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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 317510

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EXTERRA, LLC, a Washington limited liability company

Appellant,

v.

CLE ELUM GATEWAY PROPERTY LLC, a Washington limited
liability company; and CORSTONE CONTRACTORS LLC, a
Washington limited liability company,

Respondents.

BRIEF OF RESPONDENT
CORSTONE CONTRACTORS LLC

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE 2

III. PROCEDURAL HISTORY..... 9

IV. ARGUMENT..... 12

 A. Standard of Review..... 12

 B. The Waiver and Release Documents Signed and Notarized by
 Exterra are Unambiguous and Apply to All Work Included in
 Exterra's Claim of Lien. 14

 1. The Subcontract Required Exterra to Sign Waiver and
 Release Documents, the Terms of Which are
 Unambiguous. 14

 2. Exterra's Argument That the Waiver and Release
 Documents Are "Ambiguous" is Unfounded...... 16

 a. *Exterra's Subjective "Understanding" of the
 Waiver and Release Documents is Irrelevant.*.....16

 b. *The Waiver and Release Documents Have Only
 One Reasonable Interpretation.*.....18

 c. *The Waiver and Release Documents Cannot Be
 Interpreted in a Manner That Renders Them
 Meaningless Under the Subcontract.*.....21

 d. *The Waiver and Release Documents Are
 Consistent With Industry Practice.*.....23

 C. Corstone's Motion for Summary Judgment Was Properly
 Before the Trial Court..... 25

 1. Corstone is Unequivocally a Party in this Case......25

 2. The CR 41 Case Law Cited by Exterra is Inapposite......28

3. <u>Gateway Joined Corstone's Motion for Summary Judgment Against Exterra</u>	30
D. Exterra Received Specific Notice of Corstone's Waiver and Release Argument Far in Advance of Summary Judgment.....	31
E. The Trial Court Correctly Awarded Corstone Attorney's Fees and Costs as the Prevailing Party.....	33
V. MOTION FOR ATTORNEY'S FEES ON APPEAL	34
VI. CONCLUSION.....	38

TABLE OF AUTHORITIES

Cases

<i>Boyd v. Davis</i> , 127 Wn.2d 256, 897 P.2d 1239 (1995).....	35
<i>Calvert v. Berg</i> , ___ Wn. App. ___, 312 P.3d 683 (Div. 1, Nov. 4, 2013).....	29
<i>Chapman v. Perera</i> , 41 Wn. App. 444, 704 P.2d 1224 (1985).....	37
<i>Cork Insulation Sales Co., Inc. v. Torgeson</i> , 54 Wn. App. 702, 775 P.2d 970 (1989).....	29
<i>Grimwood v. Puget Sound</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	13, 19
<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 (2003).....	13, 19, 21, 22, 23
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	17
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	12
<i>Hugh W. Harding v. Oscar K. Will, et al.</i> , 81 Wn.2d 132, 500 P.2d 91 (1972).....	28
<i>Janzen v. Phillips</i> , 73 Wn.2d 174, 437 P.2d 189 (1968).....	17
<i>Krause v. Borjessan</i> , 55 Wn.2d 284, 347 P.2d 893 (1959).....	28
<i>League of Women Voters of Washington v. King County Records, Elections and Licensing Services Division</i> , 133 Wn. App. 374, 135 P.3d 985 (2006).....	13
<i>Mahoney v. Tingley</i> , 85 Wn.2d 95, 100, 529 P.2d 1069 (1975).....	31, 32, 33

<i>National General Insurance Company v. Sherouse,</i> 76 Wn. App. 159, 882 P.2d 1207 (1994).....	18
<i>Pierce County v. State of Washington,</i> 144 Wn. App. 783, 185 P.3d 594 (2008).....	18
<i>Regan v. McLachlan,</i> 163 Wn. App. 171, 257 P.3d 1122 (2011).....	34
<i>Retired Public Employees Council of Wash. v. Charles,</i> 148 Wn.2d 602, 62 P.3d 470 (2003).....	13, 17, 19
<i>Saviano v. Westport Amusements, Inc.,</i> 144 Wn. App. 72, 180 P.3d 874 (2008).....	34
<i>Sprague v. Safeco Insurance Company of America,</i> 174 Wn.2d 524, 276 P.2d 1270 (2012).....	18
<i>Trimble v. Washington State University,</i> 140 Wn.2d 88, 993 P.2d 259 (2000).....	13
<i>Universal/Land Construction Company v. City of Spokane,</i> 49 Wn. App. 634, 745 P.2d 53 (1987).....	22
<i>Wagner v. Wagner,</i> 95 Wn.2d 94, 621 P.2d 1279 (1980).....	22, 24
<i>Washington Greensview Apartment Associates v. Travelers Property Casualty Co. of America,</i> 173 Wn. App. 663, 295 P.3d 284 (2013).....	18
<i>Weyerhaeuser Company v. Commercial Union Insurance Company,</i> 142 Wn.2d 654, 15 P.3d 115 (2001).....	18
<i>William G. Hulbert, Jr., et al. v. Port of Everett,</i> 159 Wn. App. 389, 245 P.3d 779 (2011).....	16, 17

Statutes and Rules

RCW 4.84.185 35, 38

RCW 4.84.330 35

RCW 60.04.081(1)..... 30

RCW 60.04.181 35, 38

CR 8.....31

CR 8(c).....32

CR 13(g)..... 26

CR 15(b)..... 28

CR 41(a)(1)(B)..... 25

CR 56(c)..... 13

RAP 10.3(a)(6)..... 34

RAP 18.1 38, 39

RAP 18.1(a) 34

I. INTRODUCTION

As part of the payment process outlined in its Subcontract and in exchange for payment received, Appellant Exterra, LLC (“Exterra”) signed five separate Conditional and Unconditional Waiver and Release Documents (“Waiver and Release Documents”) in 2010 and 2011 that unequivocally released all claims for work performed through December 31, 2010. Exterra has confirmed, and does not dispute, that its entire lien foreclosure action at issue in this appeal is based on the work that it performed through December 31, 2010. Accordingly, Exterra’s lien foreclosure action – based entirely on work performed through December 31, 2010, for which all claims have been released by Exterra – was properly dismissed by the trial court on summary judgment.

As shown by the record in this case, this appeal is simply a continuation of Exterra's attempt to circumvent the unambiguous and unequivocal language of the five separate Waiver and Release Documents that it signed in 2010 and 2011 through relentless litigation tactics and maneuvering. There is no reasonable argument or logical extension of Washington case law supporting Exterra’s position in this appeal. This Court should not only uphold the trial court's decision, but should award Respondent Corstone Contractors LLC (“Corstone”) its fees and costs incurred in responding to and defending against this unwarranted appeal,

which is undermined specifically and entirely by the clear terms of the Waiver and Release Documents.

