

FILED  
Court of Appeals  
Division II  
State of Washington  
4/3/2019 10:48 AM

NO. 52041-9-II

IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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CONWAY CONSTRUCTION COMPANY,

Plaintiff/Respondent,

vs.

CITY OF PUYALLUP;

Defendant/Appellant.

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BRIEF OF *AMICUS CURIAE*  
WASHINGTON STATE  
ASSOCIATION OF MUNICIPAL ATTORNEYS

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## I. INTRODUCTION

This case concerns the proper interpretation of *King County v. Vinci Construction Grands Projets*, 188 Wn.2d 618, 398 P.3d 1093 (2017), a case in which WSAMA submitted an amicus brief that was cited and relied upon twice by the majority. *See id.* at 626 n.1 & 626-27 (quoting WSAMA Br. of Amici Curiae at 6 n.2 & 7). Specifically, the issue here is whether a court can enforce a clause in a public works contract that the legislature has expressly declared to be “void as against public policy.” RCW 39.04.240(2).

The answer to that question is an unequivocal no. In order to uphold the legislature’s intent when it passed Engrossed Senate Bill 6407 in 1992, this Court must vacate the trial court’s award of attorneys’ fees to Respondent Conway Construction.<sup>1</sup>

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA) is a non-profit organization of municipal attorneys in Washington. WSAMA members represent municipalities throughout the state, as both in-house counsel and as private, outside legal counsel.

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<sup>1</sup> *Amicus curiae* WSAMA does not submit argument on the liability issues as identified in Assignments of Error Nos. 1-7. *See* Br. of Appellant at 21-23. In no way should this be construed as WSAMA disagreeing with Puyallup’s position. Quite the contrary, WSAMA supports Puyallup’s arguments. But because WSAMA does not “believ[e] that additional argument is necessary on these specific issues” beyond what Puyallup has advanced, WSAMA refrains from unnecessarily repeating Puyallup. RAP 10.6(b)(4).

The municipalities represented by WSAMA members routinely bid, manage, and supervise public works projects, and WSAMA members are often called upon to represent municipalities engaged in disputes with the contractors of those projects. Additionally, as stated, this case concerns the proper interpretation of *Vinci Construction*, and WSAMA's interest in this case is every bit as strong as it was in *Vinci Construction*.

### **III. STATEMENT OF THE CASE**

For purposes relevant to the trial court's award of attorneys' fees, only the following facts are germane. Puyallup and Conway entered into a public works contract for road improvements to 39th Avenue Southwest. CP 2461; Ex. 5. At the core of the attorney fee dispute is the following clause:

The Owner and Contractor each agree that in the event either of said parties brings an action in any court arising out of this Contract, the prevailing party in any such lawsuit shall be entitled to an award of its cost of defense.

"Cost of Defense" shall include, without limiting the generality of such term, expense of investigation of plaintiff's claims, engineering expense, expense of deposition, exhibits, witness fees, including reasonable expert witness fees, and reasonable attorneys' fees. The obligation of payment under this clause shall be incorporated in any judgment rendered in such action either in the form of a judgment against plaintiff for any defendant or in the form of reduction of the judgment otherwise rendered in favor of plaintiff against any defendant, and shall be paid within thirty (30) days after entry of judgment.

Ex. 2 § 1-09.11.

Conway sued Puyallup, CP 154-174, but never made any offer of settlement under RCW 4.84.250-.280 or RCW 39.04.240. The trial court found that Conway substantially prevailed in the lawsuit and awarded it over \$1.1 million in fees and costs.

#### IV. ARGUMENT

“Under the American rule, a court may award fees only when doing so is authorized by a contract provision, a statute, or a recognized ground in equity.” *Vinci Constr.*, 188 Wn.2d at 625. All parties seemingly agree that Conway does not and cannot rely on RCW 39.04.240 (or any statute) to support the trial court’s fee award, and Conway does not argue that equity demands affirmance. Therefore, it is undisputed that Conway relies exclusively on the contractual provision quoted above as the basis for the trial court’s fee award. The question is whether this contractual provision is enforceable, for if it is not, the fee award cannot stand.

- A. **RCW 39.04.240(2)’s plain language voids any clause in a public works contract that enables a plaintiff—whether that plaintiff is a public agency or contractor—to recover attorneys’ fees without exchanging a settlement offer within 120 days after commencing suit.**

The critical issue as advanced by the parties is whether RCW 39.04.240 voids the contractual fee shifting clause in Section 1-09.11 of

the parties' public works contract. To answer that question, the Court must apply well settled principles of statutory construction.

