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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CITY OF PUYALLUP,

Appellant,

vs.

CONWAY CONSTRUCTION COMPANY,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I. SUMMARY OF ARGUMENT IN REPLY

This Court should reverse and remand the case to the trial court for the following reasons:

1. **Termination For Cause** – Respondent Conway Construction Company (“Conway”) claims that the trial court’s application of the wrong test to determine whether the City of Puyallup (the “City”) properly terminated Conway was “harmless error.”<sup>1</sup> But it is well settled law that application of the incorrect legal standard is by definition an abuse of discretion.<sup>2</sup>

Here, the trial court held that the safety violations were cured because “[o]nce Conway demonstrated that it was not neglecting or refusing to correct the cure items, any alleged breach based on the items listed in Exhibit 44 was resolved.”<sup>3</sup> This was clearly the wrong legal test of the City’s termination decision. The standard is whether the City Engineer was reasonably satisfied with the cure tendered by Conway. The Contract provides “If the remedy does not take place to the satisfaction of

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<sup>1</sup> Conway Resp. Brief, p.3 “any such error was harmless because there was no remaining safety issue at the time that the City terminated the Contract.”

<sup>2</sup> *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 822, 381 P.3d 111, 118 (2016).

<sup>3</sup> Conclusion No. 7 [CP 2478].

the Contracting Agency, the Engineer may . . . Terminate the Contract.”<sup>4</sup>

The trial court never reached this key legal issue and it should be reversed.

2. **City’s Counterclaims For Defective Work** – Conway provides no compelling reason for this Court to reject Washington law that allows a set-off for defective construction. This is the case even if the claimant is otherwise liable for breaching the contract.<sup>5</sup> Moreover, the Contract in this case specifically provides that the City “[w]ill not pay for unauthorized or defective Work.”<sup>6</sup> The trial court incorrectly applied Oregon law, which conflicts with the terms of the Contract and well established Washington law.<sup>7</sup>

3. **Attorney Fees** – RCW 39.04.240 provides that any attempt to waive its provisions by contract are “void as against public policy.”<sup>8</sup> Conway fails to articulate any compelling argument that the contract provisions at issue in this case are somehow exempt from the statute. The

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<sup>4</sup> Washington State Department of Transportation Standard Specifications 2014 (hereinafter the “Std. Specs.”) §1-08.10(1) [CP 976] and [Trial Ex. 1, p.1-80] also contained in Appendix J to Appellant’s Opening Brief.

<sup>5</sup> See, *Ducolon Mechanical, Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 893 P.2d 1127 (1995) (defaulting general contractor was entitled to set-off for defaulting subcontractor’s defective work.)

<sup>6</sup> Std. Specs §1-05.7 [CP 975] and [Trial Ex. 1, p.1-28] also contained in Appendix J to Appellant’s Opening Brief.

<sup>7</sup> *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 48, 686 P.2d 465, 475 (1984)(adopting Restatement (Second) of Contracts §348).

<sup>8</sup> RCW 39.04.240(2).

recent *Vinci*<sup>9</sup> decision by our Supreme Court is not dispositive because it did not address this issue. Other cases have held that in instances where RCW 4.84.250 applies to a contract dispute, the statute (not the contract provision) controls.<sup>10</sup>

Here Conway made no offer of settlement. Under RCW 4.84.250 and RCW 39.04.240, Conway cannot be considered the “prevailing party” for purposes of awarding attorney fees and costs. The trial court should be reversed as a matter of law.

## II. STATEMENT OF THE CASE IN REPLY

On or about September 21, 2015, the City and Conway entered into a public works contract (“Contract”)<sup>11</sup> for significant road improvements to 39<sup>th</sup> Avenue Southwest in Puyallup, Washington (the

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<sup>9</sup> *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 627, 398 P.3d 1093, 1098 (2017).

<sup>10</sup> *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 183, 321 P.3d 1215, 1224 (2014) (Competing contract attorney fees provision not applied to determine prevailing party where RCW 4.84.250 applies.)

