72258-1

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ORIGINAL

NO. 72258-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SAK & ASSOCIATES, INC., a Washington corporation,

Appellant,

vs.

FERGUSON CONSTRUCTION, INC., a Washington corporation

Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellant SAK commenced construction under contract and by doing say provided Respondent Ferguson an opportunity to observe the means and methods employed by SAK. Shortly thereafter, Ferguson terminated SAK's contract while acknowledging proper performance by SAK. The notion of a "termination for convenience" is a legal concept that is not being given any legal meaning by Ferguson or the trial court below; instead, the idea of a "termination for convenience" is being erroneously regarded as an unfettered right to render a contract illusory at the whim of the terminating party. Although the trial court granted summary judgment for Ferguson, a factual question remains whether Ferguson terminated for "convenience" as defined in a legal sense, or whether Ferguson had taken what it needed to know from SAK and after bid-shopping found someone else to perform the same contract at a lower price and on that ground elected to breach its contract with SAK. If factual determination establishes the latter to have occurred, then Ferguson's acts, even if they are an "efficient breach," must still result in liability to SAK. Washington law consistently rejects acts that render contracts illusory. That is exactly what happens when the construction industry's "termination for convenience" principle is misapplied. Reversal is required to preserve Washington law and allow justice here.

STATEMENT OF FACTS RELEVANT TO REPLY (THE CONTRACTS)

The termination for convenience provision in the Subcontract

Subcontract provides that:

> In addition to the rights listed above, Contractor may, after providing Subcontractor with written notice, terminate (without prejudice to any right or remedy of Contractor) the Subcontract, or any part of it, for its own convenience and require Contractor to immediately stop work. In such event, the Contractor shall pay the Subcontractor for the work actually performed in an amount proportionate to the total Subcontract price. Contractor shall not be liable to the Subcontractor for any other costs, including anticipated profits on work not performed or unabsorbed overhead.[1]

This provision imposes no notice obligation on SAK. The Main Contract contains provisions regarding terminations for convenience upon which Ferguson did not rely in its Notice of Termination.[2] To the extent that Ferguson takes the position that Main Contract clauses control, it is apparent that there is no notice obligation on SAK, the terminated party, and that there is an affirmative duty on Ferguson's part, as terminating party, to pay "reasonable overhead and profit on Work on executed." The Main Contract provides:

> The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.
>
> ***
>
> In case of such termination for Owner's convenience, the Contractor shall be entitled to receive payment for Work

[1] Subcontract, Sched. A, ¶ 7, E, CP at 94.
[2] See Letter of Termination at CP 104.

> executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on Work not executed.[3]

Under the Main Contract, entitlement to payment in the event of a termination for convenience is not dependent on any notice.

AUTHORITY

Factual questions exist regarding whether Ferguson had a valid basis to terminate for convenience or whether its so-called termination for convenience was pretextual and unreasonable. The trial court erred in granting summary judgment against SAK and dismissing SAK's claims. Without an opportunity for factual determination about reasonableness and the actual grounds for termination, the trial court decided as a matter of law that Ferguson's invocation of the termination for convenience clause was valid, although it plainly made the contract illusory.

The trial court was concerned about the lack of Washington caselaw on the construction industry's "termination for convenience" concept. However, the trial court erred in assuming that the lack of law equated to law. As cited in Appellant's Brief, there is Washington law striking illusory enforcement of contracts. There is no Washington case holding that every termination for convenience clause, however written and applied, must be facially enforced. In neither *Meyers v. State of*

[3] Main Contract, §§14.4.1, 14.4.3, at CP 74.

Washington nor *Lampson Universal Rigging, Inc. v. Washington Public Power Supply System*[4] did a plaintiff even challenge the validity or effect of the termination for convenience clause as SAK does in this lawsuit. Thus, Ferguson cannot rely on those cases as authority for its argument that the Subcontract's provision, in this particular case, should be enforced merely "as written" with no factual review or examination. The invocation of the termination for convenience clause in the particular facts of this case was illusory and a breach of the Subcontract. SAK is entitled to a trial on its factual claims.

