72258-1

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NO. 72258-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SAK & ASSOCIATES, INC., a Washington corporation,

Appellant,

v.

FERGUSON CONSTRUCTION, INC., a Washington corporation,

Respondent.

RESPONDENT'S BRIEF

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ORIGINAL

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INTRODUCTION

Lack of consideration is a *defense* to a breach of contract action, not a basis for one. If the termination-for-convenience provision in the Subcontract between SAK and Ferguson rendered Ferguson's promises of performance illusory, as SAK vehemently argues, then the Subcontract was invalid, and the trial court properly dismissed SAK's sole claim for breach of that non-existent agreement.

In the alternative, despite acknowledging that "the termination for convenience provision of the Subcontract...as written" allowed Ferguson to "terminate the contract...for any and all reasons," Opening Brief at p. 11, SAK argues that Ferguson's invocation of that provision was ineffective unless there was no possibility that SAK could have been the least bit confused by Ferguson's notice of termination as to the specific *reasons* Ferguson was terminating the Subcontract. Nothing in the Subcontract required Ferguson to give any reasons at all. All it required was that Ferguson give notice of the *fact* that it was terminating the Subcontract for convenience. There is no dispute that Ferguson did that, and that it paid SAK for the work it had performed as provided by the Subcontract. The trial court properly found that Ferguson complied with the Subcontract and dismissed SAK's claim for breach of that agreement.

This court should affirm the trial court's dismissal of SAK's claim on both of the foregoing bases, as well as SAK's failure to comply with the notice and claim requirements of the contract documents, as set forth below.

RESTATEMENT OF SAK'S ASSIGNMENTS OF ERROR

SAK's assignments of error are more accurately posed as follows:

1. The trial court erred in dismissing SAK's complaint for breach-of-contract on the grounds that Ferguson complied with the termination-for-convenience provision of the parties' Subcontract as a matter of law.

2. The trial court erred in dismissing SAK's sole claim for breach of a contract that SAK itself argued was invalid for lack of consideration.

FERGUSON'S ASSIGNMENT OF ERROR

1. The trial court abused its discretion in reducing Ferguson's attorney's fees when those fees amounted to only about 25 percent of the amount in controversy.

STATEMENT OF THE CASE[1]

A. Factual History

Ferguson entered into a Subcontract with SAK ("Subcontract"), dated April 19, 2012, and executed by SAK on May 14, 2012, to perform cement concrete pavement work on the Project. CP 26 at ¶3, CP 89-102. SAK performed work under the Subcontract from April 18, 2012 to July 27, 2012. CP 27 at ¶4.

On July 27, 2012, SAK was terminated for convenience, in accordance with Section 7 of the Subcontract General Conditions. CP 27 at ¶4, CP 93 at ¶7, CP 104. Upon termination, SAK was paid the last of its $181,044.77 due for all of the work it actually performed. CP 27 at ¶5, CP 106-116. Retainage in the amount of $20,116.09 was and currently is being withheld pursuant to Sections 4.A and 4.D of the Subcontract General Conditions because the Project is not yet completed. CP 27 at ¶6,

[1] As a preliminary matter, Ferguson objects to SAK's many unsupported, pejorative characterizations of its behavior as "bid-shopping" in connection with the concrete work on the project at issue in this suit. There are many reasons a prudent contractor would want to be aware of its options regarding performance of portions of a project (such as contingencies in case an existing subcontractor defaults) that do not involve nefarious intent.

CP 92, CP 106-116. No claims for additional payment were made by SAK in the immediate days, weeks, or months after termination and final payment was made to SAK. CP 27 at ¶7.

Not until April 18, 2013, over eight months (or exactly 266 days) after SAK was terminated, did Ferguson receive a letter from SAK in which SAK claimed money damages were owed as a result of the termination. However, no invoice, breakdown of costs, or calculations of damages, as required by Section 4.B of the Subcontract, were attached to the letter. CP 27 at ¶8, CP 118-119. In fact, SAK did not even identify in the letter the amount of damages or costs it was allegedly owed. CP 118-119.

On April 25, 2013, soon after receiving the above referenced letter from SAK, Ferguson responded with a letter advising SAK that it did not have a claim under the Subcontract and "[e]ven if SAK might otherwise have had a claim resulting from Ferguson's actions, it long ago waived that claim by utterly failing to comply with the notice and claim procedures in paragraph 20 of the Subcontract General Conditions, as required by *Mike M. Johnson, Inc. v. County of Spokane* [citation omitted]." CP 408-409.

On May 10, 2013, 288 days after it received the termination notice, instead of filing a claim as required by the Subcontract, SAK filed the

present lawsuit. CP 1-3. In the lawsuit, SAK claims it is owed the principal amount of $226,650.68 in "lost revenue, lost profits, and unabsorbed home office overhead expenses" – despite only doing work with a total value of $201,160.86 and already being paid $181,044.77 (with $20,116.09 in retainage being withheld). CP 3 at ¶¶1, 26, CP 27 at ¶¶ 5, 9, and CP 106-116.

On May 14, 2013, in response to SAK's Complaint, Ferguson's counsel sent a letter to SAK's counsel and again advised SAK of the notice and claim requirements in Section 20 of the Subcontract General Conditions and inserted the provision in the letter. CP 411-412. Ferguson also cited to Washington case law authority *Mike M. Johnson* and *Am. Safety Cas. Ins. Co. v. City of Olympia* [citations omitted], to explain that Washington courts apply notice of claim provisions very strictly. CP 411-412.

Nearly a year after SAK was terminated, on June 12, 2013, Ferguson received a "notarized Submission of Final Costs" and "Segregated Termination Costs Worksheet" from SAK with no invoices or back-up as required by the Subcontract CP 7 at ¶2. The total amount of costs claimed through the worksheet was $82,944. *Id.* Notwithstanding the fact that the claim was 300 days late (321 days after termination less the 21 days permitted for notice), there were no other documents or

breakdown/calculation of costs submitted with the claim that explained the $226,650.68 in damages SAK alleges it is owed in its Complaint. *Id.*

1. Relevant Contract Provisions

The Subcontract contains the following provision regarding incorporation of the "Main Contract:"

> **1. SUBCONTRACT DOCUMENTS**
>
> The terms "Contract" and "Main Contract" used herein refer to the Contract between the Owner and the Contractor for construction of the Project. The term "Contract Documents" as used herein refers to the "Main Contract" between the Owner and the Contractor, together with all Drawings, Specifications, General Conditions, Supplemental General Conditions, Special Conditions... By this reference, all terms and Provisions of the Contract Documents are incorporated in, and become part of, this Subcontract.