<sup>11</sup> Contract. [CP 17-27; Trial Ex. 5]. The Contract includes the “Public Works Contract” form which was attached to Conway’s initial complaint, and several voluminous documents incorporated by reference. The referenced documents include the Washington State Department of Transportation (“WSDOT”) Standard Specifications for Road, Bridge, and Municipal Construction (2014), [Trial Ex. 1] (the “Std. Specs.”) and the Contract Special Provisions (the “Special Provisions”) Project Manual, [Trial Ex. 2 pp.177-316].

“Project”).<sup>12</sup> The City terminated Conway for default partway through the Project due to safety violations and other failures of performance.

**A. Conway Admits Paragraph 22 Of The Contract Applies To The Termination For Default.**

Conway has admitted that the Contract includes two provisions specifically dealing with termination for default.<sup>13</sup> Paragraph 22 of the Contract provides that violation of a statute or regulation (i.e. safety) constitutes “good cause” for terminating the Contract:

22. Termination. The City shall be entitled to terminate this Contract for good cause. “Good cause” shall include, but shall not be limited to, any one or more of the following events . . .

**d. Contractor’s failure to comply with Federal, state or local laws, rules or regulations**<sup>14</sup>

Conway’s Amended Complaint admitted that the terms of the Public Works Contract<sup>15</sup> (including Paragraph 22) controls any attachments or incorporated documents including the WSDOT Std. Specs.<sup>16</sup> Thus by Conway’s own admission, the violation of safety

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<sup>12</sup> Finding of Fact (hereinafter referred to as “Finding”) No. 3. [CP 2461].

<sup>13</sup> Conway Resp. Brief, p.6, fn.5.

<sup>14</sup> Public Works Contract. [Trial Ex. 5, p.8 ¶ 22] [CP 26] (Emphasis Added.)

<sup>15</sup> *Id.* This refers to the contract form signed by the parties that in turn incorporates by reference the Std. Specs. and the other incorporated documents that form the Contract Documents and the entire Contract.

<sup>16</sup> Conway Amended Complaint, ¶ 4.21 [CP 157].

regulations is a default under the Contract and provides “good cause” for termination.

The Contract provides that the terms of the Public Works Contract supersede any conflicting terms in the Contract Documents:

“34. This Contract, and any attachments contain the entire Contract between the parties. Should any language in any attachment conflict with any language contained in this Contract, the terms of this Contract shall prevail.”<sup>17</sup>

Thus, according to the Contract’s terms, Paragraph 22 supersedes Std. Spec. 1-0-8.10(1) as a matter of law, and by definition under the terms of the Contract, the City was justified in terminating Conway. Yet the trial court determined on summary judgment that it could ignore Paragraph 22 and then ruled in Conclusion No. 7 that Std. Spec. 1-08.10(1) controls whether the City properly terminated Conway:

**“it is neglect or refusal to correct** the rejected work within the 15-day cure period that constitutes breach of this Section. Once Conway demonstrated that it was not neglecting or refusing to correct the cure items, any alleged breach based on the items listed in Exhibit 44 was resolved.”<sup>18</sup>

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<sup>17</sup> Public Works Contract, [Trial Ex. 5, p. 10, ¶ 34].

<sup>18</sup> Conclusion No. 7 [CP 2478] (emphasis added).

**B. Conway Admits The Court Applied The Wrong Test In Conclusion No. 7 re: Termination For Default By Claiming “Harmless Error.”**

Conway’s response implicitly admits that the trial court applied the wrong test to the City’s termination decision by claiming the trial court only committed “harmless error.”<sup>19</sup> The mistaken application of an incorrect legal standard to the most important issue in the entire case is by definition not “harmless error.”<sup>20</sup>

Conway asserts the unsupported conclusion that “without neglect or refusal, there is no default to justify a termination.”<sup>21</sup> But this begs the question of what standard should be applied to the decision to terminate after an event of default has occurred.

Conway ignores the fact that the Contract’s termination provisions have completely separate provisions for default based upon defective work vs. safety violations. Under Std. Spec. 1-08.10(1)(4), it is a breach of the Contract for the Contractor to “disregard . . . laws, ordinances, rules, codes, regulations. . . .”<sup>22</sup> It is a separate breach of the Contract “[i]f the Contractor performs Work which deviates from the Contract, **and** neglects

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<sup>19</sup> Conway Resp. Brief, p.40.