As with any statute, this Court's goal is to ascertain and give effect to the legislature's intent. *HomeStreet, Inc. v. Dep't of Rev.*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). The primary means of accomplishing this task is to examine the statute's text, *id.*, which is done by "[c]onstruing the statute as a whole and giving effect to every provision," *Schrom v. Bd. for Volunteer Firefighters*, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). If the text is plain, the inquiry ends, *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009), because the Court "presume[s] the legislature says what it means and means what it says," *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Critically important here is the principle that courts "may not delete language from an unambiguous statute: "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))).

RCW 39.04.240(1) establishes a baseline rule that "[t]he provisions of RCW 4.84.250 through 4.84.280 *shall* apply to an action

arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party.” RCW 39.04.240(1). The word “shall” connotes a mandatory obligation. *State v. James-Buhl*, 190 Wn.2d 470, 475-76, 415 P.3d 234 (2018). Only two exceptions to this mandatory application exist. First, “[t]he maximum dollar limitation in RCW 4.84.250 shall not apply;”<sup>2</sup> and second, “in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.” *Id.*

These provisions of RCW 4.84.250 through 4.84.280 enable litigants in actions with an amount “pleaded by the prevailing party as hereinafter defined” to be no more than \$10,000 to recover “as part of the costs of the action a reasonable amount to be fixed by the court as attorneys’ fees.” RCW 4.84.250. A “plaintiff, or party seeking relief” is “deemed the prevailing party” only “when the recovery, exclusive of costs, is as much as or more *than the amount offered in settlement by the plaintiff, or party seeking relief*, as set forth in RCW 4.84.280.” RCW 4.84.260 (emphasis added). As this Court interpreted this provision almost

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<sup>2</sup> RCW 4.84.250 has no applicability if a plaintiff fails to plead for an award of \$10,000 or less. *Reynolds v. Hicks*, 134 Wn.2d 491, 502, 951 P.2d 761 (1998) (plurality).

30 years ago, “Under RCW 4.84.260, a plaintiff must offer to settle as a precondition to an award of attorney fees.” *Singer v. Etherington*, 57 Wn. App. 542, 548 n.11, 789 P.2d 108 (1990); *accord Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997) (holding the plaintiff “does not qualify for a fee award because he never made a settlement offer”).<sup>3</sup>

Thus, this scheme is incorporated into any litigation arising out of a public works contract, regardless of the amount of controversy, and with the lone exception of when the settlement offers must be exchanged.<sup>4</sup> Beyond this, the requirement that a plaintiff submit a settlement offer within 120 days of serving and filing the summons and complaint is a prerequisite to being deemed the prevailing party.

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<sup>3</sup> Conversely, a defendant is “deemed the prevailing party ... if the plaintiff, or party seeking relief in an action ... recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or party resisting relief.” RCW 4.84.270. Unlike RCW 4.84.260, a defendant need not make a settlement offer to be deemed a prevailing party for purposes of RCW 4.84.250. *Lowery v. Nelson*, 43 Wn. App. 747, 752, 719 P.2d 594 (1986). But here, Conway was the plaintiff seeking relief, and neither the record nor briefing suggests Conway ever claimed prevailing party status based on RCW 4.84.270.

<sup>4</sup> When the amount sought in the pleadings is less than \$10,000, a plaintiff can make such an settlement offer at any time “thirty days after the completion of the service and filing of the summons and complaint” but not later than “ten days prior to trial.” RCW 4.84.280. RCW 39.04.240(1) adjusts this time frame in public works litigation, requiring that settlement offers be exchanged “not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.” RCW 39.04.240(1). In this sense, the legislature intended to encourage parties to seek settlement early rather than on the eve of trial.

But as stated, Conway relies not on RCW 39.04.240 to recover fees, but rather a contractual provision. Ex. 2, § 1.09.11. Undermining Conway's reliance is RCW 39.04.240(2), which provides:

(2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and *a provision in such a contract that provides for waiver of these rights is void as against public policy*. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

RCW 39.04.240(2) (emphasis added). A contractual clause that is contrary to public policy as stated in a statute is void and may not be enforced. *Scoccolo Constr. v. City of Renton*, 158 Wn.2d 506, 515-16, 145 P.3d 371 (2006) (applying RCW 4.24.360, which voids as against public policy clauses in construction clauses that purport to waive rights of contractors to equitable adjustments arising out of unreasonable delays in performance caused by the contractee).