CP 91 at 1

Section 7 of the Subcontract provides:

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

CP 94 at E

The Main Contract and Subcontract contain specific requirements and procedures regarding notices of claims for payment (other than retainage). The Subcontract states, in relevant part, the following regarding notices of claims:

> **20. CLAIMS**
>
> Subcontractor agrees that, if it fails to give timely notice of a claim or dispute according to the Main Contract (or if not covered, within fourteen [14] calendar days of the occurrence of a problem, dispute, claim or delay event), the claim shall be nonreimbursable and any schedule extension or adjustment to the contract sum requested by Subcontractor shall be deemed waived. This provision shall survive the completion or termination of this Subcontract.

CP 99 at 20

The "Main Contract," as referenced in the above provision, states the following with regards to "Claims:"

> **ARTICLE 15 CLAIMS AND DISPUTES**
> **§ 15.1 CLAIMS**
> **§15.1.1 DEFINITION**
>
> A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the [Subcontract]. The term "Claim" also includes other disputes and matters in question between the [Contractor] and [Subcontractor] arising out of or relating to the [Subcontract]. The responsibility to substantiate Claims shall rest with the party making the Claim.
>
> **§ 15.1.2 NOTICE OF CLAIMS**

> Claims by either the [Contractor] or [Subcontractor] must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not [sic] serving as an Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

CP 74

Section 40 of the Subcontract requires the court to award attorneys' fees to the substantially prevailing party:

> **40. Attorney Fees.**
>
> If either party becomes involved in litigation or arbitration arising out of this Subcontract or the performance thereof, the court or arbitration panel in such litigation or arbitration or in a separate suit, shall award attorney fees to the substantially prevailing party.

CP 102

B. Procedural History

Eight months after SAK cashed Ferguson's check for the percentage of the work it had completed prior to being terminated for convenience in accordance with the Subcontract, Ferguson received a letter from SAK's counsel claiming that the termination had been wrongful, and demanding unspecified damages from Ferguson. On April 25, 2013, Ferguson's counsel responded to that letter with one that stated in substantial part:

> As I am sure you know, there is no authority in Washington disapproving a private general contractor's use of a termination-for-convenience provision on such a project, for whatever purposes it chooses. In fact, Washington courts are extremely deferential to private agreements between contracting parties. Ferguson properly invoked a contractual provision to which your client agreed, and compensated SAK in accordance with that provision. SAK therefore has no claim against Ferguson on the project.
>
> * * *
>
> **In light of the foregoing, please be advised that Ferguson will consider any action you may commence against it relating to the above-reference project frivolous, and will seek sanctions under CR 11, as well as costs and attorneys' fees as provided by paragraph 40 of the Subcontract General Conditions.**

CP 408-409 (emphasis added).

Unfortunately, despite that warning, SAK proceeded to commence this matter against Ferguson based on its contention that the termination-for-convenience provision in the Subcontract was unenforceable as written.

In response, Ferguson gave SAK another chance to avoid fees and costs to both parties in a letter dated May 14, 2013, which included the following:

> In the only two reported Washington decisions I can find, the courts enforced termination-for-convenience provisions as written. *See, Myers v State,* 152 Wn. App. 823, 218 P.3d 241, (2009); *Lampson Universal Rigging, Inc. v. Washington Public Power Supply System*, 44 Wn.App. 237, 721 P.2d 996 (1986).
>
> In summary, Ferguson complied with the terms of the subcontract to which SAK agreed, including the unit-price

> structure, and the termination for convenience provision. SAK, in contrast, did not comply with the explicit provision requiring timely notice of claims and disputes, and so waived any claim it might have had as a matter of law.
>
> **I urge you to voluntarily dismiss SAK's ill-advised suit before Ferguson incurs additional attorneys' fees and costs (for which SAK will be liable under section 40 of the Subcontract General Conditions) having it dismissed on summary judgment.**

CP 411-412 (emphasis added).

Like Ferguson's previous warning, SAK ignored the foregoing request and refused to dismiss the action.

Ferguson therefore sought to dispose of the case as expeditiously as possible by seeking summary judgment on the notice issue at the first available opportunity, but that effort was frustrated and delayed by SAK waiting until the last minute and then moving for a change of judge. After a long delay caused by that maneuver, SAK then filed a cross motion seeking to have the court invent new law on the enforceability of the termination-for-convenience provision in the Subcontract. The court denied both motions, and Ferguson timely filed for reconsideration on the notice issue, which motion the court also denied. CP 219, CP 225-234, CP 268.

Failing to extinguish the matter on the notice issue, Ferguson then immediately sought the opportunity to have it dismissed on the grounds that Ferguson had complied with the Subcontract as a matter of law. CP 271-284. When the Court's availability for oral argument prevented argument on that motion from taking place before the discovery cutoff in the case schedule, Ferguson sought a continuance of the trial date to spare both parties the expense of preparing for a trial that its motion was intended to obviate. The Court granted a brief continuance and then ultimately granted Ferguson's Second Motion for Summary Judgment and dismissed SAK's claim with prejudice. CP 386-387.

Ferguson moved for an award of fees in the total amount of $58,819.72 for successfully defending against SAK's breach-of-contract claim in the principal amount of $226,650.68. CP 391-402. Ferguson's motion was supported by the Declaration of its lead counsel, Douglas R. Roach, to which was attached Ahlers & Cressman's detailed billing statements for the entire case. CP 402-423.

In response, SAK did not take issue with the hours Ferguson's counsel expended or the rates they charged for those hours, but argued that Ferguson was entitled only to the fees it

incurred on its ultimately successful motion, and not for any of its prior efforts to have SAK's suit dismissed. CP 424-428. SAK made no attempt to specifically identify how much or little of Ferguson's fees were related to the various motions and cross motions in the case. *Id.*

The trial court entered an order awarding Ferguson only $44,114.25 of its requested fees, inserting the phrase "given the proportional factor(s) as noted in Berryman v. Metcalf." It provided no further explanation of the basis for its reduction in Ferguson's fees. CP 442-443.

ARGUMENT

A. There Are Three Separate Bases On Which This Court May Affirm The Trial Court's Dismissal Of SAK's Complaint.

It is well-established Washington law that a court of appeals may affirm a trial court decision on any grounds supported by the record. *Ha v. Signal Electric, Inc.* 332 P.3d 991 (Wash. Ct. App. 2014). In this case, in addition to that upon which the trial court relied, there are two other bases upon which this Court may readily affirm.