<sup>20</sup> See, *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 822, 381 P.3d 111, 118 (2016).

<sup>21</sup> Conway Resp. Brief, p. 39.

<sup>22</sup> [Trial Ex. 1, p.1-82].

or refuses to correct rejected Work.”<sup>23</sup> Both breaches constitute grounds for termination for default, but the requirements are quite different. All that is required to establish a breach based upon disregard of laws or regulations is that the Contractor violated a law or regulation. Establishing a breach of the duty to correct defective work requires a two part test, the second part of which requires a showing that the Contractor has refused or neglected to correct the work. In relation to safety violations the defective work breach clearly has no application.

Conway’s own statements in its response show the trial court applied the wrong test to Conway’s safety violations. Conway admits that Exhibit 44 lists observed safety violations as a breach of the contract.<sup>24</sup> Conway then admits that the only response the City received regarding the safety concerns was a general denial from Conway that “none of us are aware of numerous occasions that the City has observed unsafe site

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<sup>23</sup> Std. Spec. 1-08.10(1)(6) (emphasis added.) The “and” conjunction in Std. Spec. 1-0-8.10(1)(6) is emphasized because it illustrates a significant difference in the tests applicable to subsection (4) vs. subsection (6). All that has to be proved under subsection (4) is that the Contractor disregard a regulation. Clearly that occurred in this instance. Under subsection (6) the City had to show that not only did Conway perform defective work (which it did) but that it refused or neglected to correct the work. The trial court conflated the test for bad work with that of violating safety regulations.

<sup>24</sup> Conway Resp. Brief, p.15.

conditions.”<sup>25</sup> However, Conway admitted in the same document “Ken does recall one instance when the Engineer noted an unsafe condition.”<sup>26</sup> The City then reported Conway to the Department of Labor & Industries and that agency ultimately (and shortly after Conway was terminated on March 26, 2016) issued its citation for a serious safety violation.<sup>27</sup> The L&I Citation cited WAC 296-155-657(1)(a) and found:

“the employer did not ensure that employees in an excavation were protected from cave-ins by an adequate protective system designed in accordance with subsections (2)( or (3) of this standard in that there was an employee working in the excavation without any protective system while standing inside the trench and over 4ft deep at this job site.”<sup>28</sup>

The trial court referenced the safety violations in its Finding 59 as “Item No. 9 of Exhibit 44.”<sup>29</sup> The trial court then inexplicably held that as of March 26, 2016 (the date of termination) Conway had cured the safety violations by demonstrating that **it was not neglecting or refusing to correct** the safety violations.<sup>30</sup>

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<sup>25</sup> *Id.* referencing Trial Ex. 45.

<sup>26</sup> [Trial Ex. 45, p.4].

<sup>27</sup> L&I Citation And Notice Of Assessment, [Trial Ex. 59].

<sup>28</sup> *Id.* at p.1.

<sup>29</sup> Finding 59 [CP 2473].

<sup>30</sup> *Id.* [CP 2474].

The trial court's use of the wrong test is further illustrated by Finding No. 16 which concludes: "There is no evidence that the Department of Labor and Industries was not satisfied with Conway Construction's safety practices on the site after March 9, 2016, and the record contains no evidence of ongoing or recurrent unsafe work practices."<sup>31</sup> This Finding applies the same errant standard found in Conclusion No. 7. Whether there were additional or recurring safety violations is irrelevant to the safety violation that had already occurred before March 9, 2016 and was the basis for the L&I citation. The trial court's repeated use of this errant line of reasoning illustrates the materiality and severity of the trial court's error. This was not "harmless error."

The correct test would have been to determine whether the Engineer should have been satisfied with whatever efforts Conway had made to "remedy the breach."<sup>32</sup> The trial court never reached this critical legal issue because it applied the "neglects or refuses to correct" standard to determine whether the City properly terminated Conway.<sup>33</sup>

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<sup>31</sup> Finding No. 16 [CP 2464].

<sup>32</sup> Std. Spec. 1-08.10(1), [Trial Ex. 1, p.1-81].

<sup>33</sup> See, Conclusion 7, [CP 2478].