Again, statutes are to be interpreted so that all language is given effect, no words are deemed superfluous, and no terminology is excised. *J.P.*, 149 Wn.2d at 450. The use of the word "rights" in RCW 39.04.240(2) signifies that public works contracts may not include clauses allowing for fee shifting without the settlement-exchange-framework established by RCW 4.84.250-.280, or clauses that purport to waive fee shifting altogether.

RCW 39.04.240(2), which has remained unchanged since RCW 39.04.240 was first enacted almost 30 years ago, mandates that any “provision in such a contract that provides for waiver of [“[t]he rights provided for under” RCW 39.04.240(1)] is void as against public policy.” RCW 39.04.240(2). In this sense, the plain language of RCW 39.04.240(2) undeniably voids any *contractual* clause that seeks to abridge the rights of parties to public works contracts to make and receive settlement offers early in litigation as a condition of determining the plaintiff’s entitlement to prevailing party status.<sup>5</sup>

**B. *Vinci Construction* examined whether the legislature intended to overrule the common law permitting equitable fee shifting in a specific context not present here, thus undermining the trial court’s basis for ignoring RCW 39.04.240(2).**

Conway argued, and the trial court agreed, that the Supreme Court’s recent decision in *Vinci Construction* permits contractual fee-shifting clauses in public works contracts despite RCW 39.04.240(2)’s directive. This reads too much into the decision.

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<sup>5</sup> The trial court appeared to embrace Conway’s argument that its claim for declaratory relief negated its obligation to make a settlement offer as a precondition to prevailing party status. This was error. This Court has already interpreted RCW 4.84.250-.280 to hold “nothing in [RCW 4.84.250-.280] prohibits parties from seeking other relief besides damages and this court does not so construe its requirements.” *Hanson v. Estell*, 100 Wn. App. 281, 290, 997 P.2d 426 (2000). In other words, the requirements in RCW 4.84.250-.280 apply even if a plaintiff seeks declaratory relief as opposed to purely monetary relief. Thus, Conway’s additional claim for declaratory relief did not excuse its failure to make a settlement offer within 120 days of service of process.

At issue in *Vinci Construction* was whether King County could avail itself of the common law equitable rule first announced in *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), which enables an insured to recover attorneys' fees "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." *Vinci Constr.*, 188 Wn.2d at 625 (quoting *Olympic S.S.*, 117 Wn.2d at 53). King County had asserted entitlement to the "equitable ground" of *Olympic Steamship* when it was compelled to sue the sureties of three construction firms that had defaulted on their obligations to expand the County's wastewater treatment system. *Id.* at 623-24. The specific issue confronting the Supreme Court in *Vinci Construction* was whether RCW 39.04.240 overruled the common law equitable rule announced in *Olympic Steamship*. Noting the rule that courts "will not deviate from the common law unless the language of a statute [is] clear and explicit for this purpose," the Court concluded that nothing in RCW 39.04.240 intended to supplant *Olympic Steamship*. *Vinci Constr.*, 188 Wn.2d at 627-28.

Significantly, the *Vinci Construction* majority never cited, much less discussed, RCW 39.04.240(2). Rather, only Justice Wiggins cited that provision in his dissent. *Vinci Constr.*, 188 Wn.2d at 636-37 (Wiggins, J., dissenting). To this end, the Supreme Court has instructed that "[a]

majority opinion does not necessarily reject the reasoning set forth in the dissent; rather, the majority may base its holding on a completely separate analysis and may not even consider those arguments addressed by the dissent.” *State v. Smith*, 150 Wn.2d 135, 147-48, 75 P.3d 934 (2003). Thus, Justice Wiggins’ citation to RCW 39.04.240(2) is not indicative of the majority’s disagreement with Justice Wiggins’ view that “[p]arties [to public works contracts] may not contract around the[] requirements” set forth in RCW 4.84.250-.280.” *Vinci Constr.*, 188 Wn.2d at 636 (Wiggins, J., dissenting).

If this were a case in which Conway was awarded attorneys’ fees on a recognized equitable ground, then *Vinci Construction* would control. But it is not. Rather, this case involves the very contractual clause deemed by the legislature to be against public policy and consequently void. The trial court erred by relying on it.

**C. Even if RCW 39.04.240(2) were deemed ambiguous, the legislative history supports voiding this contractual provision as against public policy.**

WSAMA submits that a plain language analysis is all that is required to void the contractual fee-shifting provision on which the trial court and Conway relied. As the language is plain, the court’s “inquiry ends because plain language does not require construction.” *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). But “if, after th[e

plain meaning] inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). Even if the Court were to conclude that the term “rights” could mean something else, the legislative history behind RCW 39.04.240 supports the receipt of a settlement offer from a plaintiff as a precondition to risk paying attorneys’ fees in litigation as a right that cannot be waived.