1. This Court Should Affirm The Trial Court's Dismissal Of SAK's Breach-Of-Contract Claim Because SAK Has Repeatedly Argued That The Contract As Written Is Invalid For Lack Of Consideration.[2]

In this appeal, as it did below, SAK argues that "the termination for convenience provision of the Subcontract...**as written** allowed Ferguson to "terminate the contract and avoid its obligations for any and all reasons, rendering its promises illusory." Opening Brief at p. 11 (emphasis added). SAK repeatedly argued below that unless the court altered the language of that provision to mean something it does not say, the contract—upon which SAK bases its sole cause of action—is invalid[3] because Ferguson's promise of performance is illusory:

[2] Ferguson accepts SAK's characterization of its promises as "illusory" for purposes of this argument only. For all other purposes, Ferguson maintains that it did not reserve the right to cancel the Subcontract "at its pleasure." The terms of the termination-for-convenience provision itself assume the Subcontractor will perform some work: "Contractor may...terminate...the Subcontract...for its own convenience and require Subcontractor to immediately stop work," and require Ferguson to pay for the work performed.

[3] In its Opening Brief, SAK replaces the word "invalid" with "illusory," but Washington courts do not find contracts "illusory"; they find them invalid if the promises that purport to provide consideration for them are found to be illusory.

15 Where there is an illusory promise, where performance is "optional with the
16 promisor," consideration is insufficient. *See Mithen v. Board of Trustees of Central Wash.*
17 *St. College*, 23 Wn. App. 925, 932, 599 P.2d 8 (1979) (cited with approval in *King County*
18 *v. Taxpayers of King County*, 133 Wn.2d 584, 600, 949 P.2d 1260 (1997) (*en banc*)).

19 An "illusory promise" is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or
20 nonperformance. When a "promise" is illusory, there is no actual requirement upon the "promisor" that anything be done because the
21 'promisor' has an alternative which, if taken, will render the "promise" nothing. When the provisions of the supposed promise leave the promisor's
22 performance optional or entirely within the discretion, pleasure and control of the promisor, the 'promise' is illusory.

23

24 PLAINTIFF'S OPPOSITION TO SECOND MOTION FOR SUMMARY JUDGMENT – 13

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1 *Interchange Assoc. v. Interchange, Inc.*, 16 Wn. App. 359, 360-61, 557 P.2d 357 (Div. 1,
2 1976) (reh'g denied 1977); *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 458, 287 P.2d
3 734 (1955). More succinctly, a party that "promises to do a thing only if it pleases him to
4 do it, is not bound to perform it at all, as his promise is illusory." *Winslow v. Mell*, 48
5 Wn.2d 581, 584, 295 P.2d 319 (1956) (as amended on rehearing). *See Interchange Assoc.*,
6 16 Wn. App. at 361 ("An apparent promise which according to its terms makes
7 performance optional with the promisor whatever may happen, or whatever course of
8 conduct in other respects he may pursue, is in fact no promise, although often called an
9 illusory promise.") (quoting Restatement of Contracts § 2, cmt. B (1932)).
10 Where there is an illusory promise, or a "contractual provision[] that reserve[s] to
11 one of the parties an unconditional right to terminate the contract, [it] render[s] the contract
12 invalid. When an absolute right to cancel a promised performance is retained, the promise
13 is illusory and insufficient consideration to support enforcement of the return promise."
14 *Mithen*, 23 Wn. App. at 932. Thus, there cannot be a contract where a party reserves the
15 right to "cancel at his pleasure." *Mithen*, 23 Wn. App. at 932 (quoting from 1 S. Williston,
16 Contracts, § 105 at 418 (3d ed. 1957).
17

CP 319-320.

As demonstrated by all of the authorities cited by SAK, lack of consideration on is a *defense* to an action for breach of contract, not a basis for one. Contrary to SAK's assertions, awarding damages for breach of a contract that was based on an illusory promise would be a radical departure from existing Washington law—and from the law of every other jurisdiction of which Ferguson is aware.

Rather than providing a basis for SAK's breach of contract claim, SAK's position on this point actually provides this Court with a ready alternative basis upon which to sustain the trial court's dismissal of SAK's breach-of-contract action: The termination-for-convenience provision *as written* rendered the contract invalid; thus, there was no contract for Ferguson to breach, and SAK's complaint stating only a breach-of-contract cause of action was properly dismissed.

2. This Court Should Affirm The Trial Court's Dismissal Based On Ferguson's Compliance With The Termination-For-Convenience Clause.

The Washington Supreme Court stated long ago in *Berschauer/Phillips*[4], "[w]e hold parties to their contracts." In doing so, "[t]he courts must not interpret what was intended to be written but what was written. *Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wn. 2d 493,

[4] *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn. 2d 816, 881 P.2d 986 (1994).

504, 115 P.3d 262, 267 (2005) citing *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348–49, 147 P.2d 310 (1944). "If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision." *Absher Constr. Co.*, 77 Wn. App. 141, 890 P.2d 1071 (2012).

There is nothing ambiguous about the termination-for-convenience provision of this Subcontract:

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

CP 94 at E ¶4 (emphasis added).

General rules of contract interpretation do not apply where there is no ambiguity or conflict, and no rule permits Washington courts to ignore the plain language of the contract. *Graoch Associates No. 5 Ltd. P'ship v. Titan Const. Corp.*, 126 Wn. App. 856, 867, 109 P.3d 830, 835 (2005). The above-quoted plain language of the Subcontract is clear and unambiguous and cannot be ignored.

The Subcontract authorized Ferguson to terminate SAK for convenience under two conditions: (1) that Ferguson provided written notice to SAK, and (2) that Ferguson paid SAK for the work SAK actually performed. Ferguson complied with both of these conditions. CP 27 at ¶¶4-5, CP 104-116. When SAK signed the Subcontract, it agreed that once Ferguson paid SAK for the work actually performed, Ferguson would not be liable to SAK "for any other costs, including anticipated profits on work not performed or unabsorbed overhead," which are exactly the type of costs and damages SAK is now seeking through this action. CP 94. If SAK wanted the Subcontract to permit it to collect any other costs, it could and should have negotiated for such additional terms. This Court may not now re-write the parties' agreement to give SAK a remedy it specifically waived and punish Ferguson for protecting itself from this specific type of liability in the event of terminating a subcontractor. Accordingly, SAK's complaint should be dismissed as a matter of law.

a. SAK Admits That No Washington Court Has Held Termination-For-Convenience Provisions Are Unenforceable Or Held Claims Can Be Made Against A Contractor For Complying With Such A Provision.

In its opening brief, SAK admits: "No published Washington case law has been found where a court has ruled on the applicability of a

termination for convenience provision clause in a similar situation." Appellants' Brief at 22. Therefore, SAK does not (and cannot) dispute that this Court would have to create new law in Washington to find that SAK can claim damages against Ferguson for complying with the mutually-negotiated termination-for-convenience provision of the Subcontract.