II. STATEMENT OF THE CASE

Project. On or about September 15, 2010, Corstone entered into a Standard Form of Agreement Between Owner and Contractor (“Main Contract”) with Respondent Cle Elum Gateway Property LLC (“Gateway”) for the construction of a McDonald’s in Cle Elum, Washington, commonly called the Cle Elum Gateway Project or the Gateway Center Project (“Project”). [CP 52, 55 - 68] On or about September 28, 2010, Corstone entered into a Subcontract with Exterra to perform certain site work at the Project (“Subcontract”). [CP 9 – 13; 70 - 75]

Waiver and Release Documents. Pursuant to the Subcontract, Exterra signed the Waiver and Release Documents as a condition of receiving payment on the Project:

SUBCONTRACTOR shall submit to the CONTRACTOR applications for payment at such reasonable times as to enable the CONTRACTOR to timely apply for and obtain payment from OWNER. Each application for payment shall include appropriate waivers and releases from SUBCONTRACTOR and from subcontractor’s materialmen, suppliers, and third party independent contractors, if any, for the period concerning which the SUBCONTRACTOR is requesting payment.

[CP 72, §7]

Starting on November 24, 2010, Exterra admittedly received and deposited payments from Corstone, signing five separate Conditional and Unconditional Lien Release in the process, as follows:

Payment	First Release Signed	Second Release Signed
11/29/10 \$12,230.55	11/24/2010 Unconditional Release [CP 133]	1/14/2011 and 2/3/2011 ¹ Unconditional Release [CP 90, 134]
1/18/11 \$1,820.66	1/14/2011 Conditional Release [CP 135]	2/3/2011 ² Unconditional Release [CP 90]
1/18/11 \$264.06	2/3/2011 Conditional Release [CP 136]	2/3/2011 ³ Unconditional Release [CP 90]

All in all, Exterra signed five Waiver and Release Documents in conjunction with its payment on the Project, and received consideration for the Waiver and Release Documents that it signed.⁴ [CP 90, 133 – 136] As set forth above, Exterra signed its final Unconditional Waiver and Release on February 3, 2011, for the total amount that it was paid

¹ Included in the total amount of \$14,315.27 set forth in the Unconditional Waiver and Release signed by Exterra on February 3, 2011. [CP 90]

² *See id.*

³ *See id.*

⁴ In its briefing on appeal, Exterra admits receiving the above-noted payments of \$12,230.55, \$1,820.66, and \$264.00, which total \$14,315.27, the amount of the February 3, 2011 Waiver and Release. [Appellant's Brief at 3]

(\$14,315.27), which includes and encompasses all work performed by Exterra through December 31, 2010. [CP 90]

Each of the Waiver and Release Documents signed and notarized by Exterra in 2010 and 2011 include an express release of all claims for work performed through a date certain. [CP 90; 133 – 136] One of the Waiver and Release Documents released all claims for work through 10/22/2010 [CP 133], and the remainder released all claims for work through 12/31/2010 [CP 90, 134 – 136]. For example, the February 3, 2011 Unconditional Waiver and Release signed and notarized by Exterra states in pertinent part:

[Exterra] does hereby waive and release any and all claims, of any type, kind or character, for labor services, equipment, rented or supplied, and materials furnished, including any mechanic's or materialman's lien, equitable lien, stop notice, equitable adjustment, or bond claim (public or private) that [Exterra] has or may ever have in any manner arising out of any work, labor, services, equipment, material or supplies furnished by or through [Exterra] in connection with the Project or the Contract through the date of 12/31/2010

[CP 90, emphasis added] Each Waiver and Release Document contained similar language. [CP 90, 133 – 136]

The Waiver and Release Documents are undisputed, and in fact Exterra provided the February 3, 2011, Unconditional Waiver and Release in response to Corstone's First Interrogatories and Request for Production.

[CP 78, 90] Exterra never objected to any of the Waiver and Release Documents during the Project. To this end, the Conditional Waiver and Release Documents signed by Exterra on January 14, 2011 and February 3, 2011, both specifically called on Exterra to fill in any items that were in dispute and for which its claims were not released. [CP 135, 136] Exterra did not fill in anything on the Waiver and Release Documents. Accordingly, all claims for work performed through December 31, 2010 were released, without exception. [CP 135, 136]

Exterra's Claim Based on Work Through 12/31/2010. It is undisputed that Exterra's Claim of Lien and lien foreclosure action in this case is based entirely on work that it performed prior to December 31, 2010. In its First Interrogatories and Requests for Production to Exterra, Corstone requested that Exterra "[s]tate with particularity and describe in detail" how its Claim of Lien is calculated. [CP 83] In response, Exterra provided its Invoices. [CP 83]

Based on Exterra's Invoices, all of the work upon which Exterra bases its Claim of Lien took place before December 31, 2010. [CP 92 - 95] Exterra did not provide any additional evidence in discovery or at summary judgment indicating that its Claim of Lien was based on work performed after December 31, 2010. As such, Exterra's Claim of Lien is based entirely on work the Exterra admits was performed prior to

December 31, 2010, for which Exterra signed multiple Waiver and Release Documents. [CP 90, 133 – 136]

Corstone Notified Exterra of Waiver Defense in 2012. Exterra's responses to Corstone's First Interrogatories and Requests for Production were signed on May 14, 2012, and were provided to Corstone on or about that date. [CP 81 - 87] On June 27, 2012, Corstone provided Exterra with notice of the fact that the Unconditional Waiver and Release that it produced in discovery barred its Claim of Lien and lien foreclosure claim. [CP 97 – 103] Corstone further requested that Exterra voluntarily release its Claim of Lien and dismiss its lien foreclosure lawsuit, given the Unconditional Waiver and Release Exterra produced in discovery. *See id.* Specifically, Corstone stated:

In reviewing Exterra's responses to Corstone's Interrogatories and Requests for Production, we note that Exterra produced a signed Unconditional Waiver and Release of Claims and Lien Upon Progress Payment ("Unconditional Waiver and Release") that unequivocally releases all claims (including lien claims) "arising out of work, labor, services, equipment, material or supplies furnished by or through [Exterra] through the date of 12/31/2010." (Copy enclosed.)

Exterra also produced a Statement dated 2/15/2012 showing that all of Exterra's work on the project at issue in this case was admittedly furnished prior to December 31, 2010. (Copy enclosed.)

Exterra's Claim of Lien was recorded on January 20, 2011, and purports to cover all work performed by Exterra on the project at issue in this case from September

29, 2010 through January 4, 2011. However, it is now clear that Exterra unequivocally and unconditionally released all claims (including lien claims) for work performed through December 31, 2010. Accordingly, Exterra's Claim of Lien for work performed through December 31, 2010, is invalid.

Corstone hereby requests that Exterra promptly file a Release of Lien and dismiss its Complaint for Lien Foreclosure. Exterra may not maintain a Claim of Lien when it signed an Unconditional Lien Release waiving all claims on which the Claim of Lien is based. Please let us know whether Exterra will voluntarily release its Claim of Lien and dismiss its lawsuit, given the enclosed documents.