Washington law confirms that valid and reasonable notice is a precondition for invoking a termination for convenience clause. False and pretextual notice is not reasonable notice. There was evidence that Ferguson's notice of termination was pretextual and inaccurate.

As the trial court erred in dismissing SAK's claims, its fee award, awarded to Ferguson under Section 40 of the Subcontract, must be vacated. If the Court of Appeals were to uphold the trial court's decision, it should also affirm the amount of the fee award to Ferguson, as Ferguson has failed to demonstrate that the court manifestly abused its discretion in reducing the award from the amount requested by Ferguson.

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[4] *Myers v. State of Wash.*, 152 Wn. App. 823, 218 P.3d 241 (2009); *Lampson Universal Rigging, Inc. v. Washington Pub. Power Supply Sys.*, 44 Wn. App. 237, 721 P.2d 996 (1986). See discussion in Appellant's Brief at pp. 22-23.

A. Ferguson's utilization of the Subcontract's Termination for Convenience provision raises factual questions and requires reversal of the Trial Court's Summary Judgment.

As shown in SAK's opening brief, as applied the Termination for Convenience provision made the contract illusory. Rather than honor contract obligations, Ferguson acted as though it owed no obligations and terminated SAK's work on the Project after only a small percentage of the work had been completed. SAK entered a contract to provide work specified in its scope of work at a price based upon the scope of work. SAK did not contract to provide the work piece-meal, or price it as being provided piece-meal. Although there was no change in the project resulting in a material change in the scope of work, Ferguson simply changed its mind, unilaterally decided to dishonor the contract, and terminated SAK and hired another contractor. That is a breach.

Although SAK did not so argue, Ferguson invites the Court to determine that the termination for convenience provision is *prima facie* illusory, arguing that the entire contract would thereby be voided if that is correct. That may be true given the absence of a valid reason to terminate for convenience. However, even if this Court of Appeals holds that, as applied, the termination for convenience provision is illusory, it would be contrary to established law for a court to void an entire contract. It is well established law that where there is a choice of alternative interpretations,

one saving the contract and one voiding it, the conflict should be resolved in favor of the interpretation that saves the contract. "Where there is a choice of alternative interpretations, one saving the contract and one voiding it, the conflict should be resolved in favor of the interpretation that saves the contract."[5]

Accordingly, should the Court determine that the entire provision is *prima facie* void, it would be appropriate to adopt the interpretation that the provision was void as applied. It follows that Ferguson breached the Subcontract by invoking the termination for convenience provision under the circumstances.[6] SAK is entitled to a trial on its breach of contract claim.

B. Ferguson's invocation of a Termination for Convenience clause, even if the clause was properly invoked, was ineffective because the notice was inaccurate, pretextual, or false.

1. Ferguson's Notice Was Not Reasonable.

While it is true that the parties' Subcontract contains no specific requirement as to the contents of notice, once given, Washington case law requires that notice be reasonable, or such notice as may be fairly and

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[5] *See Spokane Sch. Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn. App. 291, 305-06, 331 P.3d 60 (2014) (an important principle of contract law is that courts will interpret contracts in a way not to render contractual obligations illusory), citing *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997) (Div. I)); *see also Patterson v. Bixby*, 58 Wn.2d 454, 458, 364 P.2d 10 (1961) ("where one construction would make a contract unreasonable, and another, equally consistent with it language, would make it reasonable, the interpretation which makes it a rational and probably agreement must be adopted") (citation omitted); *see also Torncello v. United States*, 681 F.2d 756, 761, 771 (1982).

[6] *See Torncello v. United States*, 681 F.2d 756, 757, 771 (1982).

properly expected or required under the circumstances.[7] Although it sets forth the reasonable standard for notice in Washington, *Cascade* is completely dissimilar and does not support Ferguson's contention about the contents of Ferguson's Notice of Termination.