In its opening brief, SAK makes no attempt to distinguish the termination-for-convenience in *Realm Inc. v. City of Olympia*, 168 Wn. App. 1, 277 P.3d 679 (2012), but does attempt to distinguish the facts of *Meyers v State of Washington,* 152 Wn. App. 823, 218 P.3d 241 (2009), and *Lampson Universal Rigging, Inc. v. Washington Pub. Power Supply Sy.*, 44 Wn.App. 237, 721 P.2d 996 (1986). However, SAK admits that the Court of Appeals in each case did not find termination-for-convenience clauses invalid or unenforceable. On the contrary, in all three cases, the termination-for-convenience provisions of the contracts were enforced as written. This Court, therefore, is required to enforce the Subcontract's termination-for-convenience provision as written. That means the only thing left to decide is whether Ferguson complied with the terms of that provision. As set forth below, it is beyond question that it did.

b. Ferguson Notified SAK Of The Termination For Convenience and Paid SAK For The Work Actually Performed.

On this appeal, SAK takes issue with the *content* of Ferguson's termination letter, not the *fact* that Ferguson provided it, which is all that matters for purposes of Ferguson's second motion for summary judgment. SAK admits having timely received Ferguson's notice that said: "**SAK's services** for this project **are no longer required**," as a matter of "**basic convenience**;" and "[p]ursuant to Section 7 of the Subcontract General Conditions, **the subcontract is terminated**, effective immediately." CP 104 (emphasis added). The notice was even titled, in bold: "**Notice of Termination**." *Id.*

All the Subcontract requires is that Ferguson give SAK notice that the Subcontract is being terminated. It contains no specific requirements as to the *content* of that notice. SAK's professed confusion over Ferguson's reasons for the termination is irrelevant to the fact that Ferguson provided notice as required by the Subcontract.[5] That fact is uncontroverted on the record before the Court.[6]

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[5] Citing no authority, SAK argues that "[a]t the very least, an untruth cannot be reasonable" and that "[o]nce Ferguson undertook to provide a reason or explanation of the termination of SAK's contract, a false and pretextual notice, should not be deemed, as a matter of law, reasonable." Opening Brief at p. 17. Ferguson denies that its notice contained any untruths, but even if it had stated inaccurate reasons for invoking the clause, it would not alter the fact that SAK received notice that it was doing so, which is all that was required under the Subcontract.

[6] In fact, as declared by SAK's managing employee, SAK admits it received the notice: "In late July 2012, SAK received a facsimile from Ferguson Construction, Inc. ("Ferguson") **unilaterally terminating our contract**." CP 328 at ¶2 (emphasis added).

SAK's invocation of a notice-to-cure case, *Lano v. Osberg Const. Co.*, 67 Wn.2d 659, 409 P.2d 466 (1966),—finding that a contractor's notice to a defaulting subcontractor did not give the subcontractor a reasonable opportunity to correct its defective work before being terminated for cause—is off the mark here. All Ferguson was required to do under Section 7 of the Subcontract was tell SAK its subcontract was being terminated. No reasonable finder of fact could find that Ferguson did not do that.

Neither does SAK dispute the fact that Ferguson paid SAK $181,044.77, and that the payment represented "an amount proportionate to the total Subcontract price" as required by Section 7. CP 27, CP 106-116. That fact is therefore uncontroverted. When, as here, there are no questions of material fact, summary judgment was properly granted.

3. This Court Should Affirm The Trial Court's Dismissal Of SAK's Claims Because SAK Failed To Comply With The Contract's Notice And Claim Requirements.

Even if there was a valid contract and Ferguson failed to comply with it, the Main Contract and Subcontract General Conditions contain specific provisions (§§ 15.1.2 and 20, respectively), as outlined above, which SAK was required to follow if it believed it was entitled to a claim for damages. CP 74 and CP 99. It is well established that interpretation of such unambiguous contract provisions is a matter of law. *Absher*, 77 Wn. App. at 141. "If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.") The

above notice provisions of the Subcontract and Main Contract are clear and unambiguous. If SAK wanted to dispute Ferguson's right to terminate SAK or make a claim for "Segregated Termination Costs," "lost revenue, lost profits, and unabsorbed home office overhead expenses," or any other type of claim arising from the termination, SAK was obliged to notify Ferguson to that effect by August 17, 2012 – twenty-one (21) days after SAK received its notice of termination on July 27, 2012. Even in the event the Main Contract was somehow not incorporated, the Subcontract required SAK to respond in an even shorter time, within fourteen (14) days of termination. Thus, under the best of all scenarios for SAK, it was required to respond in twenty-one (21) days after termination. Instead, SAK sent a notice for no specified amount of damages 266 days after termination, filed a complaint with this Court for an unexplained "principal amount of $226,650.68" in damages 288 days after termination, and sent an $82,944 claim for "Segregated Termination Costs" to Ferguson 321 days after termination.

a. SAK Did Not Comply With the Notice And Claim Provision in the Subcontract and, Therefore, Waived Any Claim It Might Have Had.

The controlling precedent relating to notice and claim provisions in a construction contract is the Washington Supreme Court's 2003 decision in *Mike M. Johnson, Inc. v. County of Spokane*; 150 Wn.2d 375, 28 P.3d 161 (2003). In *Mike M. Johnson,* the Supreme Court held that

contractors such as SAK must strictly comply with contractual notice and claim submission procedures, unless those procedures are unambiguously waived. *Mike M. Johnson,* 150 Wn.2d at 386. A finding of waiver by the other contracting party requires a showing of "unequivocal acts of conduct evidencing an intent to waive." *Id.* at 391 citing *Absher Const. Co. v. Kent Sch. Dist.,* 77 Wn. App. 137, 143, 890 P.2d 1071 (1995). (The issue of waiver was never raised by SAK below).

In *Mike M. Johnson*, Spokane County contracted with Mike M. Johnson, Inc. ("Johnson") to construct two sewer projects. *Johnson,* 150 Wn.2d at 378. The contract required Johnson to follow formal written notice and claim procedures for all claims for additional compensation or time. Such claims were to include a detailed explanation of the nature of the claim and the estimated dollar cost. *Id.* at 379. The contract further specified that the failure to follow the written notice provisions would result in a waiver of the contractor's claims. *Id.* at 380. Johnson contemporaneously wrote a letter to the County stating that its work had been delayed and that the delay was adding costs to its work. *Id.* at 380-81. Johnson later brought suit to recover the additional compensation. The County moved for summary judgment and obtained an order dismissing Johnson's claims on the grounds that Johnson had failed to comply with the contractual claims procedures. The Washington Supreme Court affirmed the summary judgment dismissal, noting that "Washington law generally requires contractors to follow contractual notice provisions unless those procedures are waived." *Johnson,* 150 Wn.2d at 386. The

Court emphasized that "MMJ's notice to the County concerning its grievances did not excuse MMJ from complying with the contractual requirements." *Id.* at 392. The Court further emphasized that "vague references to problems were insufficient for the County to deal with as claims." *Id.* at 390.