[CP 97]

Corstone further notified Exterra that it reserved its right to "request reimbursement of its attorneys' fees and costs for addressing Exterra's invalid Claim of Lien." *See id.* Exterra received this letter both via facsimile and via first class mail. *See id.* Exterra did not respond.

On July 24, 2012, Corstone provided another letter to Exterra, again requesting that Exterra voluntarily release its Claim of Lien and dismiss its lawsuit, stating:

It has been almost a month, and I have not received a response to my letter dated June 27, 2012 (a copy of which is enclosed).

Please let us know whether Exterra will voluntarily release its Claim of Lien and dismiss its lawsuit, given the Unconditional Waiver and Release signed by Exterra that clearly covers all work furnished through December 31, 2010.

[CP 104] This letter was also sent both via facsimile and via first class mail. *See id.* Exterra did not respond.

Motion for Summary Judgment. After Exterra refused to respond to Corstone's June 27, 2012 and July 24, 2012 letters, Corstone filed its Motion for Summary Judgment on January 4, 2013, based on the very Waiver and Release Document and language that Corstone notified Exterra of in June and July 2012. [CP 36 – 49] After briefing by all parties and extended oral argument, the trial court granted Corstone's motion and dismissed Exterra's unfounded Claim of Lien and lien foreclosure action, finding:

. . . Exterra does not dispute the entry of the contract, the requirement of the waivers and releases, and the signing of the February 3, 2011 unconditional waiver and release which waived and released any and all claims for labor and services provided through the date of December 31, 2010. However, Exterra argues that the "partial waiver and release" language demonstrates that the intent of the document was to waive any claims only as to payments already made. Exterra argues that the "partial waiver and release" language creates a genuine issue of material fact which must be submitted to a trier of fact.

This court does not find that an ambiguity exists as to the interpretation of the waiver and release. Nowhere does it indicate that Exterra was only waiving claims as to payments already made . . .

. . . The unconditional waiver and release clearly precludes the filing of any type of lien claim for services through December 31, 2010. As such, Exterra is now precluded from filing a lien claim, and no genuine issues of material fact exist on that issue.

[CP 162 - 63]

Following the trial court's Order Granting Motion for Summary Judgment, Exterra filed a Motion for Reconsideration. [CP 226 – 227] The trial court entered an Order Denying Reconsideration on April 17, 2013. [CP 228] Final Judgment Pursuant to CR 54 Regarding Plaintiff's Claim of Lien and Lien Foreclosure Action was entered by the trial court on June 7, 2013. [CP 229 – 234]

III. PROCEDURAL HISTORY REGARDING STANDING

Exterra filed its Complaint for Foreclosure of Lien and Breach of Contract against both Corstone and Gateway on May 12, 2011. [CP 1 – 13] Exterra then filed a Motion for Voluntary Dismissal of Corstone on July 14, 2011. [CP 14 – 15] Before such Order was entered, however, Gateway filed its Answer to Exterra's Complaint, and asserted a Cross Claim against Corstone based on Exterra's Claim of Lien and lien foreclosure action. [CP 16 – 19] As such, by the time that the trial court entered its Order of Voluntary Dismissal of Corstone on July 28, 2011, Corstone was already subject to the Cross Claim by Gateway. [CP 14 – 19] Although Exterra dismissed Corstone as a party, Gateway simultaneously added Corstone as a party. *See id.*

On November 15, 2011, Exterra expressed confusion as to the procedural stance of the case, stating that it believed Corstone was not a

party to the action. [CP 158] However, both Gateway and Corstone clarified that Gateway had filed a Cross Claim against Corstone, and that Corstone had thereafter filed a Cross Claim against Exterra and a Third Party Claim against Charles Tudor. [CP 156] While Exterra no longer had any claims against Corstone, Corstone was a party in the case due to Gateway's Cross Claim. [CP 16 – 19] Additionally, the basis for Gateway's Cross Claim against Corstone was Exterra's Claim of Lien. *See id.* After the exchange between the parties on November 15, 2011, Exterra did nothing in regard to its "confusion" on this issue, and did not seek to have Corstone removed from the case.

Following November 15, 2011, both Exterra and Gateway proceeded with the case treating Corstone as a party. Exterra and Charles Tudor conducted extensive written discovery, at all times treating Corstone as a party. [CP 143 – 44] At no time did Exterra argue that Corstone did not have standing to either respond to or conduct written discovery. Exterra then filed a Note for Trial Setting on its lien foreclosure action on April 24, 2012, specifically naming Corstone as a party in the Note for Trial Setting. [*See* Corstone's Designation of Additional Clerk's Papers] In each step of the case leading up to the hearing on Corstone's Motion for Summary Judgment, Exterra did not

once object to Corstone's standing based on CR 41, and at all times treated Corstone as a party in this case.

For the first time during oral argument at the summary judgment hearing on February 1, 2013, Exterra asserted that Corstone had no standing as a party in the case pursuant to CR 41. The trial court provided the parties an opportunity to brief the issue of standing [*See* Corstone's Designation of Additional Clerk's Papers], which each party did. [CP 137 – 157] After briefing by the parties, the trial court found that Corstone was a proper party to the case based on Gateway's Cross Claim, and clearly had standing to bring its Motion for Summary Judgment, stating:

Although Exterra did move to dismiss Corstone and an order dismissing Corstone was entered 14 days later, in the interim between the filing of the motion and the order of dismissal, Gateway filed a cross-claim against Corstone. Gateway asserted that Corstone would be required to indemnify and hold Gateway harmless of any of the plaintiff Exterra's claims. Given that the order of dismissal had not been entered, Gateway appropriately initiated its claim against co-party Corstone as a CR 13(g) cross-claim.

The question then becomes what happens to the status of Gateway's cross-claim against Corstone after Exterra's order of dismissal was entered dismissing Corstone as a party. Although Corstone was dismissed by Exterra, it is neither practical nor feasible to think that Corstone is then dismissed for all purposes. Since a cross-claim was filed against Corstone prior to the dismissal, Corstone remained a party who was required to respond to Gateway's cross-claim. Corstone did in fact respond to Gateway's cross-claim on September 13, 2011 and at the same time filed a cross-claim against Exterra.

As noted by Corstone, perhaps the terminology should have changed after the filing of the dismissal and Gateway's cross-claim against Corstone should now be considered a third party complaint. Regardless of whether Gateway's claim against Corstone is considered a cross-claim or a third party complaint, Corstone remains a party to this lawsuit and must be able to respond. As noted above, Corstone responded by filing a cross-claim against Exterra. Had Gateway's action been considered a third party complaint against Corstone then alternatively Corstone would have likewise been authorized to assert defenses against Exterra as the original plaintiff. Therefore, under either scenario, Corstone is a party, is entitled to respond, and has therefore appropriately noted the motion for summary judgment against Exterra.

