76.040, because Flatiron withheld that sum from Scarsella in good faith.

Because Scarsella was not the prevailing party, it was not entitled to recover fees under RCW 39.04.250, and RCW 39.76.040. The trial court found Flatiron withheld payment in "good faith," so Flatiron's withholding did not meet the "wrongfully withheld" requirement of RCW 39.04.250. And, because Scarsella's claim for prejudgment interest fails, it is not entitled to an award under RCW 39.76.040.

Second, Scarsella argues the trial court should have awarded it recovery against the contract retainage and attorney fees under RCW 60.28.030. In its trial complaint, Scarsella asserted a claim for "the retained percentage fund the principal amount of $6,564,370.73, plus pre-judgment interest, costs and attorney's fees, pursuant to RCW 60.28." RCW 60.28.030 provides, "In any action brought to enforce the lien, the claimant, if he or she prevails, is entitled to recover, in addition to all other costs, attorney fees in such sum as the court finds reasonable." Because the trial court

properly denied Scarsella's claim for recovery against the contract retainage, Scarsella did not prevail. So, we deny its claim for recovery under RCW 60.28.030.

Third, Scarsella argues the trial court should not have denied it attorney fees and costs under RCW 39.08.030(1)(b). RCW 39.08.030(1)(b) provides, "in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items specified in this section, the claimant is entitled to recover in addition to all other costs, attorneys' fees in such sum as the court adjudges reasonable." "RCW 39.08.030 authorizes attorney fees in an action brought against a performance bond where the surety contests a right to recover, denies the allegations in a complaint, and seeks dismissal of an action."[45] "A surety contests a right to recover when it denies the allegations in a complaint and seeks dismissal of an action."[46] The trial court denied Scarsella's claim for attorney fees and costs under RCW 39.08.030(1)(b) because it determined Scarsella did not have a statutory basis for attorney fees and that Scarsella was not the prevailing party.

Because Scarsella's bond claim fails, its claim for attorney fees and costs under RCW 39.08.030(1)(b) also fails.

Fourth, Scarsella argues the trial court should not have denied it attorney fees and costs under Olympic Steamship because it was the prevailing party, and to obtain the benefit of the surety, it had to litigate. In Olympic Steamship, the Washington State

[45] Campbell Crane & Rigging Services, Inc. v. Dynamic Intern. AK, Inc., 145 Wn. App. 718, 727, 186 P.3d 1193 (2008) (citing Diamaco, Inc. v. Mettler, 135 Wn. App. 572, 578, 145 P.3d 399 (2006)).

[46] Diamaco, 135 Wn. App. at 578.

Supreme Court explained, "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue."[47] "An award of attorney fees under Olympic Steamship is restricted to disputes where the insurer forces the insured to litigate coverage and then loses."[48] Because we determined Scarsella is not the prevailing party, it is not entitled to recovery under Olympic Steamship.

Fifth, Scarsella argues it is entitled to full attorney fees and costs without segregation. Flatiron asserts the trial court did not decide the issue of segregation because Scarsella's claims were unsuccessful. We review a trial court's determination of whether segregation is possible for abuse of discretion.[49] "[W]here the 'plaintiff's claims for relief. . . involve a common core of facts or [are] based on related legal theories,' a lawsuit cannot be 'viewed as a series of discrete claims' and, thus, the claims should not be segregated in determining an award of fees."[50] "A trial court need not segregate attorney fees if it determines that 'the claims are so related that no reasonable segregation can be made.'"[51] Here, Scarsella's claims relied on the same

[47] 117 Wn.2d, 52, 811 P.2d 673 (1991).

[48] King County v. Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV, 188 Wn.2d 618, 630, 398 P.3d 1093 (2017).

[49] Vinici Construction Grands Projects, 188 Wn.2d at 632 (citing Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 693, 132 P.3d 115 (2006)).

[50] Fiore v. PPG Industries, Inc., 169 Wn. App. 325, 351-52, 279 P.3d 972 (quoting Brand v. Department of Labor and Industries of State of Wash., 139 Wn.2d 659, 672-73, 989 P.2d 1111 (1999)).

[51] Everett Hangar, LLC v. Kilo 6 Owners Association, No. 76949-9-I, 7 Wn. App. 2d 1029 (unpublished).

"common core of facts." Scarsella lost its primary claims and was not entitled to fees. Because Scarsella was not entitled to fees, segregation was not appropriate.

Flatiron asserts the trial court incorrectly denied its claim for attorney fees under RCW 39.76.040 and RCW 39.04.250(3) because it prevailed against Scarsella's RCW 39.04.250 and 39.76.011 claims. Because neither party is the prevailing party, we deny Flatiron's claim.

Prejudgment Interest

Scarsella argues the trial court abused its discretion when determining the amount awarded was unliquidated, and that the trial court should have awarded prejudgment interest totaling $949,626.03. We disagree.

We review prejudgment interest decisions for abuse of discretion.[52] A court may award prejudgment interest (1) for liquidated damages[53] or (2) "when the amount of an 'unliquidated' claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion."[54] "Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished, or the value of the services rendered, interest will not be allowed prior to the judgment."[55]

[52] Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).
[53] Scoccolo Const., 158 Wn.2d at 519.
[54] Prier v. Refrigeration Engineering Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968).
[55] Wright v. City of Tacoma, 87 Wn. 334, 353-54, 151 P. 837 (1915).

