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NO. 52041-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CITY OF PUYALLUP,
a Washington municipal corporation,

Appellant,

vs.

CONWAY CONSTRUCTION COMPANY,
an Oregon corporation,

Respondent.

RESPONDENT CONWAY CONSTRUCTION COMPANY'S ANSWER
TO AMICUS CURIAE BRIEF OF WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS

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I. INTRODUCTION

The City made the choice to include a contract provision for remedies that were in addition to those provided for by RCW 39.04.240. The City drafted the public works contract at issue (“the Contract”). The City now tries to negate provisions that it added to the Contract. The trial court was correct to enforce the Contract as drafted by the City.

Contrary to the argument of amicus curiae Washington State Association of Municipal Attorneys (“WSAMA”), neither the statute nor the legislative history supports its argument. Nowhere did the legislature say that parties to a public works contract cannot contract for remedies that are additional to those under RCW 39.04.240. The statute merely provides that the rights to attorney fees, costs, and interest cannot be waived. It was passed to encourage settlement. It established a mechanism by which an offer of settlement could be made. The City by its inclusion of a prevailing party attorney fee clause, in a contract that it drafted after the passage of RCW 39.04.240, and with apparent full awareness of that statute, gave itself another way to recover attorney fees if it did not avail itself of RCW 39.04.240. The City had freedom to include or exclude additional attorney fee remedies via contract. In the ultimate irony, the City asks the Court to save the City from its own draftsmanship.

Regardless, it is settled law that RCW 39.04.240 is not an exclusive

fee remedy in a public works contract. *King County v. Vinci Constr. Grands Projets/Parson RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 624–34, 398 P.3d 1093 (2017).

The trial court was correct to award fees and costs to Conway Construction Company (“Conway”). This Court should affirm the trial court in all respects.

II. STATEMENT OF THE CASE

The Contract incorporated the following attorney fees and litigation costs provision:

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.

Trial Ex. 2. This clause was not tied to any offer of settlement procedure under RCW 39.04.240.

The trial court appropriately applied the provision reciprocally. CP 3397. The City did not appeal that conclusion, and it conceded that the

provision “is clearly a unilateral fee provision.” Opening Brief at 50. It is undisputed that (1) Conway did not make a settlement offer, (2) the Contract did not require that a party make a settlement offer in order to benefit from the contractual fee provision, (3) Conway was the only party who received final judgment in its favor, and (4) the Contract was drafted entirely by the City.

In the interest of brevity, Conway incorporates by reference the statement of the case from its response brief.

III. ARGUMENT

Washington law is clear: a party to a contract with an attorney fee provision is entitled to its fees and costs if final judgment is rendered in its favor. RCW 4.84.330; *see also* RCW 4.84.010. As recently as 2017, the Washington Supreme Court had the opportunity to answer the precise question posed by the City and WSAMA:

Is RCW 39.04.240, which applies the attorney fee award provisions of RCW 4.84.250 through RCW 4.84.280 to public works contracts, the exclusive fee remedy available in public works contract disputes where the primary issue is coverage?

Vinci, 188 Wn.2d at 625. The Washington Supreme Court answered this question by expressly holding that it was not an exclusive fee remedy:

Although a statutory fee provision exists for public works contracts under RCW 39.04.240, we hold that it is not the exclusive fee remedy available.

Id. at 634. The holding in *Vinci* disposes of the issue and the arguments raised by WSAMA.

The Washington Supreme Court performed an analysis of legislative intent, asking the following:

[W]e consider first whether the existence of a statutory fee remedy enacted after our decision in *Colorado Structures* reveals an intent by the legislature to exclude all other fee remedies in public works contracts, including the equitable remedy under *Olympic Steamship* and *Colorado Structures*.

Id. at 627. The Washington Supreme Court answered: “[W]e hold that it does not.” *Id.* In reaching that conclusion, it noted that although there was a condition precedent to recovery under this statutory scheme, it did not represent a limitation. *Id.* at 628. Indeed, the Washington Supreme Court expressly concluded that there was no language indicating such a limitation:

There is no language within either RCW 4.84.250–.280 or RCW 39.04.240 suggesting that the legislature intended to exclude all other means of recovering attorney fees. The legislature simply took an existing statutory remedy and made it available to actions arising out of a public works contract.

Id. It held, “[t]here is nothing in the legislative history indicating that RCW 39.04.240 was intended to proscribe alternative fee remedies.” *Id.* The Washington Supreme Court also noted that the final bill report acknowledged other grounds for fees:

[I]n the final bill report for RCW 39.04.240, the legislature recognized that attorney fees may be awarded as authorized by statute, contract, or equitable common law grounds.

FINAL B. REP. ON ENGROSSED S.B. 6407, at 1, 52d Leg., Reg. Sess. (Wash. 1992).

Id. at 629 (emphasis removed).

Despite the clear holding in *Vinci*, WSAMA argues that the procedural requirement of a settlement offer is a right. There is no support for this in the statutory text or the legislative history. In fact, the original form of the bill, quoted in WSAMA's brief, demonstrates that the "rights" referred to "fees, costs, and interest," not a settlement offer. WSAMA Brief at 11–12 (stating, "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," quoting S.B. 6407 52nd Legis., Reg. Sess., *available at* <http://lawfilesexst.leg.wa.gov/biennium/1991-92/Pdf/Bills/Senate%20Bills/6407.pdf>; 1 Senate Journal at 162 (52nd Legis., Reg. Sess. 1992)).

The City made a calculated decision to contract for remedies that were in addition to those provided for by RCW 39.04.240. The City made that decision more than 20 years after the passage of RCW 39.04.240. The City and WSAMA were surely aware of the statute. Despite that awareness, the City elected to add an additional contractual method of recovering attorney fees in addition to the statute. The City made its choice. The City cannot now disavow its own contract.

The arguments proffered by WSAMA fail under the binding

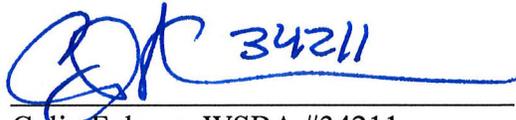
precedent of *Vinci*. Under the Contract, RCW 4.84.330, and Washington law, the trial court was correct to award Conway its fees and costs. This Court should affirm.

IV. CONCLUSION

For the reasons set forth in this answer and in Conway's response brief, this Court should affirm.

Respectfully submitted this 3rd day of May, 2019.

SCHWABE, WILLIAMSON & WYATT, P.C.

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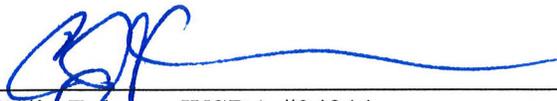
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 3rd day of May, 2019, I served the foregoing RESPONDENT CONWAY CONSTRUCTION COMPANY'S ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS on the following parties and/or counsel of records via *Electronic Court E-Service* as follows:

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