Cascade contracted with an insurance company to repair and replace windshields for an insurance company's policyholders. Cascade objected to the insurance company's unilateral change in pricing terms and sued for the difference between the new price and the previous price.[8] The contract in question in *Cascade* was terminable at will, as it failed to specify duration, and the context was an industry where pricing agreements are based upon informal understandings between parties and both parties expect that pricing agreements will be modified or revoked in response to market shifts even if modified through informal means.[9] The court rejected the objecting party's argument that notice was ineffective (because it purported to modify rather than terminate the agreement) on the ground that terminable-at-will contracts may be unilaterally modified.[10] This is completely different from the instant case where the parties agreed upon a specific scope of work as essential terms for the

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[7] *See Lano v. Osbert Const. Co.*, 67 Wn.2d 659, 663, 409 P.2d 466 (1966); *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 767, 145 P.3d 1253 (2006).
[8] 135 Wn. App. at 762.
[9] *Id.* at 766, 768.
[10] *Id.* at 768-69.

contract (the terms upon which pricing was based), terms that were not subject to modification through informal understandings. Here, contrary to Cascade, no unilateral modifications of the Subcontract are permissible and although a duration was not fixed in Cascade, here a specific work scope was established by contract.

2. There is Evidence that Ferguson's Notice Was Ambiguous or Pretextual.

Whether notice is reasonable is dependent upon the circumstances[11] and is a question for the trier of fact making it improper for summary judgment.[12] Because, as Ferguson points out, proper notice under the Subcontract would trigger certain procedures for making a claim, including a limited time for making a claim, the content of Ferguson's notice is significant. Ferguson's Notice of Termination was misleading or false and SAK did not realize that it had a claim because the contents of Ferguson's Notice led SAK to believe that Ferguson had merely exercised a legitimate termination for convenience provision of the Subcontract by deleting SAK's work scope due to "phasing" and "logistics." The trial court below so ruled in denying Ferguson's first motion for summary judgment but erroneously negated that ruling with its subsequent grant of summary judgment despite the existence of this

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[11] *See Lano,* 67 Wn.2d 659 at 663; *Cascade Auto Glass,* 135 Wn. App. 760, 767.
[12] *See Service Chevrolet, Inc. v. Sparks*, 99 Wn.2d 199, 204, 660 P.2d 760 (1983).

factual dispute.

a. Ferguson's argument that "Complete" is synonymous with "Perform" is wrong.

Rather than allowing a trier-of-fact to determine factual disputes, Ferguson asks this Court to make the factual determination of "reasonableness" by providing dictionary definitions and then equating "complete" with "perform." Ferguson cites no on-point legal authority that is pertinent to the terms used here. Instead, Ferguson cites to cases showing only, unremarkably, that courts sometimes interpret terms of contracts and statutes. None of the cases cited by Ferguson discuss interpretation of notice letters or the actual language used here.

However, even following Ferguson's analysis of chopping the Notice letter into specific dictionary-defined chunks, reveals its pretextual nature. For example, Ferguson makes much of the fact that its letter stated that Ferguson would 'complete' concrete paving with its own forces. Because that did not, in fact, happen, Ferguson then undertakes linguistic gymnastics to assert that 'complete' has the same meaning as 'perform,' which is not true. SAK reasonably assumed from the notice that, because Ferguson used the word 'complete,' the project was at an end stage and planned work was being deleted. However, as a factual matter, Ferguson should have given notice that it would perform the remainder of SAK's

contractual work scope, a point on which the Notice is silent and ambiguous.