[CP 160 – 161]

In addition to the above, during and throughout the summary judgment briefing and summary judgment oral argument, Exterra never once objected to Corstone's ability to bring its Motion for Summary Judgment based on CR 8. It was not until its Motion for Reconsideration that Exterra made an argument regarding CR 8 for the very first time. [CP 225 – 227] This argument was denied as part of the trial court's Order Denying Reconsideration. [CP 228]

IV. ARGUMENT

A. Standard of Review.

The standard of review for a trial court's ruling on summary judgment is de novo, where the appellate court engages in the same inquiry as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699,

706-07, 50 P.3d 602 (2002). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See id.*; CR 56(c). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. *Retired Public Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003). Likewise, unsupported conclusory statements may not be considered by the court on a motion for summary judgment. *Grimwood v. Puget Sound*, 110 Wn.2d 355, 359-360, 753 P.2d 517 (1988). Evidentiary facts must be presented. *Id.* at 359-60; *see also Trimble v. Washington State University*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000).

The standard of review for the trial court's application of a court rule to the facts of a case is de novo. *League of Women Voters of Washington v. King County Records, Elections and Licensing Services Division*, 133 Wn. App. 374, 378, 135 P.3d 985 (2006).

The standard of review for the trial court's ruling on a motion for reconsideration is abuse of discretion. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons." *Id.*

B. The Waiver and Release Documents Signed and Notarized by Exterra are Unambiguous and Apply to All Work Included in Exterra's Claim of Lien.

Exterra assigns error to the trial court's Order Granting Motion for Summary Judgment on April 12, 2013, arguing that language in the multiple Waiver and Release Documents signed by Exterra were "ambiguous" and thus precluded summary judgment in Corstone's favor. [Appellant's Brief at 2] Given the clearly unambiguous language in the five separate Waiver and Release Documents signed by Exterra, Exterra's argument is without merit. There is no basis to overturn the trial court's Order Granting Motion for Summary Judgment under Washington law or the facts of this case.

1. The Subcontract Required Exterra to Sign Waiver and Release Documents, the Terms of Which Are Unambiguous.

As set forth above, the fully integrated Subcontract between the parties (which Exterra does not dispute) requires Exterra to provide Waiver and Release Documents as a condition of receiving payment on the Project:

SUBCONTRACTOR shall submit to the CONTRACTOR applications for payment at such reasonable times as to enable the CONTRACTOR to timely apply for and obtain payment from OWNER. Each application for payment shall include appropriate waivers and releases from SUBCONTRACTOR and from subcontractor's materialmen, suppliers, and third party independent

contractors, if any, for the period concerning which the SUBCONTRACTOR is requesting payment.

[CP 72, §7 (emphasis added)] Notably, the Subcontract specifically requires that Exterra submit signed waivers and releases “for the period concerning which the SUBCONTRACTOR is requesting payment.” not for the amount of the payment made in conjunction with the Waiver and Release Document. [CP 72, §7 (emphasis added)]

In accordance with this Subcontract requirement, Exterra signed Waiver and Release Documents that waived all claims, including lien claims,

. . . that the undersigned has or may ever have in any manner arising out of work, labor, services, equipment, material or supplies furnished by or through the undersigned in connection with the Project or the Contract through the date of 12/31/2010.

[CP 90, 133 – 136, emphasis added] At no point did Exterra object, modify, provide its own waiver forms, or otherwise raise disputed items that it was excepting from the Waiver and Release Documents. [CP 90, 133 – 136] In fact, Exterra had the express opportunity to list any items that remained in dispute, and did not note any items or payment in dispute when signing the Waiver and Release Documents. [CP 135 – 136]

As is clear from the Waiver and Release Document quoted above, there is no ambiguity in the language stating that all claims based on work performed through December 31, 2010 were waived by Exterra.

Additionally, as is clear from the Subcontract language quoted above, the intent of the Subcontract and Waiver and Release Documents is likewise unambiguous. Exterra unequivocally released any and all claims for work, labor, services, equipment, materials, or supplies furnished for the Project through December 31, 2010, which Exterra admits includes all work upon which Exterra's Claim of Lien is based. [CP 81 - 88, 92 – 95]

2. Exterra's Argument That the Waiver and Release Documents Are "Ambiguous" is Unfounded.

Despite the above, Exterra erroneously argues that the Waiver and Release Documents are somehow "ambiguous" because they state: "This is a partial Waiver and Release, the total unpaid balance of the Subcontract Agreement will be paid upon final completion of the Project." [Appellant's Brief at 10 – 12] Exterra's argument fails for multiple reasons.

a. *Exterra's Subjective "Understanding" of the Waiver and Release Documents is Irrelevant.*

First, Exterra's contention that it did not subjectively "understand" the Waiver and Release Documents is neither admissible nor persuasive. While Washington does follow the context rule for contract interpretation, "extrinsic evidence of a party's subjective, unilateral intent as to [a] contract's meaning is not admissible." *William G. Hulbert, Jr., et al. v. Port of Everett*, 159 Wn. App. 389, 400, 245 P.3d 779 (2011).

Additionally, “extrinsic evidence may not . . . be used to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” *See id.*, citing *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

Accordingly, the Declaration of Charles A. Tudor [CP 114 – 116] and arguments of Exterra regarding its subjective intent [Appellant’s Brief at 10] are not admissible and do not defeat summary judgment. *See id.*; *see also Janzen v. Phillips*, 73 Wn.2d 174, 192, 437 P.2d 189 (1968) (subjective intent and understanding of party entering contract did not control, and did not defeat summary judgment). Exterra’s subjective “understanding” of the Waiver and Release Documents is irrelevant. *See Retired Public Employees Council of Wash.*, 148 Wn.2d at 612 (nonmoving party may not rely on speculation, argumentative assertions, or on having its affidavits considered at face value to defeat summary judgment).

The express intent of the fully integrated and unambiguous Subcontract signed by the parties is that Exterra will provide Waiver and Release Documents “for the period concerning which the SUBCONTRACTOR is requesting payment.” [CP 72, §7 (emphasis added)] There is no question that the Waiver and Release Documents serve the very purpose that their plain language expresses – waiver of all

claims for work performed through a date certain. In this case, that date certain is December 31, 2010, and Exterra admits that all work upon which its Claim of Lien is based was performed prior to December 31, 2010.

b. *The Waiver and Release Documents Have Only One Reasonable Interpretation.*

Second, Exterra's suggestion that the Waiver and Release language is susceptible to "two different interpretations" is simply wrong.⁵ [Appellant's Brief at 11] In asserting that there are "two interpretations" of the Waiver and Release Documents, Exterra relies exclusively on its own subjective "understanding" of the Waiver and Release Documents as one of the "interpretations" that it advances.⁶ [Appellant's Brief at 10] In

⁵ Exterra cites *Weyerhaeuser Company v. Commercial Union Insurance Company*, 142 Wn.2d 654, 15 P.3d 115 (2001), in support of this argument. However, *Weyerhaeuser* addresses insurance contracts, not construction contracts, and does not support Exterra's contentions. To the contrary, *Weyerhaeuser* actually substantiates Corstone's position regarding contract interpretation under Washington law, as set forth by Corstone herein.