Mike M. Johnson is directly on point here. As in *Mike M. Johnson*, the Main Contract and Subcontract in this case contain notice and claim submission requirements that SAK was required to follow if it wished to pursue its claims for "Segregated Termination Costs," "lost revenue, lost profits, and unabsorbed home office overhead expenses." As in *Mike M. Johnson*, Section 20 of the Subcontract General Conditions clearly and unambiguously states that the failure to assert a claim in accordance with the Subcontract operates as a waiver of the claim. Section 20 of the Subcontract adds that the "claim shall be nonreimburseable" if the notice provisions are not followed. CP 99. Article 15.1.2 of the incorporated Main Contract General Conditions clearly and unambiguously states that notice of such claims need to be in writing and provided "21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim." CP 74. SAK alleges in its complaint that the termination was the event giving rise to the claim. CP 1-3. SAK cannot reasonably argue that it did not recognize "the condition giving rise to the claim" when its claims are based on the termination. In both *Mike M. Johnson* and this case, the parties were bound by contracts requiring

written notice of a claim within certain prescribed time frames. Application of the holding in *Mike M. Johnson* to the facts of this case, as outlined above, bars SAK's claim for additional cost and/or damages.

The *Mike M. Johnson* decision establishes a bright-line approach for reviewing a contractor's compliance with contractual notice and claim submission procedures. The contractor has either complied or has not. Here, there is no question SAK failed to comply with Section 20 of the Subcontract General Conditions and Section 15.1.2 of the Main Contract General Conditions when it submitted an $82,944 claim for "Segregated Termination Costs" 300-days after it was permitted to submit a claim under the contracts. Further, SAK has never made a claim per the Subcontract and Main Contract for the alleged $226,650.68 in "lost revenue, lost profits, and unabsorbed home office overhead expenses," as asserted in SAK's Complaint. CP 1-3. Accordingly, SAK is barred from making any claims for payment and/or damages.

This Court recently decided this very same issue on similar facts. In *Realm Inc. v. City of Olympia*, 168 Wn.App. 1, 277 P.3d 679 (2012), a contractor entered into a contract with the City of Olympia to build a tunnel that would serve as a fish passage route for salmon. *Realm*, 277 P.3d at 681. Prior to the completion of the project, the contractor was terminated for convenience and issued payment for work performed up to

the date of termination. *Id.* The contractor cashed the check and, after it was terminated, subsequently sued the City for additional amounts it believed it was owed. *Id.* The City filed for summary judgment, arguing the contractor waived its claim by failing to comply with the contract's notice provisions and the acceptance of payment constituted accord and satisfaction. *Id.* The trial court granted summary judgment and the Court of Appeals affirmed. The general contractor argued on appeal that it was not required to comply with the contractual notice provisions because its dispute with the City did not arise until after the city terminated the contract. *Id.* The Court of Appeals disagreed and held that the contractor "was required to comply with the notice provisions even after termination." *Id.* Here, the facts are identical. SAK was terminated for convenience; Ferguson issued payment for work performed; SAK cashed the check; and, SAK (over a year later) filed this suit for additional amounts it believes it is owed despite never filing a claim or providing any type of notice as required by the notice provisions of the contracts.

It is worth noting that in *Realm*, the Court stated that if the contractor had made some "good faith effort" to comply with the notice provision, the Court may have allowed the contractor to escape summary judgment:

> If the [contractor] had shown some good faith effort to comply with [the notice] section, we might reach a different result. In *Weber Construction, Inc. v. Spokane County*, 124 Wn.App. 29, 34, 98 P.3d 60 (2004), Division Three of our court allowed a contractor to maintain litigation despite a technical failure to comply with [the notice] section [of the contract]. There, the contractor provided the required notice of protest, but it failed to include an estimate of the dollar cost of the protested work because under the case's particular facts, it lacked adequate information to make such an estimate. 124 Wn.App. at 34, 98 P.3d 60. Had [the contractor] made a similar technically defective attempt to comply with [the notice] section, we might be persuaded that it provided sufficient evidence of compliance with the contract to escape summary judgment. But instead, inadvertently or not, [the contractor] ignored [the notice] section both during and after the performance of its contract with the city. Because we reject [the contractor]'s argument that it was not required to comply with [the notice] section simply because the contract was terminated for public convenience, this total failure to even attempt compliance is fatal to [the contractor]'s case.

Realm, 168 Wn.App. at 11-12. Here, as in *Realm*, SAK made no effort at all to comply with the notice provisions of the contract documents. SAK failed to make any claim within 21 days after it was terminated, stayed silent until approximately eight months had passed before it raised a dispute with the termination, did not make a claim for

"Segregated Termination Costs" (which was not for the same amount alleged in the Complaint or a properly documented claim) until almost a year after termination, and **never** made a claim for "lost revenue, lost profits, unabsorbed home office overhead expenses" that it seeks through its complaint. CP 1-3. Based on these facts – the only relevant facts on this issue – SAK is barred from making a claim under the contracts and the Supreme Court's decision in *Johnson,* and subsequent Court of Appeals decisions, such as *Realm.*

i. There Is No Question Of Fact As To When SAK Became Aware Of The Basis Of Its Claim.

As set forth below, the undisputed evidence in this case is that SAK knew everything it needed to know about the project and Ferguson's intentions regarding SAK's work in order to make a claim for allegedly wrongful termination when it received Ferguson's termination letter on July 27, 2012.

a. According to SAK, The Only Valid Invocation Of A Termination-For-Convenience Provision Is To Delete Work From A Project.

In SAK's unsuccessful Motion for Partial Summary Judgment, it took the position that the *only* valid invocation of a termination-for-convenience provision was in connection with deletion of a portion of the work from the project, and that termination for the purpose of self-

performing is an improper use of a termination-for-convenience provision as a matter of law:

> In the case before the Court, Ferguson **did not terminate in order to avoid completion of the work**, but was actually re-procuring in order to self-perform...This Court should hold that Ferguson's termination for convenience in this particular instance was not a valid termination and a breach of contract, entitling SAK to damages for breach of contract.

CP 129-130. SAK's counsel reiterated this position several times in oral argument:

> **Now, there's only** two **things that really could happen. One would be a valid notice for termination for convenience, which would mean they just stop that part of the project**. That's when a valid notice for termination for convenience occurs....Otherwise, it does render contracts illusory...

CP 240 at Line 15-25 (emphasis added)

> Now, if it happens because they **no longer need the work**, it happened consistent with the law...