Conway's discussion of the difference between a termination for convenience and a termination for default is largely irrelevant to the issues on appeal. Conway attempts to demonize the City and the City Engineer because of limited communications during the 15 day cure period mandated by the Contract. But Conway does not take issue with the fact that the trial court ruled on summary judgment that Conway breached the Contract by failing to provide shoring in a dangerously deep trench.<sup>34</sup> The test applied by the trial court is dispositive because it restricted the City from arguing that, based upon the facts known at the time of termination, the City Engineer was justified in not accepting Conway's excuses about the safety violations.

For instance, even though Conway admitted that it cut asbestos pipe, it failed to provide any assurance that it would avoid such failures in the future. Similarly, Conway failed to provide any proof that it had a safety program or that Conway would improve its safety practices in the future. No such assurances were ever provided by Conway.

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<sup>34</sup> Order On City's Motion For Partial Summary Judgment [CP 2238]. The trial court ruled that the "safety violation cited by the Department of Labor & Industries constituted a default . . . based on violation of Sec. 1-08.10."

**C. Conway Admits The Trial Court Erred As A Matter Of Law In Concluding Four Foot Deep Trenches Did Not Required Shoring By Claiming “Invited Error.”**

Conway attempts to minimize the trial court’s error contained in Finding No. 15 where the trial court expressed the erroneous legal conclusion that trenches four feet in depth “require(s) no benching or shoring given extant soil conditions.”<sup>35</sup> This is directly contrary to the Department of Labor & Industries WAC provisions that require benching for trenches four feet or more in depth.

**WAC 296-155-657**

**Requirements for protective systems.**

**(1) Protection of employees in excavations.**

(a) You must protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with subsections (2) or (3) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) **Excavations are less than 4 feet (1.22m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.**<sup>36</sup>

At a minimum the trial court’s own Finding indicates there were trenches that were at or near unsafe levels thereby supporting the City’s termination decision. As of March 26, 2016 the City had ample unresolved safety concerns to support its decision to terminate Conway.

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<sup>35</sup> Finding No. 15 [CP 2464].

<sup>36</sup> WAC 296-155-657.

**D. Conway Doesn't Introduce Any Facts Supporting The Trial Court's Denial Of The City's Counterclaims For Defective Work.**

The trial court ruled as a matter of law that the City was not entitled to recover anything for defective work discovered after termination.<sup>37</sup> The trial court disregarded the applicable Contract provisions that provide that the City is not required to pay for defective or non-conforming work.

The Contract specifically provides as follows:

**The Contracting Agency will not pay for unauthorized or defective Work.** Unauthorized or defective Work includes: Work and materials that do not conform to Contract requirements; Work done beyond the lines and grades set by the Plans or the Engineer; and extra Work and materials furnished without the Engineer's written approval.<sup>38</sup>

The only facts introduced in support of the trial court's ruling is that the defects were discovered after termination and that, according to the trial court, the City was in breach of the Contract for having terminated Conway for Default. The trial court reasoned that without an opportunity to cure, the City did not have recourse for defective work.<sup>39</sup> As admitted

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<sup>37</sup> Conclusions 16-19 [CP 2701-2704].

<sup>38</sup> Std. Spec. 1-05.7, [Trial Ex. 1, p.1-28] (emphasis added).

<sup>39</sup> Conclusion 16 [CP 2701-2703].

by the trial court, there is no Washington precedent for the trial court's ruling in this regard.

This is a significant issue. The City's counterclaims and set-offs totaled \$388,784.78 as detailed at trial.<sup>40</sup> Furthermore, the trial court's ruling conflicts with the Contract. Even under a termination for convenience, the recovery by Conway is limited to the value of the actual work performed: "Whenever the Contract is terminated in accordance with Section 1-08.10(2), payment will be made in accordance with Section 1-09.5 for the actual Work performed."<sup>41</sup> Section 1-09.5 deals with payment for deleted or terminated work. That section specifically allows for set-off for costs to complete the work.

"4. The total payment for any one item in the case of a deletion or partial termination shall not exceed the Bid price as modified by approved change orders **less the estimated cost (including profit and overhead) to complete the Work** and less any amount paid to the Contractor for the item."<sup>42</sup>

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<sup>40</sup> Increased Costs [Trial Ex. 43].