⁶ Exterra's also cites *Washington Greensview Apartment Associates v. Travelers Property Casualty Co. of America*, 173 Wn. App. 663, 295 P.3d 284 (2013); *Sprague v. Safeco Insurance Company of America*, 174 Wn.2d 524, 276 P.2d 1270 (2012); *Pierce County v. State of Washington*, 144 Wn. App. 783, 185 P.3d 594 (2008); and *National General Insurance Company v. Sherouse*, 76 Wn. App. 159, 882 P.2d 1207 (1994), in support of its assertion that the Waiver and Release Documents should be construed "against the drafter." [Appellant's Brief at 11 – 12] At best, each of these cases make a fleeting reference to this concept, and do not support Exterra's argument. Additionally, there is no ambiguous language at issue in this case that warrants interpretation "against the drafter" or that otherwise changes the meaning of the plain and unambiguous Waiver and

other words, Exterra suggests that its own subjective “understanding” of the Waiver and Release Documents constitutes an “interpretation” that creates ambiguity in the documents. Washington law does not support such an argument. *See Retired Public Employees Council of Wash.*, 148 Wn.2d at 612 (party may not rely on speculation, argumentative assertions, or on having its affidavits considered at face value to defeat summary judgment); *Grimwood*, 110 Wn.2d at 359-360 (unsupported conclusory statements do not defeat summary judgment.)

As previously set forth, under Washington law, evidence of a party’s unilateral or subjective intent as to the meaning of a contractual term, evidence that would show intention independent of the contract, or evidence that varies, contradicts or modifies the written language of the contract, is inadmissible. *See Go2Net, Inc.*, at 84 – 85. That is all Exterra presented to the trial court, and all Exterra presents on appeal.

Further, Exterra’s various suggestions that the Subcontract amount overrides the Waiver and Release Documents or that there is no dispute regarding amounts owed to Exterra or that Exterra has “completed” its work are all immaterial here. [Appellant’s Brief at 11] As is clear from the record on review, Corstone does not agree that Exterra performed its

Release Documents. As such, none of these cases have any bearing on the substantive issues at play in this appeal.

duties under the Subcontract, and does not agree that Exterra completed its work, including repairs of its defective work at the Project. [CP 25 – 26] Exterra was asked to return to the Project, and refused. [CP 25 – 26] This is the subject of the remainder of this lawsuit, pursuant to the bifurcated claims that remain to be litigated at the trial court level. [CP 229 – 234] However, none of these bifurcated issues have any impact on the Waiver and Release Documents signed by Exterra for work performed through December 31, 2010.

Reviewing the Waiver and Release Documents in the context of the Subcontract requirements, it is clear that there is only one reasonable interpretation of the Waiver and Release language – and that interpretation is just exactly what the Waiver and Release Documents say:

. . . that the undersigned has or may ever have in any manner arising out of work, labor, services, equipment, material or supplies furnished by or through the undersigned in connection with the Project or the Contract through the date of 12/31/2010.

[CP 90] There is no reasonable alternative interpretation to this clear and unambiguous language in the Waiver and Release Documents, and the plain and unambiguous language of the Waiver and Release Documents controls.

c. *The Waiver and Release Documents Cannot Be Interpreted in a Manner That Renders Them Meaningless Under the Subcontract.*

Third, even if Exterra’s “interpretation” of the Waiver and Release Documents was considered, the explanation of the Waiver and Release offered by Exterra creates a conflict with the terms of the Subcontract, which is not a supportable approach to contract interpretation under Washington law.

The plain language of the Waiver and Release Documents [CP 90, 133 – 136], as required by the Subcontract [CP 72], is that all claims for work performed during a certain time period are waived in exchange for payment. [CP 72, §7] However, Exterra ignores this express language and asserts that this should be read to mean that the Waiver and Release Document was only waiving Exterra’s “right to claim a lien as to the monies that it had been paid on the project.” [Appellant’s Brief at 10]

Manipulating the interpretation of the Waiver and Release Documents as Exterra suggests – to only release claims as to the amount paid, and not as to the time period in which work was performed – would create dissonance between the Waiver and Release Documents and the Subcontract. This runs afoul of Washington law of contract interpretation. *See Go2Net, Inc.*, 115 Wn. App. at 84–85 (evidence that varies, contradicts or modifies the written language of the contract is not

admissible). “[C]ourts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it,” both of which would happen in this case if the Waiver and Release Documents were determined to apply only to a certain sum, and not to the time period during which work was performed. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).⁷

Additionally, as set forth in *Universal/Land Construction Company v. City of Spokane*, “[a]n ambiguity will not be read into a contract where it can be reasonably avoided by reading the contract as a whole.” 49 Wn. App. 634, 637, 745 P.2d 53 (1987).⁸ The Subcontract and its terms must be viewed as a whole, and must be enforced based on its plain language and objective manifestations – both of which call for releasing all claims during a certain time period, not releasing all claims as to a certain amount of payment. *See Go2Net, Inc.*, 115 Wn. App. at 84 – 85. Washington law is clear that “interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” *Wagner*, 95 Wn.2d at 101.

⁷ This case was cited by Exterra in its appeal briefing, but actually supports Corstone’s position in this appeal. [Appellant’s Brief at 12]

⁸ *See id.* [Appellant’s Brief at 11]

To accept Exterra's "understanding" of the Waiver and Release language would require ignoring the clear terms of the Subcontract and disregarding the express language in each of the five Waiver and Release Documents that states that all claims are waived for work performed through a date certain. Washington law simply does not support such a reading of the Subcontract or the Waiver and Release Documents.

d. *The Waiver and Release Documents Are Consistent With Industry Practice.*

Finally, it is important to consider the context in which the Waiver and Release Documents are provided on a construction project. *See Go2Net, Inc.*, 115 Wn. App. at 84 (subject matter and objective of the contract considerations in determining intent). The effect of the Subcontract terms regarding payment and the Waiver and Release Documents is to make certain that no subcontractor claims will arise for work performed during a certain time period, so that the general contractor can meet its obligations to the owner, and so that the general contractor and owner can be assured that a project will not be subject to lien claims after payment is made. [CP 10 – 11, 58] Waiver and Release Documents would provide no value to the general contractor and owner if the subcontractor still had the ability to go back and claim additional funds are

owed for work during a certain time period, even though the subcontractor confirmed that all funds for such work had been paid. [CP 90, 133 – 136]

If the Waiver and Release Documents were to be read the entirely self-serving way that Exterra suggests (that the Waiver and Release only applies to the amount paid, and not to the date through which work was performed as stated on the Waiver and Release), then the Waiver and Release Documents would be rendered meaningless under the Subcontract, and the payment terms of the Subcontract would not be fulfilled. [CP 10 – 11, 58] Such an interpretation is not supported by Washington law, nor is it logical in the construction context. *See, e.g., Wagner*, 95 Wn.2d at 101 (giving effect to all parts of a contract is favored over an interpretation that renders some of the language meaningless or ineffective).