CP 241 at Lines 6-7 (emphasis added)

> "You terminated us for convenience, but you had someone else do our work? **You did our work**?" That means it's not a termination for convenience.

Id. at 15-17 (emphasis added)

> Now, it would have been saved if it met the circumstances where it's because **they're no longer doing the work**. That's different. But that's not what we have here, and so it can't be saved.

CP 242 at Lines 6-9 (emphasis added)

> The Court: So it is your position that if there's a change—that a change of circumstances is a prerequisite for this subcontract to be valid?
>
> ...
>
> There had to have been a change of circumstance? There had to be some sort of legitimate external factor going on here?
>
> Mr. Elison: For that clause to be valid?
>
> The Court: Right.
>
> Mr. Elison: The termination for convenience clause? That is correct.

CP 243-244

> [I]f there's a change of circumstance and **something is no longer needed**, we're going to consider that a unique situation where a contract can be terminated for convenience.

CP 244 at Lines 1-4 (emphasis added)

> Well, if there's a change and **they no longer need this work**, okay, it didn't render it illusory.

Id. at Lines 14-15 (emphasis added)

In other words, according to SAK, the relevant facts underlying its claim that the termination was invalid were that its scope was not being eliminated from the project and that Ferguson intended to self-perform at least some of it. Therefore, for notice purposes, the relevant question is when SAK learned those facts. As explained below, there can be no dispute that SAK learned those facts upon receipt of Ferguson's termination notice on July 27, 2012.

b. Ferguson's July 27, 2012 Termination Notice Explicitly Stated That SAK's Work Was Not Being Deleted From The Project, But That Ferguson Would Complete It.

As set forth above, in its letter to SAK of July 27, 2012, Ferguson explicitly stated that "it is in the best interest of the project to **complete** the site concrete paving[7] with Ferguson's own forces." CP 146 (emphasis added). Thus, Ferguson made it clear that there had not been a change of circumstances resulting in a deletion of SAK's work from the project, but that SAK's work would be *completed* by other means. In light of this explicit statement in Ferguson's letter, the statement in Ms. McCorkle's Declaration that "SAK did not know, nor have reason to know, whether the project owner had altered the project needs and changed the project so as not to require SAK's services any longer on the project" is not entitled to any weight. CP 137. As stated by the Washington Supreme Court in *Seven Gables Corporation* v. *MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986):

> **A nonmoving party in a summary judgment may not rely on** speculation, argumentative assertions that unresolved factual issues remain, or in **having its affidavits considered at face value**; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. *Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wash.App. 929, 587 P.2d 191 (1978). (emphasis added)

[7] Scope of Work and Project Conditions describes SAK's scope of work as "Cement Concrete Pavement for the Quad 7 Redevelopment—Sitework project..." CP 140.

A party's self-serving statements of conclusions and opinions alone are insufficient to defeat a summary judgment motion. *Segaline v. Dep't of Labor & Indus.*, 144 Wash.App. 312, 325, 182 P.3d 480 (2008) (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 359–61, 753 P.2d 517 (1988)).

Section 15.1.2 of the General Conditions of the Prime Contract,[8] which is incorporated by reference into the Subcontract, contains the following requirement: "Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or **within 21 days after the claimant first recognizes the condition giving rise to the Claim**, whichever is later." *Id.* (emphasis added).

Of course, Ferguson does not agree that there was anything improper about its invocation of the termination-for-convenience provision of its subcontract with SAK. However, SAK maintains that if Ferguson terminated the Subcontract under conditions that did not involve the deletion of SAK's scope of work, then the termination was improper. SAK cannot reasonably contend that it did not know that its work was not being deleted from the project after Ferguson stated in its July 27, 2012 letter that it had decided to "**complete** the site concrete paving with Ferguson's own forces." CP 146 (emphasis added). SAK therefore had 21 days from the receipt of that letter[9] to give Ferguson notice of a claim

[8] CP 74

[9] Ms. McCorkle states at ¶6 of her Declaration that SAK received Ferguson's termination notice "on or about July 27, 2012". CP 137 at ¶6.

for wrongful termination, or relinquish any such claim. It is undisputed that SAK failed to do so. Ferguson's Motion for Summary Judgment should therefore have been granted, and this Court may affirm the trial court's dismissal of SAK's suit on that basis.

c. Ferguson Gave SAK Reasonable Notice Of The Termination.

Where notice of termination is concerned, the appropriate inquiry is whether the notice is reasonable depending on the facts and circumstances of the particular case. *Lano v. Osberg Const. Co.*, 67 Wn.2d 659, 663, 409 P.2d 466 (1965), citing *Vance v. Mutual Gold Corp.*, 6 Wn.2d 466, 478, 108 P.2d 799 (1940) and *Black's Law Dictionary* (4th ed.) p. 1211 ("Such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances.") This makes sense in that the import of a notice of termination is not the intent of the drafter, but the information it can reasonably be said to convey to the recipient. Under this analysis, the proper question is whether Ferguson's termination letter provided SAK reasonable notice that Ferguson was terminating SAK's contract under the termination-for-convenience clause.

It is true that "[w]hether particular notice was reasonable is ordinarily a question of fact for the jury. But when reasonable minds could reach only one conclusion, the court can determine reasonableness as a matter of law." *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 767, 145 P.3d 1253 (2006), citing, *Havens v. C & D*

Plastics, Inc., 124 Wash.2d 158, 181, 876 P.2d 435 (1994). "To defeat summary judgment, [the plaintiff] must present sufficient evidence to establish an issue of material fact concerning the reasonableness of [the defendant]'s termination notice." *Id.*, citing CR 56(c). "Reasonable notice is notice 'fairly to be expected or required under the particular circumstances.'" *Id.*, citing Black's Law Dictionary at 1091 (8th ed.1999); and *Lano*, 67 Wash.2d at 663, 409 P.2d 466.

In *Cascade*, a glass repair company claimed that an insurance company's termination letter did not provide reasonable notice of termination because the letter was unsigned and mass mailed, and because it was unclear as to whether the parties' pricing arrangement was being terminated or unilaterally modified. The Court of Appeals rejected those arguments and ruled as a matter of law that the letter provided reasonable notice under the circumstances.

So here, the Court may find as a matter of law that Ferguson provided reasonable notice to SAK as to the circumstances of its termination from the project. There is no reasonable interpretation of Ferguson's termination letter that supports any other conclusion.

d. The Termination Letter Is Not Ambiguous.

Washington courts interpret clear and unambiguous language as a question of law. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005); citing *Paradise Orchards Ge. P'ship v. Fearing*, 122 Wash App. 507, 517, 94 P.3d 372 (2004). A provision is

ambiguous only if it susceptible to two different, **reasonable** interpretations. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). It is not ambiguous simply because the parties suggest opposite meanings, *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 944, 974 P.2d 1261 (1999), and the court will not adopt an unreasonable meaning urged by one of the parties. *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn.App. 666, 677, 285 P.3d 892 (2012).