<sup>41</sup> Std. Spec. 1-08.10(4) [CP 978].

<sup>42</sup> Std. Spec. 1-09.5 [CP 979] (emphasis added.)

Thus according to the terms of the Contract, the City is entitled to a set-off for the cost of correcting Conway's defective work.<sup>43</sup> The trial court went far afield of established Washington precedent and the Contract to arrive at its decision and should be reversed.

**E. Conway Fails To Introduce Any Facts Supporting The Trial Court's Determination That Conway Was The Prevailing Party Under RCW 39.04.240.**

RCW 39.04.240 requires that in any dispute involving a public works contract, the provisions of RCW 4.84.250 will apply.<sup>44</sup> The statute also provides that its terms are mandatory and any attempt to waive its terms by contract is deemed "void as against public policy."<sup>45</sup>

The trial court determined that Conway was the prevailing party under the terms of the Contract and totally disregarded the provisions of RCW 39.04.240:

The trial court simply dismissed the requirements of the controlling statute by misapplying the holding in *Vinci*. "RCW 39.04.240 is not an exclusive fee remedy in public works contracts and does not preempt the parties' private agreement authorizing the recovery of

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<sup>43</sup> *Ducolon*, 77 Wn. App. 707; see also *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984).

<sup>44</sup> RCW 39.04.240.

<sup>45</sup> RCW 39.04.240(2).

attorney fees and costs. *See King Cnty. V. Vinci Constr. Grands Projets/Parson RCI/Frontier-Kemper, JV*, 188 Wn2d 618, 627-30, 398 P.3d 1093 (2017).”<sup>46</sup>

The trial court did not even consider the statute’s prohibition against waiver by contract. This was an error of law and must be reversed.

### III. LEGAL ARGUMENT

#### A. Conway’s “Refuses Or Neglects” Standard Conflicts With The Terms Of The Contract

The trial court erred as a matter of law when it determined that Conway cured its contract default for safety violations because Conway did not refuse or neglect to correct the safety violation:

Conclusion of Law No. 7: As specified in the Findings of Fact, the City Engineer deliberately told Conway that all defects must be remedied within the 15-day window specified in the suspension and cure letter at Exhibit 44. As detailed in the Court’s ruling on partial summary judgment related to Section 1-08.10(1) of the WSDOT Standard Specifications, incorporated into the Contract, it is **neglect or refusal to correct the rejected work within the 15-day cure period that constitutes breach of this Section. Once Conway demonstrated that it was not neglecting or refusing to correct the cure items, any alleged breach based on the items listed in Exhibit 44 was resolved.** The City’s position that all cure items must be remedied

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<sup>46</sup> Order Awarding Fees and Costs to Plaintiff Conway Construction Company, pg. 4, ¶ 5, [CP 3398].

within a 15-day period violates the Contract's actual terms.<sup>47</sup>

Conway claims in its response that this was "harmless error." But the requirements for harmless error are not met. In order to show the trial court's error was "harmless error," the ruling must be "trivial."

But an incorrect application of law is harmless when it is trivial, or formal, or merely an academic error, and when a reasonable person would determine that the error did not affect the outcome of the case. *See City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000) (quoting *State v. Smith*, 131 Wash.2d 258, 263–64, 930 P.2d 917 (1997) (quoting *State v. Wanrow*, 88 Wash.2d 221, 237, 559 P.2d 548 (1977))); *see also* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L.Rev. 277 (1995/96).<sup>48</sup>

The trial court's error is not trivial, formal, or merely academic. Once a breach is established, the test for whether the City acted reasonably is whether there was some reasonable good faith basis for the decision to terminate.<sup>49</sup> The trial court's conclusion is contrary to the Contract's specific language providing that whatever remedy is tendered by Conway

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<sup>47</sup> Conclusion No. 7 [CP 2478] (emphasis added). Note that Exhibit 44 is the City's Notice of Default that lists all nine of the default conditions for which it was demanding that Conway correct including the various safety violations.

<sup>48</sup> *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 613, 49 P.3d 894, 910 (2002), *as amended on denial of reconsideration* (June 14, 2002).

