No. 99158-8

SUPREME COURT
OF THE STATE OF WASHINGTON

SCARSELLA BROTHERS, INC.,

Petitioner,

v.

FLATIRON CONSTRUCTORS, INC., et al.,

Respondents.

REPLY ON PETITION FOR REVIEW

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In its answer to the petition for review of Scarsella Brothers, Inc. ("Scarsella"), Flatiron Constructors, Inc. ("Flatiron") asked this Court to grant review on the application of RCW 39.04.250/RCW 39.76.040 and conclude that it was entitled to attorney fees as the prevailing party. Flatiron ans. at 11-12. Scarsella provides this reply accordingly. RAP 13.4(d).

A. STATEMENT OF THE CASE

Scarsella prevailed in the trial court; it is *undisputed* that Scarsella recovered $2.7 million from Flatiron plus an additional $760,000 from the retainage. Pet. at 2-3. The trial court specifically found for Scarsella on the breach of contract and bond claims, citing RCW 39.08.010. CP 1317-18, 1321-22; RP 3942. It erred, however, in concluding that Scarsella did not prevail on its Prompt Payment Act claims.[1]

Flatiron's errs in implying that the issue of fees under RCW 39.04.250/RCW 39.76.040 is not properly before the Court. Flatiron ans. at 9, 10. The issue was obviously before the trial court because *it addressed the issue and denied Scarsella fees under that statute*. CP 2320. Moreover, Division I addressed the issue in any event, concluding that Scarsella had not prevailed under those statutes. Op. at 22-23.

[1] Flatiron expresses some surprise at the description of the statutes as part of the Prompt Payment Act. That is a description given the statutes by Division I itself. Op. at 22.

Contrary to respondent's assertions, Scarsella was *forced* to litigate to get paid the $2.7 million the trial court ultimately awarded; "it would not pay Scarsella unless Scarsella sued Flatiron." CP 1663. This Court should not ignore the fact that Flatiron *withheld any moneys due to Scarsella* until the litigation. Moreover, it filed a counterclaim seeking $10.8 million in damages. CP 1328-30. But for this litigation, Scarsella would not have received a dime for work the trial court determined Flatiron owed it.[2] Scarsella prevailed. Pet. at 8-10.

B. ARGUMENT WHY FLATIRON'S REQUEST FOR REVIEW SHOULD BE DENIED

With regard to the statutes at issue here, Flatiron has *no answer* to the fact that Washington law on a "prevailing party" is a mess. Pet. at 9-10. This Court should grant review to articulate a clear articulation of the standard. RAP 13.4(b)(1, 2, 4).

Under *any* of the applicable standards, Flatiron was not the prevailing party under RCW 39.04.250/39.76.040. It recovered *nothing* on its $10.8 million counterclaim. It was able to limit Scarsella's recovery, but

[2] These facts also belie the sureties' contention that this litigation was unnecessary. Sureties ans. at 16 n.48. Notwithstanding their argument that they had no opportunity to respond to Scarsella's claim, Sureties ans. at 5 ("The Co-Sureties were thrust into litigation before they had an opportunity to evaluate Scarsella's claim on the Bonds."), they specifically *adopted* Flatiron's litigation arguments, CP 287-89, and made no effort to address Scarsella's claim during *the entirety* of this lengthy litigation.

not avoid it all together. The fact that Scarsella did not recover as much as it sought still does not deprive it of the status of a "prevailing party." *See Silverdale Hotel Assoc. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 774, 677 P.2d 773, *review denied*, 101 Wn.2d 1021 (1984). Moreover, $2.7 million ($3.460 million) recovery is substantial.

Finally, Flatiron's attempt to import the so-called "safe harbor" provisions of RCW 39.04.250 into the fee analysis is misplaced. RCW 39.04.250(2), by its terms, applies to interest. RCW 39.04.250 does not help Flatiron because the safe harbor provision, to the extent it applies here at all, relates to *interest*, not fees. Division I's interpretation of that statute would gut the Prompt Payment Act, allowing general contractors to exert their more than considerable financial power over subcontractors by withholding payment to such contractors for any general reason they may conceive, *without any penalty to those general contractors.*

But if Flatiron is correct about its extremely broad reading of the statutes, it has only reinforced the point made in Scarsella's petition that review is entirely appropriate as to Division I's treatment of RCW 39.04.250. Pet. at 13-15. Flatiron *nowhere* disputes that any analysis of that statute would be an issue of first impression for this Court, meriting review. RAP 13.4(b)(4).

C. CONCLUSION

While Division I's analysis of the fee and prejudgment interest issues here was erroneous and merits review, Flatiron's cross-petition for fees under RCW 39.04.250/RCW 39.76.040 does not.

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, should be awarded to Scarsella.

DATED this 9th day of December, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Reply on Petition for Review*** in Supreme Court Cause No. 99158-8 to the following:

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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: December 9, 2020, at Seattle, Washington.

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