A claim is liquidated "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion."[56] A claim is " 'unliquidated' where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, . . . but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed."[57]

In Prier, the Washington State Supreme Court explained, "the existence of a dispute over part or all of a claim does not change the claim from a liquidated to an unliquidated one. It is the character of the claim and not of the defense that determines the question."[58] There, the court determined there was data available to compute the exact costs of repairs, so the plaintiff's claims were for a liquidated sum on which interest would be allowed.[59]

Here, the trial court determined, "Scarsella's request for an award of prejudgment interest cannot be granted because Scarsella is not a prevailing party against Flatiron, and because the principal judgment amount is not based upon a liquidated sum." The trial court compared this case to Wright v. City of Tacoma where the court permitted prejudgment interest on a sum that was not in dispute but denied prejudgment interest where "the items which made up this amount were in dispute."[60] In Wright, the court explained, "It being necessary to establish by evidence the amount of the services

[56] Prier, 74 Wn.2d at 32.
[57] Prier, 74 Wn.2d at 33.
[58] Prier, 74 Wn.2d at 35.
[59] Prier, 74 Wn.2d at 34-35.
[60] 87 Wash. at 354.

furnished, or the quantity of material supplied, and not being able to establish these either by computation or by reference to a known standard, interest prior to the date of the judgment was improperly allowed."[61]

Here, Flatiron calculated it owed Scarsella approximately $2,731,437.97. But, the trial court determined the amount Flatiron owed Scarsella was not, and could not be, calculated "with any certainty from the evidence, and thus it is not possible to compute prejudgment interest on that sum."

We agree the amount of Scarsella's recovery is an unliquidated sum that is not "determinable by computation with reference to a fixed standard contained in the contract." For this reason, the trial court did not abuse its discretion in denying prejudgment interest.

Scarsella also argues it is entitled to prejudgment interest because RCW 39.04.250 and RCW 39.76.011 did not supersede common law rules for prejudgment.[62] "Where. . . the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force, the statute will be deemed to abrogate the common law."[63]

RCW 39.04.250(3) provides a party may recover interest where a party wrongfully withheld the sum. Scarsella cannot recover under RCW 39.04.250(3)

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[61] 87 Wash. at 354.

[62] Scarsella also argues the trial court improperly determined RCW 39.04.250 and RCW 39.76.011 to be the exclusive remedy. This claim is without merit because the trial court did not state that RCW 39.04.250 and RCW 39.76.011 were exclusive remedies.

[63] State ex rel. Madden v. Public Utility Dist. No. 1 of Douglas County., 83 Wn.2d 219, 222, 517 P.2d 585 (1973).

because Flatiron withheld payment in good faith. Because it cannot recover under RCW 39.04.250(3), Scarsella is not entitled to interest under that statute. The good faith safe harbor provided by the parties' contract and RCW 39.04.250(3)'s requirement that a withholding be wrongful abrogate any previous inconsistent common law right of recovery. And, because the date of completion had not arrived by the time of trial, the retainage issue was premature and Scarsella is not entitled to interest on the retained sum under RCW 39.76.011.

The trial court did not abuse its discretion in denying prejudgment interest. So, we affirm.

Attorney Fees on Appeal

Both Scarsella and Flatiron request attorney fees and costs on appeal. But, neither is the prevailing party on appeal. Each has prevailed on one or more major issues. So we deny both requests.

CONCLUSION

We affirm. The prime contract notice and claim provisions apply to Scarsella's claim for extra work because the subcontract broadly incorporated the prime contract, Flatiron did not waive the prime contract provisions, and Scarsella's claim for estoppel fails. Because Scarsella did not comply with the notice and claims requirements, it waived its right to recovery and quantum meruit is unavailable. Scarsella's claim for foreclosure of the lien on retainage was premature because the prime contract date of completion had not arrived by the time of trial. Neither Scarsella nor Flatiron is the

prevailing party, and neither party is entitled to trial fees and costs. Scarsella did not prevail on a liquidated claim, and the trial court did not abuse its discretion in denying prejudgment interest. Flatiron breached the subcontract "by causing the substantial project delays." We deny Scarsella and Flatiron's requests for attorney fees and costs on appeal.

Leach, J.

WE CONCUR:

Brennan, J.

Mann, C.J.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 78543-5-I to the following:

Meghan A. Douris
Ryan M. Gilchrist
Oles Morrison Rinker & Baker, LLP
One Convention Place
701 Pike Street, Suite 1700
Seattle, WA 98101

Michael P. Grace
Evan A. Brown
Groff Murphy PLLC
300 East Pine Street
Seattle, WA 98122

Meredith Dishaw
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380

Jan D. Sokol
Stewart Sokol & Larkin LLC
2300 SW First Avenue, Suite 200
Portland, OR 97201-5047

Guy W. Bowman
Assistant Attorney General
Attorney General of Washington
P.O. Box 40113
Olympia, WA 98504-0113

Terry R. Marson II
Marston Legal, PLLC
11400 98th Avenue NE, Suite 201
Kirkland, WA 98033

Original Efiled with:
Court of Appeals, Division I
Clerk's Office

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

DATED: October 27, 2020, at Seattle, Washington.

Frankie Wylde, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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