Ferguson acknowledges that, contrary to the notice, SAK's work was not deleted. Instead, rather than merely completing activities, Ferguson and/or other subcontractors performed the 76% of SAK's work scope that was left after SAK was terminated. The transitive verb "complete" means to "finish making or doing," or to "make (something) whole or perfect: *he only needed one thing to complete his happiness.*"[13] A dictionary definition shows that "complete" infers that the project or state is in its final stages. The word "finish" (which is used in both the definition cited by Ferguson and the one herein) means to "bring (a task or activity) to an end; complete."[14] A dictionary example that illustrates the usage is "consume or get through the final amount or portion of."[15] Again, the emphasis is on the end stages. A second definition is "complete the manufacture or decoration of (a material, object, or place) by giving it an attractive surface appearance."[16] Completing, finishing or bringing an project to an end means and implies that the end is close, not that the end is 76% away. Even without resort to a dictionary, this is the common understanding of the term to complete. A finder of fact could reasonably

[13] New Oxford American Dictionary, Third Ed.
[14] *Id.*
[15] *Id.*
[16] *Id.*

conclude that Ferguson notice was unreasonable and deceptive because Ferguson was not concluding the project; rather, Ferguson was stealing the project work from SAK.

b. Reasonable minds could conclude that Ferguson's Notice Letter was ambiguous, pretextual, or false.

Furthermore, Ferguson's reference to "phasing" and "logistics"[17] does not create an inference that there were no changes contemplated. To the contrary, Ferguson gave notice to SAK that something along the lines of "phasing' and "logistics" had changed so substantially that SAK's work was no longer required. It would be eminently reasonable for a finder-of-fact to hear evidence and conclude that changes are expected. There is more than one way to interpret Ferguson's Notice letter. One reasonable interpretation is that SAK's cement work scope was being deleted due to changes in "phasing" and "logistics." That proved to be inaccurate, but it's what the Notice communicated. In any event, under Washington law, whether the letter was pretextual is a factual matter properly decided by a finder-of-fact, not a court on summary judgment or on appeal.[18]

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[17] The dictionary definitions of phasing (involving "adjustment") and logistics (planning and organizing a complicated activity) notwithstanding.

[18] *See Dumont v. City of Seattle*, 148 Wn. App. 850, 866, 200 P.3d 764 (2009); *see also Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 120 P.3d 579 (2005); *accord Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 60 P.3d 106 (2002) and *Barker v. Advanced Silicon Materials, LLC,* 131 Wn. App. 616, 624, 128 P.3d 633 *review denied* 158 Wn.2d 1015, 149 P.3d 377 (2006).

c. SAK presented competent evidence in its Opposition to Ferguson's Second Motion for Summary Judgment.

Unlike the cases cited by Ferguson, SAK did not rely upon "speculation" or "statements of conclusions and opinions alone" in its opposition to Ferguson's second summary judgment motion. Ferguson has chosen to cite to Ms. McCorkle's Declaration submitted in support of SAK's Motion for Partial Summary Judgment.[19] However, in its opposition to Ferguson's Second Motion for Summary Judgment, SAK submitted evidence gleaned from Ferguson's discovery responses, including Ferguson's own admissions. Furthermore, on the question of proper notice (besides Ferguson's deceptive Notice letter and materials obtained in discovery from Ferguson), SAK presented Ms. McCorkle's statement of what she understood from the letter, and stated that SAK relied upon Ferguson's representations in the notice letter to be true.[20] The statement of Ms. McCorkle described herein is competent evidence because it states what conclusion was drawn by SAK from Ferguson's Notice letter as well as the state of SAK's knowledge at relevant times.

d. There is no Inquiry Notice required.

Aware the it had misled SAK with the Notice letter, Ferguson attempts to shift responsibility to SAK by arguing that SAK should have

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[19] See CP 136-38.
[20] See CP 328-367 (Declaration and exhibits), and CP 330 (Ms. McCorkle's statement regarding what she understood from the letter).

inquired into the actual basis for the termination. This is a shocking proposition and inversion of Washington law. The Notice of Termination provided no notice of wrongful conduct. It essentially stated that SAK's work was being deleted due to logistical and phasing issues. Whatever was really happening behind the scenes was known only by Ferguson. When parties have been charged with inquiry notice, it has always and only been when additional information is within the ken of the inquiring party. No case has ever charged a party with the responsibility to go collect additional information held and concealed by the offending party.