If the written language (contractual, statutory, or otherwise) is not defined in the document itself, the court must begin with the plain, ordinary meanings of the words used, and will derive that meaning from a standard dictionary definition. *Boeing Co. v. Aetna Cas. and Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507, (1990); *Cornu-Labat v. Hospital District No. 2 Grant County*, 177 Wn.2d 221, 298 P.3d 791 (2013).

SAK argued below that Ferguson's letter was ambiguous because it referred to "phasing restrictions" and "site logistics," arguing that those words "could reasonably be interpreted to mean Ferguson was just wrapping up work without completing the original scope awarded to SAK, which scope was no longer needed and had been phased out..." and that "the notice falsely communicated that Ferguson was not going to complete the work awarded to SAK and would instead just wrap up whatever was necessary with its own forces." CP 251, CP 254. Unfortunately for SAK, Merriam Webster disagrees.

Webster defines the transitive verb "complete" as: **"to finish making or doing (something);** to bring (something) to an end or **to a**

finished state; to make (something) whole or perfect"[10] (emphasis added). These definitions are inconsistent with any notion that site concrete work was being deleted from the project, such that Ferguson would just be doing wrap-up work after SAK was terminated. It is hard to imagine why Ferguson would have stated that it intended to **complete** SAK's work if what it really meant was that it intended to **delete** it from the project.

Similarly, Webster defines "phasing" as: "(1) to adjust so as to be in a synchronized condition" and "(2) to conduct or carry out by planned phases."[11] Again, these definitions are consistent only with continuation of an ongoing project. They carry no implication whatever of terminating any part of that project.

The same is true of the word "logistics." Webster defines "logistics" as "the things that must be done to plan and organize a complicated activity or event that involves many people."[12] Again, the term is consistent only with an ongoing activity, and has no whiff of eliminating any part of that activity.

Regarding scope, Ferguson said what it was going complete was "the site concrete paving," which constituted the entirety of SAK's scope. CP 350. No reasonable recipient would have required more than that to

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[10] http://www.merriam-webster.com/dictionary/complete
[11] http://www.merriam-webster.com/dictionary/phasing
[12] http://www.merriam-webster.com/dictionary/logistics

consider herself on notice that Ferguson was taking over her company's work.

i. No Reasonable Juror Could Conclude That SAK Did Not Know That Ferguson Intended To Complete SAK's Work By Other Means.

Although subjective knowledge is usually a question of fact, this Court may rule on it as a matter of law where reasonable minds could not differ. *Wirtz v. Gillogly*, 152 Wn. App. 1, 8, 10, 216 P.3d 416 (2009). Given that *all* of the language Ferguson employed suggested that all parts of the overall project would continue after SAK was terminated, and Ferguson explicitly stated that it intended to *complete* SAK's work by other means, no reasonable juror could conclude that any literate, intelligent human being (which Ms. McCorkle is presumed to be) would not have recognized that fact when she received Ferguson's termination letter.

e. Ferguson's Termination Letter Provided Inquiry Notice, Which Is Sufficient As A Matter Of Law.

Even if Ferguson's termination letter was ambiguous (which it was not), it is beyond question that it at least placed SAK on inquiry notice regarding the circumstances of the termination. As stated by the Washington Supreme Court in *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006):

> [W]hen a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the

> scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. **A person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts the reasonable inquiry would disclose.**

Id. at 581, 146 P.2d at 431 (emphasis added, internal citations omitted). The Court reiterated the rule in *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012), in which it held that a purchaser at a trustee's sale had inquiry notice of title defects as a matter of law:

> If a purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed.

Id. at 573, 276 P.3d at 1284.

Ferguson's termination letter stated that it was terminating SAK's subcontract and that it intended to "complete the site concrete paving with Ferguson's own forces." CP 350. If SAK had a question about what that meant, it had only to ask Ferguson. Moreover, if it had visited the site at any time during the ensuing 8 months, it would have been obvious that others were completing SAK's work scope. Washington law does not allow SAK to put its head in the sand for an indeterminate time after receiving a letter that would have caused any ordinarily prudent subcontractor to ask a few questions or go look at the site. The Court may therefore rule as a matter of law that SAK had notice of all of the facts that

such a simple inquiry would have revealed months before providing any notice to Ferguson that it disagreed with the termination, and that SAK's claim is therefore barred.

f. That Ferguson Eventually Subcontracted Portions of SAK's Scope To Others Is Irrelevant.

In its own motion for summary judgment, and repeatedly in oral argument, SAK was emphatic that termination for convenience for *any* reason other than deleting a subcontractor's scope from the project was invalid. CP 228-230 at ¶A. Ferguson's letter provided reasonable notice that it was *not* terminating for that reason when it said it intended to complete the site concrete paving with its own forces. CP 104. That was sufficient to trigger SAK's own contractual obligation to provide notice to Ferguson that it disagreed with that action. That Ferguson decided later on to have other subcontractors do some of SAK's work does not alter the fact that Ferguson provided reasonable notice that SAK's scope remained part of the project at the time of the termination. That is the only fact that matters in terms of SAK's theory of the case.

B. The Trial Court Acted Arbitrarily In Reducing Ferguson's Fees

As set forth above, at every turn, Ferguson sought to avoid incurring expense responding to SAK's unfounded claims, but at every turn, SAK insisted on pursuing those claims. Even so, thanks to its willingness to let the court decide the pivotal issues in the case, the fees

Ferguson sought in the trial court are considerably less than they would have been if this matter had gone to trial.

1. Ferguson Is Entitled To Its Attorneys' Fees Pursuant To Section 40 Of The Subcontract General Conditions.

In *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn.App. 203, 242 P.3d 1 (2010), Division 1 of the Washington Court of Appeals recently reviewed the law on contractual attorneys' fee awards:

> Attorney fees and costs may be awarded when authorized by a contract, a statute, or a recognized ground in equity. *Kaintz v. PLG, Inc.*, 147 Wash.App. 782, 785, 197 P.3d 710 (2008). When a contract includes a bilateral attorney fees provision, "it is the terms of the contract to which the trial court should look to determine if such an award is warranted." *Kaintz*, 147 Wash.App. at 790, 197 P.3d 710. " 'Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.' " *Marine Enters., Inc. v. Sec. Pac. Trading Corp.*, 50 Wash.App. 768, 773, 750 P.2d 1290 (1988) (quoting *Schauerman v. Haag*, 68 Wash.2d 868, 873, 416 P.2d 88 (1996)).
>
> As a general rule, a prevailing party is one who receives an affirmative judgment in its favor. *Marassi v. Lau,* 71 Wash.App. 912, 915, 859 P.2d 605 (1993), abrogated on other grounds by *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash.2d at 481, 200 P.3d 683 (2009). *But see Marine Enters., Inc.*, 50 Wash.App. at 773, 750 P.2d 1290 (holding that when parties provide specific contract language regarding attorney fees, "reliance on cases holding that the prevailing party is the party with an affirmative judgment rendered in his favor ... is misplaced"). However, **a successful defendant can also recover as a prevailing party**. *Marine Enters., Inc.*, 50 Wash.App. at 772, 750 P.2d

> 1290. **Such a defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff's claims.** *See Marassi*, 71 Wash.App. at 916, 859 P.2d 605.

