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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

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HUARD SEPTIC DESIGN AND MONITORING, LLC.,

Appellant,

v.

PRESTIGE CUSTOM BUILDERS,

Respondent.

BRIEF OF APPELLANT

ON APPEAL FROM THE KING COUNTY SUPERIOR COURT, THE
HONORABLE LAURA MIDDAUGH

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A. INTRODUCTION

The sole issue in this appeal is whether the Superior Court erred when it declined to make any attorney's fee award to Appellant Huard. Prestige, a general contractor, sued Huard, one of its subcontractors. Prestige lost; its claim against Huard was dismissed on summary judgment. Huard subsequently moved for an award of fees contending that it had a right to an attorney's fee award under each of two separate provisions of the parties' Master Subcontract and also under an attorney's fee provision contained in the parties' Project Subcontract. Huard's motion for a fee award was denied.

There are four separate and independent reasons why it is entitled to such an award.

First, Huard is entitled to a fee award because Article XIX of the Master Subcontract contains a unilateral attorney's fee provision that states that Prestige gets a fee award if it is the prevailing party, and under RCW 4.84.330 that unilateral fee provision is automatically treated as a bilateral attorney's fee provision.

Second, Huard is entitled to a fee award under the clear and unequivocal terms of the Project Subcontract.

Third, Huard is entitled to a fee award pursuant to the attorney's fee

provision of Article XVI of the Master Subcontract, which is entitled “Disputes and Arbitration.”

Fourth, even if the attorney’s fee provision in Article XVI of the Master Subcontract is deemed to be ambiguous, such ambiguity must be resolved in Huard’s favor because Prestige drafted the Master Subcontract.

If this Court finds Huard is correct with respect to any one of these four arguments, it need not address any of the other arguments.

B. ASSIGNMENTS OF ERROR

Appellant assigns error to the Superior Court’s order denying Appellant’s motion for an award of attorneys’ fees entered on June 19, 2013. CP 197-199.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The “Indemnification” provision of the parties’ Master Subcontract Agreement recognizes the right of Respondent Prestige (the general contractor) to attorney’s fees if it prevails. Appellant Huard (the subcontractor) prevailed. Is Huard entitled to attorney’s fees because RCW 4.84.330 mandates the recognition of a bilateral right to attorney’s fees whenever the language of a contract grants a unilateral right?

2. The attorney's fee provision of the Project Subcontract covers "all disputes" between Prestige and Huard and provides that "[i]n the event of such dispute, the prevailing party shall be entitled to recover his/her/their/its reasonable attorney's fees and court costs." CP 41. Is Appellant Huard entitled to attorney's fees and costs under this provision of the Project Subcontract?

3. Under the "Disputes and Arbitrations" provision of the parties' Master Subcontract Agreement (drafted by Prestige), is Appellant Huard entitled to attorney's fees and costs because it prevailed under the Superior Court's Mandatory Arbitration Rules by obtaining summary judgment?

4. Assuming, *arguendo*, that Article XVI of the Master Subcontract Agreement is ambiguous on the subject of whether Appellant Huard is entitled to attorney's fees, is Huard entitled to such fees because Prestige drafted the Master Subcontract Agreement and any ambiguity in a contract is construed against the party that drafted it?

5. Is Appellant Huard entitled to an award of attorneys' fees for fees that it incurred on appeal?

D. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY OF THE CASE

Prestige Custom Builders (“Prestige”), a general contractor, agreed to build a home for Michael and Lois Keith. CP 2, ¶ 3.2, 17. Prestige subcontracted with Huard Septic Design & Monitoring (“Huard”) to design the septic system for the home. CP 17, ¶ 3.4. In July of 2012, the Keiths sued Prestige claiming that its work was defective in several respects and that these defects led to water intrusion and damage to the home. CP 2-3, ¶¶ 3.3 – 3.14. Prestige then filed a third-party complaint, followed by an amended third-party complaint, against several subcontractors including Huard.¹ Prestige alleged that Huard’s defective design of the septic system for the home was the actual cause of the water intrusion and sought indemnification from Huard. CP 15-21, ¶¶ 3.4, 3.5, 3.12, 3.14, 4.1 & 4.2. “[W]ithout admitting or in any way acknowledging responsibility, Prestige . . . tender[ed] defense of and indemnity against Plaintiffs’ [the Keiths’] claims” to Huard. CP 11, 19. Prestige alleged that Huard and the other third-party defendants

¹ Prestige also brought third party claims against Chet’s Roofing and Construction, Inc., Mirsky Electric, Inc., and Stucco Works, and the owners of Chet’s Roofing. CP 20-21, ¶¶ 4.1 – 4.3.

were “liable to Prestige, *in contract*, for that part of the [Keiths’] damages arising from . . . labor, services or materials provided by [them] . . .” CP 20 (emphasis added). In its amended third-party complaint, Prestige specifically requested that the Superior Court grant it “*An award of attorneys’ fees and costs* incurred herein, *pursuant to the terms of the applicable contracts.*” CP 21 (emphasis added). In its answer to Prestige’s third-party complaint, Huard requested “[a]n award of attorneys’ fees,” and prayed for “[i]ndemnification for any personal financial, loss and expense, including legal costs and fees and consultant and expert fees, sustained by Huard as a result of claims asserted against it by Prestige, plus interest.” CP 28.