Inquiry notice has been argued or required where leaks or cracks in siding and water intrusion placed consumers on notice of construction defects and the consumer had the ability to study their own building.[21] That has nothing to do with this case where Ferguson was concealing its true motives and conduct. Here, there were no problems of which SAK was aware and nothing to put SAK on inquiry notice that the statements in Ferguson's Notice of Termination were actually untrue. Ferguson is arguing a new law where parties are required to assume they have been misled; but our actual law holds parties to notices that they provided.

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[21] *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 556, 571-72, 573, 146 P.3d 432 (2006) and *Albice v. Premier Mortgage Servs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012).

C. SAK is not bound by notice requirements in the Subcontract in order to pursue its claims against Ferguson.

1. There is no Notice requirement in the Termination for Convenience Clause nor should there be for unilateral acts stopping work.

In denying Ferguson's first motion for summary judgment, the trial court ruled that SAK's notice of claim might be timely based on when SAK knew it had a claim. Although that ruling was not appealed by Ferguson, Ferguson confuses this appeal by making arguments about notice. This Court would be entitled to ignore Ferguson's notice arguments and leave that issue for the trial court.

Washington adheres to the objective manifestation theory of contracts, where the "outward manifestations of intent" are examined and courts will "impute an intention corresponding to the reasonable meaning of a person's words and acts."[22] Intent is determined "by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract. . . ."[23]

Viewing the Subcontract as a whole as required, the provision that purports to allow Ferguson to terminate for convenience does not contain a notice provision, nor does it incorporate or even refer to any notice

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[22] *City of Everett v. Sumstad's Estate*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981) (citing to *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 517, 408 P2d 382 (1965) (Washington "has long adhered to the objective manifestation theory in construing the words and acts of alleged contractual parties. We impute to a person an intention corresponding to the reasonable meaning of his words and acts").

[23] *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973).

provision or requirement. It appears that no dispute was contemplated, particularly since the provision attempts to strip SAK of its rights to recover any sums beyond that for work actually performed.

Nor do notice provisions elsewhere in the Subcontract refer to terminations for convenience. Instead, existing notice obligations are plainly and expressly intended to cover changes regarding on-going performance, which is why the provision expressly provides that "[s]ubcontractor shall proceed diligently with its work pending final determination of any dispute or claim."[24] One requirement is that SAK's claim be presented "through Contractor to Owner . . . in such time as will enable Contractor to present such claims to Owner for payment or recognition," further shows that the provision was not intended to cover terminations for convenience by Ferguson. Rather, it was intended to cover disputes that might result in owner liability. Ferguson's termination for its own convenience exposes only Ferguson to liability, not the Owner. The Notice requirement found elsewhere in the Subcontract serves no purpose and the Subcontract required none for terminations for convenience.

Ferguson's termination notice was unequivocal and unilateral, stopping work and leaving nothing to note or discuss about ongoing

[24] See Subcontract Schedule A, Para. 20, at CP 99.

project performance. Ferguson intended to terminate the Subcontract "effective immediately" and to terminate SAK from the project for its own benefit. Ferguson had apparently determined that it would make more money doing the work itself or by hiring new subcontrators. The Subcontract's notice provision for ongoing work was never intended to apply in this situation. The Subcontract's notice provision for ongoing work has no application.

Ferguson argues a general 21-day notice obligation drawn from the Main Contract and, confusingly, conflates Main Contract and Subcontract terms. The Subcontract provides as follows regarding the Subcontract:

> The terms "Contract" and "Main Contract" used herein refer to the Contract between the Owner and Contractor for construction of the project. . . . By this reference, all terms and provisions of the Contract Documents are incorporated in, and become part of this Subcontract.[25]

Terms of the Main Contract are incorporated by reference, but with the express clarification that the terms "Contract" and "Main Contract" still retain their meaning as between the owner and Contractor, not the Subcontractor. The Contractor (Ferguson) may have had a 21-day requirement to submit claims to the project owner under the Main Contract, but that is irrelevant for this appeal. The Subcontract

[25]Subcontract, Sched. A, ¶1, at CP 91 (emphasis added).

incorporation clause preserved the distinction between the parties and never required notice for terminations of convenience.