158 Wn.App. at 231 (emphasis added).

Here, Ferguson successfully defended against SAK's $226,650.68 claim, having that claim dismissed with prejudice. CP 386-388. Ferguson is therefore unquestionably entitled to attorney's fees as the substantially prevailing party in accordance with the mandatory fee provision in its Subcontract with SAK.

a. Ferguson's Actual Fees Are Reasonable

Ferguson's fees reasonable under Washington law. In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998) the Washington Supreme Court confirmed that Washington courts should be guided by the "lodestar" methodology in evaluating the reasonableness of attorneys' fee awards. That method generally consists of the court multiplying the lawyer's reasonable rate by the reasonable number of hours he or she expended.

In response to Ferguson's Motion for Award of Attorneys' Fees, SAK did not take issue with the hours billed or the rate charged, but continued its pursuit of unsupported legal theories and argued that the Court should award Ferguson fees only for the summary judgment motion

that finally disposed of this matter. CP 424- 428. That argument ignores the fact that, "[i]n Washington, a prevailing party or substantially prevailing party is the one that receives judgment in its favor **at the conclusion of the entire case**." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev. Inc.*, 160 Wn.App. 728, 239-40, 253 P.3d 101 (2011) (emphasis added). Ferguson was the defendant in this matter, and the Court dismissed SAK's breach of contract claim against it with prejudice, which concluded the entire case. CP 386-387. Ferguson is the prevailing party and is entitled to its fees for successfully defending against SAK's claim. Because the Subcontract requires the Court to award fees to the substantially prevailing party, under *Harmony at Madrona Park, supra*, the Court must reject SAK's invitation to declare a winner and a loser of each individual encounter along the way, and award Ferguson its fees as the "one who receive[d] judgment in its favor at the conclusion of the entire case." *Harmony.*

Even if the Court were inclined to accept SAK's unorthodox invitation to parse the case on a motion-by-motion basis, the result would not be much different because the only motion on which SAK can claim to have prevailed is Ferguson's single-page motion to strike certain parts of Christine McCorkle's Declaration in opposition to Ferguson's Second Motion for Summary Judgment. CP 385. SAK did *not* prevail on its own

Cross Motion for Summary Judgment,[13] CP 219 and Ferguson ultimately prevailed on the issue on which that motion was based in its Second Motion for Summary Judgment. CP 386- 387. Neither was the Court's denial of Ferguson's Amended Motion for Summary Judgment on the notice issue a win for SAK; it merely deferred the issue for ultimate determination at trial. Nor did the Court actually deny Ferguson's motion for continuance, despite the caption of the Court's order. Rather, in substance, the Court *granted* the motion in part, giving the parties additional time to seek the Court's ruling on the termination-for-convenience provision before incurring the expenses of preparing for trial. Thus, other than a brief motion to strike, there is *nothing* on which SAK can claim to have prevailed during the course of these proceedings.

Even if SAK had actually won the motions it claims to have won along the way, its request that Ferguson be denied the fees it incurred in pursuing or defending those motions would not be supported by Washington law. Numerous Washington cases hold that when opposing parties pursue numerous distinct *claims* against each other, the court will award each party fees for the ones on which it ultimately prevails and then

[13] Ferguson spent considerable time responding to that Cross Motion in conjunction with pursuing its own Amended Motion for Summary Judgment.

offset those awards,[14] but none award or deny fees on a motion-by-motion basis leading up to the final judgment. Here, the only *claim* was SAK's for breach of contract. Ferguson completely prevailed on that claim. Under Washington law, it is the only prevailing party in this case.

It is interesting that SAK defends its decision to bring suit on its novel interpretation of termination-for-convenience clauses, upon which issue SAK was unequivocally defeated, but argues that it was somehow unreasonable for Ferguson to incur fees advancing a notice defense that is well-established in Washington law, and which was preserved for presentation to the jury, and is now presented to the Court of Appeals as an alternate basis to affirm the trial court's dismissal of SAK's claim. The fact is that Ferguson simply spent no time on claims (or defenses to SAK's claims) that were ultimately determined to be unsuccessful. Nor does SAK identify any specific instances of duplicated effort or otherwise unproductive time spent by Ferguson's counsel in this case, such as overstaffing or wild goose-chase discovery efforts as detailed by Division 1 of the Court of Appeals in *Berryman v. Metcalf*, 177 Wn.App. 644, 312 P.3d 745 (2013).

The trial court's somewhat cryptic reference to the "proportional factor(s)" in *Berryman*, is hard to understand. The *Berryman* court did

[14] *See, e.g., Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010).

state that in a mandatory arbitration case, "the proportionality of the fee award to the amount at stake remains a vital concern." *Id.* at 660. But there, and in all of the cases upon which *Berryman* relied, the requested fee was many times the amount in controversy. The opposite is true here: Ferguson managed to dispose of this matter for about 25 percent of the principal amount sought by SAK. Nothing in *Berryman* remotely hints that fees in such a small proportion to the amount in controversy are evidence of a "lack of billing judgment" about which that court was concerned.

b. Ferguson Is Entitled To Its Fees On Appeal

In the very likely event that Ferguson prevails on this appeal, it hereby requests its attorneys' fees as provided by RAP 18.1.

RESPECTFULLY SUBMITTED this 17th day of November, 2014.

AHLERS & CRESSMAN PLLC

By:______________________________

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following:

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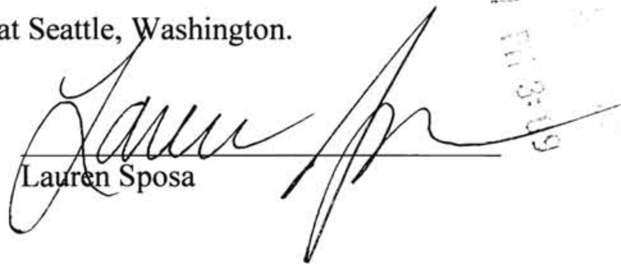
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed November 17, 2014 at Seattle, Washington.



Lauren Sposa