<sup>49</sup> *Omni Grp., Inc. v. Seattle-First Nat. Bank*, 32 Wn. App. 22, 26, 645 P.2d 727, 730 (1982).

must be remedied within 15 days to the satisfaction of the City.<sup>50</sup> Thus under the Contract, the City had discretion to reject Conway's tendered cure if not satisfied.

By applying the wrong legal test, the trial court never reached the most critical issue of the case. That is, whether the City had a reasonable basis to be dissatisfied with Conway's tendered cure.

This Court should review the trial court's interpretation of the Contract language de novo.

Contract interpretation is the process of ascertaining the parties' intention. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). When the facts regarding the meaning of a contract provision are undisputed, interpretation is a matter of law. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008).<sup>51</sup>

Based upon the trial court's own findings and conclusions, the City had a reasonable basis to terminate. First, the trial court agreed with the City that the safety violation for an unsafe trench was a default under the contract.<sup>52</sup> Second, the trial court recognized the fact that L&I issued a

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<sup>50</sup> Std. Spec. 1-08.10(1), [Trial Ex. 1, p.1-81], [CP 976].

<sup>51</sup> *Iron Gate Partners 5, L.L.C. v. Tapio Constr., Inc.*, 197 Wn. App. 1077 (2017).

<sup>52</sup> 6/8/17 Order re: Conway's Motion For Partial Summary Judgment, p. 2 ll.12-16 [CP 2232].

citation for a serious safety violation.<sup>53</sup> And finally, the trial court recognized that numerous other trenches were “at or very near four feet” which requires shoring under WAC 296-155-657(a)(1).<sup>54</sup> It must be noted that the L&I Citation notes a “closing conference” on March 29, 2016, three days after the City’s termination decision.<sup>55</sup> This fact further illustrates that the L&I investigation was ongoing.

The trial court’s Finding No. 16 shows that the trial court completely lost track of the Contract requirements for termination:

There is no evidence that the Department of Labor and Industries was not satisfied with Conway Construction’s safety practices on the site after March 9, 2016, and the record contains **no evidence of ongoing or recurrent unsafe work practices.**<sup>56</sup>

The lack of ongoing or recurrent unsafe work practices is only one factor that might be considered by the City in its determination of whether Conway had somehow cured its safety violation. There is no finding by the trial court or indication in the record that Conway made any effort to give the City assurance that the safety violations would not recur. In fact there is every indication that Conway was in denial about whether safety

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<sup>53</sup> Finding No. 14 [CP 2464].

<sup>54</sup> L&I Citation [Trial Ex. 59].

<sup>55</sup> *Id.* p.1.

<sup>56</sup> Finding No. 16 [CP 2464].

violations had ever occurred on the project as shown by Conway's letter dated March 21, 2016:

"9. Job Site Safety

a. Pipe work near the daycare was performed long before the City's suspension. Why did the City not bring its allegation then? So far my investigation finds no supporting evidence.<sup>57</sup>

The City was clearly dealing with a contractor that did not recognize it had a problem. Furthermore, the City had received information that asbestos pipe had been cut in front of a day care facility.<sup>58</sup>

The trial court never evaluated the evidence in light of the proper legal standard. Conway's response does not introduce any facts or law that support the trial court's use of the wrong test. The uncontested facts show that as of March 9, 2016, Conway was in default for safety violations. The same uncontested facts show that the City had ample reason to reject Conway's minimal efforts to address those safety violations. Thus the trial court's erroneous application of the legal standard to the City's termination decision was critical to resolution of this case. The trial court's application of the incorrect test for determining

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<sup>57</sup> [Trial Ex. 45, p. 4].

<sup>58</sup> City Letter March 21, 2016 [Trial Ex. 53, p.1].

whether Conway cured its safety problems is an abuse of discretion and should be reversed.

**B. Application Of Shelter Products Is Contrary To Established Washington Law And Should Be Rejected**

Conway's response fails to recognize established law in Washington that even a defaulting owner is entitled to set-off for defective work.