All in all, Exterra did not object to the five separate Waiver and Release Documents, did not question them, and did not provide its own Waiver and Release form. The Subcontract expressly required that Waiver and Release forms include the period for which the subcontractor was requesting payment, which is what the Waiver and Release Documents did. [CP 10, 90, 133 – 136] There is no other possible and reasonable interpretation of the Subcontract and the Waiver and Release Documents but to read them how they were intended: to waive and

release claims for work performed through a date certain in exchange for payment. And that is exactly what transpired in this case.

All claims for work performed through December 31, 2010 have been waived by Exterra in five separate Waiver and Release Documents, and Exterra admits that all work upon which its Claim of Lien is based was performed prior to December 31, 2010. Exterra's appeal is unfounded, and the trial court's Order Granting Motion for Summary Judgment must be upheld.

C. Corstone's Motion for Summary Judgment Was Properly Before the Trial Court.

Exterra also assigns error to the trial court's Order Granting Motion for Summary Judgment on April 12, 2013, arguing that Corstone was not a party in the lawsuit at the time the Motion for Summary Judgment was filed. [Appellant's Brief at 2] As with Exterra's "ambiguity" argument, this assertion is without merit.

1. Corstone is Unequivocally a Party in this Case.

The sole basis for Exterra's argument that Corstone is "not a party" in this action is that Exterra took a voluntary nonsuit against Corstone pursuant to CR 41(a)(1)(B) in July 2011. [Appellant's Brief at 7 – 9] In its argument, however, Exterra fails to recognize that it did not take a voluntary nonsuit against Gateway, the other party in this case. [CP 14 - 15, 20 – 21] When Gateway filed a Cross Claim against Corstone prior to

the time the Order of Voluntary Dismissal was entered, Gateway made Corstone a party in this case as a Defendant to Gateway's Cross Claim. [CP 16 – 19]

Gateway specifically alleged an indemnity claim against Corstone based on Exterra's Claim of Lien. *See id.* Corstone then filed a Counterclaim against Gateway, a Cross Claim against Exterra, and a Third-Party Claim against Charles Tudor. [CP 22 – 29] Despite the CR 41 dismissal of Corstone by Exterra, through Gateway's Cross Claim, Exterra's Claim of Lien remained the epicenter of all of the claims made by the parties against one another in this case.

The Cross Claim filed by Gateway against Corstone, and by Corstone against Exterra, is consistent with CR 13(g), which states in pertinent part:

A pleading may state as a cross claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

Corstone clearly had standing to address Exterra's Claim of Lien by way of the Cross Claim alleged by Gateway against Corstone, and the Cross Claim alleged by Corstone against Exterra.

The essence of Exterra's argument appears to be that because Gateway's Cross Claim was filed after the Motion for Voluntary Dismissal was filed, but before it was entered, Corstone was "not a party" against which Gateway could have filed a Cross Claim. [Appellant's Brief at 7 – 9] As set forth in the trial court's ruling, however, in making this argument, all Exterra is really alleging is that Gateway's Cross Claim is mislabeled. If Corstone ceased being a party altogether as of the date that Exterra's Motion for Voluntary Dismissal was filed (as Exterra argues), then Gateway could have theoretically filed a Third Party Complaint against Corstone, instead of a Cross Claim. As the trial court found:

Although Corstone was dismissed by Exterra, it is neither practical nor feasible to think that Corstone is then dismissed for all purposes. Since a cross-claim was filed against Corstone prior to the dismissal, Corstone remained a party who was required to respond to Gateway's cross-claim. Corstone did in fact respond to Gateway's cross-claim on September 13, 2011 and at the same time filed a cross-claim against Exterra.

. . . Had Gateway's action been considered a third party complaint against Corstone then alternatively Corstone would have likewise been authorized to assert defenses against Exterra as the original plaintiff. Therefore, under either scenario, Corstone is a party, is entitled to respond, and has therefore appropriately noted the motion for summary judgment against Exterra.

[CP 160 – 161]

For standing purposes, whether Gateway's claim is labeled as a Cross Claim or a Third Party Claim does not detract from the fact that all

parties all acknowledged the claim filed by Gateway against Corstone based on Exterra's Claim of Lien, and the subsequent claim filed by Corstone against Exterra as a result. *See Hugh W. Harding v. Oscar K. Will, et al.*, 81 Wn.2d 132, 137 (1972) (trial court has the discretion to realign parties and issues to conform to the evidence and grant complete relief to all parties before trial court); *see also* CR 8(f) ("All pleadings shall be so construed to do substantial justice."); CR 15(b) (issues tried by express or implied consent of the parties shall be treated as if raised in pleadings). Exterra consistently treated Corstone as a party, has now briefed and argued the Waiver and Release of Exterra's Claim of Lien at both the trial court and appellate level, and has accordingly long since waived the right to contest whether Gateway's Cross Claim should have procedurally been labeled a "Third Party Claim."

2. The CR 41 Case Law Cited by Exterra is Inapposite.

In addition, none of the authority cited by Exterra supports its position that the CR 41 motion prevented Gateway (who was always a party) from pursuing a Cross Claim against Corstone. In *Krause v. Borjessan*, 55 Wn.2d 284, 285, 347 P.2d 893 (1959), the court found that the defendant was not entitled to claim a setoff or seek affirmative relief in order to prevent the granting of a voluntary nonsuit under CR 41. Here, there is no dispute that Exterra's voluntary nonsuit dismissed Corstone,

but it did not dismiss Gateway. Corstone did not allege a counterclaim against Exterra in an attempt to defeat Exterra's CR 41 motion, but instead properly responded to Gateway's Cross Claim against Corstone (which is based on Exterra's Claim of Lien) by alleging a Cross Claim against Exterra. *Krause* is inapplicable to the facts of this case.

Cork Insulation Sales Co., Inc. v. Torgeson, 54 Wn. App. 702, 775 P.2d 970 (1989), and *Calvert v. Berg*, ___ Wn. App. ___, 312 P.3d 683 (Div. 1, Nov. 4, 2013) are likewise unrelated to this case. In both *Cork* and *Calvert*, the case was entirely dismissed (as to all parties) by a voluntary nonsuit under CR 41. *Cork*, 54 Wn. App. at 704; *Calvert*, 312 P.3d at 685. In both cases, it was determined that the trial court was without jurisdiction over the case following the filing of the voluntary nonsuit. *Cork*, 54 Wn. App. at 705; *Calvert*, 312 P.3d at 686.