2. *Mike M. Johnson* has no applicability in this case.

Mike M. Johnson, Inc. v. County of Spokane, cited by Ferguson as controlling, is inapplicable in this case because it is an authority that enforced a specific contract waiver resulting from specific failure to give clearly required contractual notice. In contrast, there are no notice requirements here.[26] Nor is there a dispute about change order work and notice required for such work. The only potential applicability of 'waiver' in the contract documents pertains to schedule extensions or contract sum adjustments, neither of which were pursued by SAK in trial court, nor are they at issue on appeal. On the facts, *Mike M. Johnson* is otherwise plainly distinguishable as it presented a dispute pertaining to ongoing work and changed conditions, exactly the situation that matches the purpose of notice obligations, but precisely not the situation here.

Mike M. Johnson took the position that it was entitled to additional compensation for various developments, but failed to follow the notice and claim provisions in the contract.[27] In the instant case, and in stark contrast, Ferguson instructed SAK to completely stop work pursuant to

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[26] *See Mike M. Johnson v. County of Spokane*, 150 Wn.2d 375, 378-79, 78 P.3d 161 (2003).
[27] 150 Wn.2d at 380-81.

the illegally invoked termination for convenience provision. As SAK was paid (apart from retainage) for work already performed, there was no current dispute or claim regarding any entitlement to payment for past work. Furthermore, there was no dispute that would implicate any potential liability of the Owner, with regard to which Ferguson would owe any notice obligations to retain its rights vis-à-vis the Owner.

3. *Realm* Has No Applicability In This Case

Likewise, although argued by Ferguson, the instant dispute between SAK and Ferguson contrasts starkly with the facts in *Realm, Inc. v. City of Olympia*. In that a case, the parties' contract differed significantly in that its termination for convenience provision explicitly provided that the Contractor must submit a request for termination costs in compliance with the contract's notice provisions, and, furthermore, there were multiple references in the termination for convenience provision relating to notice and dispute resolution provisions in the contract.[28] No such provisions are present in the Subcontract here. That lack of any such references in the instant case is completely consistent with the Subcontract's termination for convenience provision which, unlike the one in *Realm, Inc.*, purports to limit damages to work actually performed.[29]

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[28] *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 5-7, 277 P.3d 679 (2012).
[29] See Subcontract, Sched. A, ¶ 7, E, at CP 94.

As argued *supra,* nothing triggered any provision the Subcontract that required notice.

In arguing language from Paragraph 20 of the Subcontract (CP 99), and suggesting that that provision shall survive the completion or termination of the subcontract, Ferguson takes the sentence out of context. Notably, its quotation of a separate notice provision omits the sentence immediately following, which states: "Subcontractor shall proceed diligently with its work pending final determination of any dispute or claim."[30] Clearly a situation where work might be ongoing is contemplated.[31] There are situations in which a dispute might be ongoing after a contract ends, whether by completion or termination for cause. This is not one. There is no indication in the Subcontract's notice provision that it applies to terminations for convenience, and it would not make sense to have it written in or apply to a termination for convenience clause that already proscribes what happens next.

D. If this Court affirms the trial court's dismissal of SAK's claims on Summary Judgment, it should also affirm the amount of fees it awarded to Ferguson.