"In Washington and most jurisdictions, the cost of completion and correction are remedies available to building contractors upon a subcontractor's default. *Eastlake Constr. Co. v. Hess*, 102 Wash.2d 30, 686 P.2d 465 (1984) (adopting Restatement 2d § 348 (1981) and allowing contractor to recover cost of completion and repair); *J & J Elec., Inc. v. Gilbert H. Moen Co.*, 9 Wash.App. 954, 516 P.2d 217 (1973), *review denied*, 83 Wash.2d 1008 (1974); *see generally* Dobbs, at § 12.19(1)."<sup>59</sup>

In *Ducolon*, this Court held that even where the general contractor was in default for disavowing (terminating) the subcontract, the general contractor is entitled to reduce the recovery of the subcontractor for work performed by the cost of correcting the work:

"*Ducolon*, citing *Dravo*, at 92, 492 P.2d 1058, argues that its award should not be reduced by Shinstine's cost to complete and repair because Shinstine elected to disaffirm the contract and thereby waived contract damages.<sup>6</sup>

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<sup>59</sup> *Ducolon*, 77 Wn. App. at 714 (Breaching general contractor entitled to set off for defective work by defaulting subcontractor.)

Under the Restatement 2d, a defaulting party's award is offset by the loss caused by his or her part performance. Offsetting the award by the defendant's damages is appropriate because restitution under § 374(1) is measured by the *benefit conferred to the defendant*. Thus, there can be no recovery unless the value of the plaintiff's part performance exceeds the amount of the defendant's injury. Simpson, at § 204. As a result, whether the defendant elects to affirm or disaffirm the contract is irrelevant to calculating the value of the benefit conferred to the defendant.”<sup>60</sup>

Here, the trial court based its decision on another faulty analysis. Namely, the legal conclusion that the City breached the Contract by terminating Conway prohibited the City from limiting Conway’s recovery to the contract price less the cost to correct defects. This was precisely the holding in *Ducolon* and should have been adopted by the trial court. This is an error of law that should be reversed.

**C. Conway’s Response Fails To Address RCW 39.04.240(2) Which Prohibits Waiver Of Its Provisions**

RCW 39.04.240 requires that any dispute involving a public work contract is subject to the provisions of RCW 4.84.250 et seq.:

**(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

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<sup>60</sup> *Ducolon*, 77 Wn. App. at 713–14 (footnote omitted).

mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.<sup>61</sup>

Nothing in Conway's Response addresses the language or intent of the statute. The trial court simply chose to ignore RCW 39.04.240 by enforcing the Contract's attorney fees provision. This is a clear error of law and must be reversed.

#### IV. CONCLUSION

A. Termination. The City Engineer met all of the Contract requirements to terminate Conway for default. The trial court utilized the wrong test in holding that Conway cured all of its default conditions at the time of termination, and the trial court should be reversed.

B. Defective Work. The trial court's decision to prohibit the City from asserting set-offs against Conway for defective work is contrary to established Washington law under *Ducolon* and *Eastlake*, the trial court should be reversed as a matter of law.

C. Attorney Fees. RCW 39.04.240 cannot be waived by contract. The trial court ignored the statute and enforced the Contract's attorney fees provision in favor of Conway even though Conway made no offer of

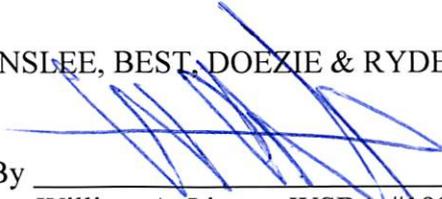
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<sup>61</sup> RCW 39.04.240 (emphasis added).

settlement and was therefore not the prevailing party. The trial court must be reversed.

Respectfully submitted this 5<sup>th</sup> day of April, 2019.

INSLEE, BEST, DOEZIE & RYDER, P.S.

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**DECLARATION OF SERVICE**

I, Leslie Addis, under penalty of perjury under the laws of the State of Washington, hereby declare that on April 5th, 2019, the following documents were served on the following individuals in the manner indicated below:

1. *Appellant's Reply Brief.*

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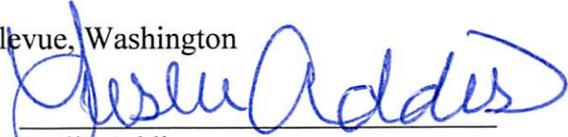
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