In the case at hand, however, the trial court clearly had continuing jurisdiction over the underlying lawsuit because Gateway was not dismissed from the case. Accordingly, when Gateway brought Corstone back into the case through Gateway's Cross Claim, the trial court obviously maintained jurisdiction over all the parties – jurisdiction over Exterra and Gateway by way of Exterra's claim against Gateway, and jurisdiction over Corstone by way of Gateway's claim against Corstone.

Although Corstone was dismissed by Exterra, Corstone was brought back in by Gateway. *Cork* and *Calvert* are inapplicable here.

3. Gateway Joined Corstone's Motion for Summary Judgment Against Exterra.

In addition to the above, it is also notable that Gateway joined Corstone's Motion for Summary Judgment against Exterra. [CP 158, 220, 230, *see also* Corstone's Designation of Additional Clerk's Papers] Gateway's Joinder was dated January 10, 2013, which was well before the hearing on the Motion for Summary Judgment on February 1, 2013. [Corstone's Designation of Additional Clerk's Papers] This, in and of itself, renders Exterra's arguments regarding "standing" moot. Exterra does not argue anywhere in its briefing before the trial court or in this appeal that Gateway is without standing to bring the underlying Motion for Summary Judgment against Exterra, which Gateway did by joining in Corstone's Motion for Summary Judgment.

Further, it is worthy to note that the mechanic's lien statute recognizes the standing of a contractor to challenge a frivolous Claim of Lien. *See* RCW 60.04.081(1). The Claim of Lien in this case is unfounded and frivolous. As a party to this action, Corstone properly brought a Motion for Summary Judgment to succinctly address the Waiver and Release Documents signed by Exterra, to save judicial resources and

avoid an unnecessary trial (which had been noted by Exterra against both Gateway and Corstone). [See Corstone's Designation of Additional Clerk's Papers]

D. Exterra Received Specific Notice of Corstone's Waiver and Release Argument Far in Advance of Summary Judgment.

Exterra also argues on appeal that Corstone failed to "plead release," and is thus precluded from raising this defense pursuant to CR 8. [Appellant's Brief at 9 – 10] As with Exterra's other arguments, this assertion also has no grounding in law or fact.

As noted above, during and throughout the summary judgment briefing and summary judgment oral argument, Exterra never once objected to Corstone's ability to bring its Motion for Summary Judgment based on CR 8. [CP 109 – 116, 137 – 139] It was not until its Motion for Reconsideration that Exterra made an argument regarding CR 8 for the very first time. [CP 225 – 227] This alone undermines Exterra's argument on appeal in its entirety. "[O]bjection to a failure to comply with [CR 8] is waived where there is written and oral argument to the [trial] court without objection on the legal issues raised in connection with the [CR 8] defense." *See Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1069 (1975). Exterra made no objections and no argument to the

trial court regarding CR 8 during the summary judgment proceedings, and has waived this argument.

The whole policy behind CR 8(c) is to provide notice to parties of defenses in order to avoid surprise. *See id.* However, Exterra was not surprised by Corstone's defense in this case. Corstone sent Exterra two specific letters regarding the very issue addressed on summary judgment approximately five months before Corstone's Motion for Summary Judgment was filed, and eight months before the trial date. [CP 97 – 104] "Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless." *Mahoney*, 85 Wn.2d at 100. In this case, Exterra's cannot plausibly argue that its substantial rights were affected, as it received explicit notice of Corstone's intent to raise the Waiver and Release Documents as a defense to Exterra's baseless Claim of Lien.

Further, because Exterra dismissed Corstone from the lien foreclosure lawsuit, Corstone did not have a CR 8 obligation to respond to Exterra's Complaint. To that end, CR 8 is arguably inapplicable to this case as it pertains to Corstone's defenses to the Claim of Lien. Nonetheless, with Gateway's Cross Claim against Corstone based on the Claim of Lien, and Corstone's Cross Claim against Exterra based in part on the Claim of Lien, and Corstone's two detailed letters regarding the

Waiver and Release Documents as a defense to the Claim of Lien, Corstone more than met the policy and intent behind CR 8 in providing Exterra ample notice of its defenses.

Exterra unequivocally had notice of the defenses related to the Waiver and Release Documents prior to Corstone's Motion for Summary Judgment. "To conclude that [Corstone is] precluded from relying upon the [Waiver and Release Documents] as a defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c)," particularly where Exterra received specific notice of Corstone's defense on two separate occasions long before the Motion for Summary Judgment was filed. *Mahoney*, 85 Wn.2d at 101. The trial court did not abuse its discretion in denying Exterra's Motion for Reconsideration, including the portion of Exterra's Motion for Reconsideration regarding Exterra's argument under CR 8.

E. The Trial Court Correctly Awarded Corstone Attorney's Fees and Costs as the Prevailing Party.

Lastly, Exterra argues that Corstone should not have been awarded its attorney's fees and costs at the trial court level. [Appellant's Brief at 13 – 14] The only basis for this argument proffered by Exterra is that Corstone was "not a party." *See id.* Exterra does not challenge the trial court's actual award of attorney's fees, or the reasonableness of it. *See id.*

As such, Corstone's award of attorney's fees, and the reasonableness of it, are verities on appeal. *See Regan v. McLachlan*, 163 Wn. App. 171, 178, 257 P.3d 1122 (2011) (Court of Appeals will not address issues raised without proper citation to legal authority); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008) (Court of Appeals will not address issues that are not discussed meaningfully with citations to authority); *see also* RAP 10.3(a)(6).

As set forth above, Corstone is unquestionably a party in this case. To argue that Corstone is not is baseless. Corstone prevailed entirely against Exterra and its Claim of Lien at the trial court level, resulting in a Final Judgment on the Claim of Lien and lien foreclosure lawsuit. [CP 229 – 234] Corstone was clearly the prevailing party at the trial court level, and the trial court's award of attorney's fees and costs to Corstone was proper. And, as Exterra has simply argued the same unfounded issues on appeal regarding its Claim of Lien, Corstone should also be awarded its attorney's fees and costs on appeal.

V. MOTION FOR ATTORNEY'S FEES ON APPEAL

Attorney's fees may be awarded on appeal where "applicable law grants to a party the right to recover reasonable fees or expenses on review." RAP 18.1(a). Here, there are multiple basis for an award of attorney's fees, including the Subcontract between the parties, the Waiver

and Release Documents signed by Exterra, RCW 4.84.185, and RCW 60.04.181. Washington law recognizes the application of RCW 4.84.330 and a contractual attorneys' fees provision to ancillary proceedings, including appeals. *See Boyd v. Davis*, 127 Wn.2d 256, 263-64, 897 P.2d 1239 (1995).

First, Corstone is entitled to an award of its attorney's fees and costs pursuant to the Subcontract between the parties, which states in pertinent part:

In any action between [Corstone] and [Exterra] concerning the rights and obligations imposed on them by this Subcontract, the substantially prevailing party in such action shall be entitled to recover from the other party its expenses of litigation, including attorney's fees and costs.