Ferguson cross-appeals the amount of the trial court's fee award. Ferguson neglects to mention the standard of review for fee awards. The

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[30] Bennett Decl. at Ex. B Subcontract, Sched. A, ¶ 20 E, p. A-9).
[31] *See Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973) (intent is determined by viewing the contract as a whole).

standard of review is a stringent one and requires that Ferguson demonstrate that that the trial court "manifestly abused its discretion," to obtain a reversal.[32]

If Ferguson prevails upon appeal, and its award of attorneys' fees are upheld under the contract, the amount awarded should be affirmed since Ferguson has not shown that the trial court manifestly abused its discretion.[33] In Washington the party seeking attorneys' fees has the burden of proving reasonableness of the fees.[34] Whether fees were reasonable is then left to the court's discretion.[35]

In assessing reasonableness, a court does not simply "accept unquestioningly" fee affidavits from counsel.[36] It must determine whether counsel expended reasonable number of hours in prevailing, which "requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims."[37] Clearly the trial court determined that Ferguson's requested fees were not reasonable, likely because Ferguson claimed fees related to

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[32] *Berryman v. Metcalf,* 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013).
[33] *Berryman v. Metcalf*, 177 Wn, App. 644, 657-58, 312 P.3d 745 (2013) (Div. 1).
[34] *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998); *Berryman*, 177 Wn. App. at 657.
[35] *Mahler*, 135 Wn.2d. at 434.
[36] *Id.* at 434-35, cited by *Berryman*, 177 Wn. App. at 657.
[37] *Mahler*, 135 Wn.2d at 651.

efforts in filing two separate summary judgment motions, the first of which was denied.

Ferguson filed its first motion for summary judgment, which was unsuccessful. It then filed a motion for reconsideration, which was also unsuccessful. After both motions were denied, Ferguson finally filed its second motion for summary judgment upon which it finally prevailed. The court could easily have found that the motion for reconsideration was duplicative and wasteful for purposes of awarding attorneys' fees. The Court could also have found that unsuccessful work in the first motion was not proper for inclusion in a fee award.

The trial court could have found that Ferguson filing a second summary judgment motion with no new evidence meant the first effort was wasteful or duplicative for purposes of an attorneys' fee award. If Ferguson had simply filed the second motion, upon the theories therein (and, according to Ferguson based upon issues articulated in SAK's own cross motion for summary judgment[38]) it might have prevailed without the necessity of filing two motions for summary judgment. In other words, looking at Ferguson's activities as a whole, instead of piecemeal, and in light of the nature of the issue upon which Ferguson prevailed, the amount of attorneys' fees requested should not be disturbed (except that they

[38] Respondent's Brief at 42.

should be vacated entirely as part of a reversal).[39] In sum, Ferguson has not shown that the full amount of its fees were reasonable, looking at the outcome, and has not overcome the high burden of showing that the trial court's fee award was manifestly an abuse of discretion.

CONCLUSION

SAK has shown that, as applied, the termination for convenience clause rendered the contract promise made by Ferguson illusory. Moreover, there are disputed facts regarding whether Ferguson's Notice of Termination was reasonable, accurate, pretextual or false. This Court should reverse the trial court's order granting summary judgment, reverse the trial court's fee award to Ferguson and reinstate SAK's claims for trial. Doing so, this Court should award SAK its attorneys' fees for appeal as authorized by contract. Alternatively, should this Court affirm the trial court regarding dismissal of SAK's claims on motion for summary judgment, it should leave undisturbed the amount of the fee award to Ferguson, as Ferguson has failed to show that the amount was a manifest abuse of discretion.

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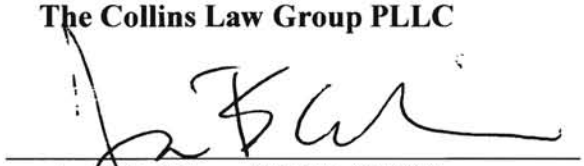
[39] *See Berryman*, 177 Wash. Ap. at 658-59 (even where hours and rates charges are reasonable, if certain blocks of time are duplicative and unnecessary that factors into reasonableness).

DATED this 17th day of December 2014.

The Collins Law Group PLLC



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