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

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

(2) As used in this section, “costs” means reasonable and necessary expenses incurred in the prosecution or defense of an action.

(3) As used in this section, “public owner” means the state of Washington, or a municipality, or other public body that contracts for public improvements or work.

(4) As used in this section, “prevailing party” means the party in whose favor final judgment is rendered.

(5) The rights provided for under this section are not subject to waiver by the parties to a contract that is entered into after the effective date of this act. A provision in such a contract or lease that provides for a waiver of

attorneys' fees, costs, or interest is void as against public policy.

S.B. 6407, 52nd Legis., Reg. Sess., available at <http://lawfilesexst.leg.wa.gov/biennium/1991-92/Pdf/Bills/Senate%20Bills/6407.pdf#page=1>; 1 SENATE JOURNAL at 162 (52nd Legis., Reg. Sess. 1992). The bill was amended by the Committee on Commerce and Labor to insert a damages limitation of \$250,000, which was adopted by the Senate on February 18, 1992. 1 SENATE JOURNAL at 285, 661 (52nd Legis., Reg. Sess. 1992). The House then proposed amendments, which unlike the original Senate Bill, incorporated the statutory scheme set forth in RCW 4.84.250-.280, which were ultimately adopted by the Senate. *See* 2 HOUSE JOURNAL at 1765-66 (52nd Legis., Reg. Sess. 1992). Ultimately, the legislature embraced the House's approach. LAWS OF 1992, ch. 171; *see also* 2 HOUSE JOURNAL at 2278-79 (52nd Legis., Reg. Sess. 1992); 2 SENATE JOURNAL at 1645-56 (52nd Legis., Reg. Sess. 1992). But importantly, the use of the term "rights" never changed throughout the legislative history; the term was always intended to encompass the ability of parties to recover attorneys' fees provided they met whichever definition of "prevailing party" the legislature would adopt:

The statutory procedures for awarding attorneys' fees to the prevailing party in actions for damages of \$10,000 or less are made applicable to an action arising out of a public works contract in which a public body is a party. In using these provisions, the maximum amount of the claim is

\$250,000, rather than \$10,000, and *the parties are required to serve offers of settlement not less than 30 days and not more than 120 days after serving and filing the complaint*, rather than at least 10 days before trial. *The plaintiff is the prevailing party if awarded as much or more than their settlement offer.* The defendant is the prevailing party if the plaintiff's eventual recovery does not exceed the defendant's settlement offer.

*The parties may not waive these rights*, but the waiver prohibition is not to be construed as prohibiting the parties from mutually agreeing to a contract clause that requires submission of a dispute to arbitration.

FINAL B. REP., ESB 6407 (52nd Leg., Reg. Sess. 1992), *available at* <http://lawfilesexxt.leg.wa.gov/biennium/1991-92/Pdf/Bill%20Reports/Senate/6407.FBR.pdf> (emphasis added). This history thus bolsters the conclusion that the legislature viewed the receipt of a settlement offer from a plaintiff as a “right” of a defendant in a public works lawsuit, namely when fees the defendant could be compelled to pay attorneys’ fees to its adversary.

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

As such, even if the Court were to view the term “rights” in RCW 39.04.240(2) as ambiguous, the term encompasses the right to receive a settlement offer from a plaintiff as a prerequisite to that plaintiff potentially acquiring “prevailing party” status in public works contract litigation. Consequently, that “right[] ... may not be waived by the parties to a public works contract,” meaning that the contractual provision on which Conway relies exclusively to support the fee award “is void as against public policy.” RCW 39.04.240(2).

## V. CONCLUSION

The trial court’s award of attorneys’ fees to Conway hinges on the enforceability of a clause the legislature has declared to be contrary to public policy and consequently void. Contrary to what was argued below and before this Court, *Vinci Construction* did not suggest that a court may judicially excise RCW 39.04.240(2) from the books. Rather, courts are obligated to give that language full effect. The trial court’s failure to do so constitutes reversible error.

For all of the foregoing reasons, this Court should vacate the trial court’s award of attorneys’ fees to Conway.





**VANCOUVER CITY ATTORNEY'S OFFICE**

**April 03, 2019 - 10:48 AM**

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**Superior Court Case Number:** 16-2-07731-1

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