[CP 13, §32] As set forth above, this case concerns the rights and obligations of Exterra pursuant to the payment provisions and requirements in the Subcontract. Corstone has prevailed entirely as to the portion of the case regarding Exterra's Claim of Lien, confirmed in the Final Judgment Pursuant to CR 54 entered by the trial court. [CP 229 – 234] Accordingly, Corstone is entitled to an award of attorney's fees and costs pursuant to the Subcontract for prevailing in this appeal.

Corstone is also entitled to an award of attorney's fees and costs pursuant to the Waiver and Release Documents signed by Exterra, which state in pertinent part:

[Exterra] hereby agrees to indemnify and hold Owner and Corstone Contractors LLC harmless from any claim, cause of action or liability, including but not limited to costs, expenses, interest, and attorney's fees arising from any claims hereafter made on account of work, labor, services, equipment, materials or supplies through the date of 12/31/2010. This waiver and release shall also be effective in the event of any bankruptcy court action that may ultimately deprive the undersigned of entitlement to the payment hereunder.

[CP 90, 133 – 136]

Exterra's entire appeal relates to its Claim of Lien, which is for work performed by Exterra prior to December 31, 2010. Corstone's forced involvement in this lawsuit – first by way of Exterra's claim against Corstone directly prior to Exterra's voluntary dismissal under CR 41, and then by way of Gateway's Cross Claim against Corstone – has clearly caused Corstone to incur "costs . . . and attorney's fees arising from any claims . . . made on account of work, labor, services, equipment, materials or supplies through the date of 12/31/2010." [CP 90, 133 – 136] With the dismissal of Exterra's claims based on work performed prior to December 31, 2010, Corstone's claim for attorney's fees and costs incurred as a result of defending against such claims is ripe, and Corstone should also be awarded its attorney's fees and costs on this basis.

Further, Corstone is entitled to an award of its attorney's fees because Exterra's appeal is frivolous. RCW 4.84.185 states in pertinent part:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action . . .

"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985). Such is the case at hand. Exterra's Claim of Lien and lien foreclosure lawsuit is indisputably based on work provided by Exterra through December 31, 2010, which is clearly barred pursuant to the Waiver and Release Documents signed by Exterra. Exterra offers no debatable issues on appeal, only subjective and self-serving argument based on an inadmissible Declaration by Charles A. Tudor. [CP 114 – 116] To continue to pursue claims that are based on work, labor, services, equipment, materials, or supplies furnished for the Project prior to December 31, 2010, is to advance such claims without reasonable cause, and is frivolous.

Finally, Chapter RCW 60.04 governs mechanics liens, including the Claim of Lien recorded by Exterra which was the basis of this action.

RCW 60.04.181 states in pertinent part:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action . . . attorney's fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable.

As the prevailing party against Exterra's Claim of Lien, Corstone is also entitled to an award of attorney's fees pursuant to RCW 60.04.181.

Awarding Corstone's attorney's fees on appeal is both warranted and appropriate under RAP 18.1, the terms of the Subcontract, the terms of the Waiver and Release Documents signed by Exterra, RCW 4.84.185, and RCW 60.04.181. Corstone respectfully requests this Court award its attorney's fees for the time and expense of responding to and arguing this appeal.

VI. CONCLUSION

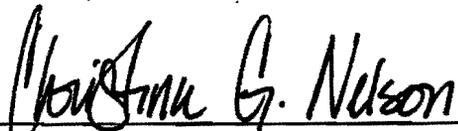
By operation of the clear and unambiguous language in the multiple Waiver and Release Documents signed and notarized by Exterra, the trial court was correct in finding that there is no genuine issue of material fact that Exterra has released any and all claims for work, labor, services, equipment, materials, or supplies furnished on the Project through December 31, 2010. Based on Exterra's own Invoices produced

in discovery, this includes all amounts which underlie Exterra's Claim of Lien. As such, Exterra's Claim of Lien and lien foreclosure action were properly dismissed as a matter of law by the trial court. Additionally, the trial court's discretion was sound in denying Exterra's Motion for Reconsideration, as Exterra has no basis in law or fact to persevere with its frivolous lien foreclosure action in this case.

Corstone respectfully requests that this Court affirm the trial court Order Granting Motion for Summary Judgment And Award of Attorney's Fees and Costs to Corstone Contractors LLC [CP 219 – 224] and Order Denying Reconsideration [CP 228] in this case. In so doing, Corstone also respectfully requests that the trial court's Final Judgment Pursuant to CR 54 Regarding Plaintiff's Claim of Lien and Lien Foreclosure Action [CP 229 – 234] be affirmed, and that Corstone be awarded its attorney's fees and costs on appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED on January 13, 2014.

CGN PLLC | Law Office

By 

Christina Gerrish Nelson
WSBA No. 29278

Attorney for Respondent
Corstone Contractors LLC

FILED

JAN 15 2014

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

EXTERRA LLC, a Washington limited liability company,)	
)	
Appellant,)	CASE NO. 317510
)	
v.)	
)	CERTIFICATE OF SERVICE
CLE ELUM GATEWAY PROPERTY, LLC, a Washington limited liability company; and CORSTONE CONTRACTORS LLC, a Washington limited liability company,)	
)	
)	
)	
Respondents.)	

I certify that on this 13th day of January, 2014, I caused a true and correct copy of: 1) Brief of Respondent Corstone Contractors LLC; and 2) Corstone Contractors LLC's Designation of Additional Clerk's Papers, to be sent via e-mail (a courtesy copy) and via first class U.S. Mail (pursuant to RAP 18.5 and CR 5) to:

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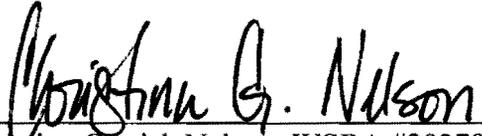
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DATED this January 13, 2014.

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FILED

JAN 21 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 317510

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

EXTERRA LLC, a Washington limited liability company

Appellant,

v.

CLE ELUM GATEWAY PROPERTY, LLC, a Washington
limited liability company; and CORSTONE
CONTRACTORS, LLC, a Washington limited liability company,

Respondents.

JOINDER OF RESPONDENT
CLE ELUM GATEWAY PROPERTY, LLC

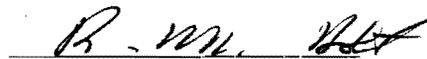
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I. Joinder

The respondent, Cle Elum Gateway Property, LLC,
joins the respondent, Corstone Contractors LLC in their
Brief and adopts by reference page 1 through 33 of the
Brief of the respondent Corstone Contractors LLC.

Dated this 7 day of January, 2014.



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R. M. Holt, Inc. P.S.
Attorneys for Respondent
Cle Elum Gateway Property, LLC