Huard moved for summary judgment. On May 31, 2013, the Superior Court granted that motion and dismissed Prestige’s claims against Huard with prejudice. CP 58-60.

On June 10, 2013, Huard then moved the Superior Court for an order directing Prestige to pay its reasonable attorneys’ fees and costs incurred defending itself against Prestige’s claims. CP 61-66. Relying upon the contractual provisions in both the “Master Subcontract Agreement” and the “Project Subcontract” which Huard and Prestige had entered into, and upon the provisions of RCW 4.84.330, Huard

noted that it was the prevailing party and asserted that it was entitled to an attorney's fees award. CP 61. Huard asserted that it had incurred \$72,677.50 for attorney fees and \$1,738.67 for costs incurred in successfully defending itself against Prestige's third-party plaintiff claim. CP 65. Supporting evidence and documentation was provided to the Court to justify the amount requested. CP 68-71, 73, 75-93, 95-96, 98-129.

Prestige opposed Huard's motion, arguing that because "Huard's summary judgment victory did not occur in the context of an arbitration proceeding, which is the only vehicle for recovery of attorney's fees under the contract," that Huard was not entitled to any attorney's fee award. CP 136. Prestige argued that Article XVI of the Master Subcontract provided the "only vehicle" for awarding fees, and ignored the attorney's fee provision in Article XIX, the indemnification clause of the Master Subcontract. Nor did Prestige address Huard's reliance upon RCW 4.84.330.

Prestige did present evidence that it had expressly tendered the defense of the Keiths' lawsuit to Huard, and that it notified Huard that Huard was obligated to pay any of Prestige's attorney fees incurred as a result of defending against claims resulting from services that Huard

performed for Prestige. CP 154. In a letter to Huard's Registered Agent, the lawyer representing Prestige quoted the indemnification provision of the Master Subcontract Agreement to Huard, including the language which explicitly obligated Huard to indemnify and hold Prestige harmless for "reasonable attorney's fees, court costs and all other claim related expenses." CP 154.

The Superior Court denied Huard's motion for an award of fees and costs, and that order was entered on June 19, 2013. CP 197-199. Huard filed a notice of appeal on July 18, 2013, and an amended notice of appeal on October 30, 2013. CP 200-206, 224-236.²

² Initially, this Court raised the question of whether Huard's appeal was premature because other claims between other parties had yet to be resolved. *Ruling of Comm'r Neel*, 8/12/13. On September 6, 2013, the Superior Court granted Prestige's motion for summary judgment against the Keiths and dismissed the Keiths' claims against Prestige. CP 207-209. Then, on October 22, 2013, the Superior Court dismissed all the remaining claims between Prestige and all the other parties. CP 219-223. Since this last dismissal order of October 22nd resolved all the remaining claims in the case, the Superior Court's prior order of June 19, 2013 denying Huard's motion for fees became appealable as a matter of right as of October 22nd. Huard then filed its amended notice of appeal on October 30th, again seeking appellate review of that order. CP 224-236. This Court then entered an order acknowledging that all claims between all parties had now been resolved, striking a previously scheduled hearing on the issue of appealability, and ruling that the June 18th order denying fees and costs was now appealable. *Ruling of Commissioner Kanazawa*, 11/7/13.

2. THE TEXT OF THE ATTORNEY FEE PROVISIONS IN THE PRESTIGE-HUARD CONTRACTS.

Prestige and Huard entered into a “Master Subcontract Agreement” which Prestige drafted and sent to Huard. CP 31. Article I of the Master Subcontract provides that “from the date hereof until this Master Agreement is terminated,” Prestige could contract with Huard “for the furnishings of materials and/or the performance of various work on projects being constructed by the Contractor.” CP 31, 34. It further provides that for every project there would be an additional “Project Subcontract” agreement to be provided by the subcontractor:

Each individual project conducted with the Subcontractor will be described in a separate addendum agreement called a Project Subcontract. Your signed proposal or quote, including specific details on Project Scope of Work, Price, Schedule, and Payment Terms and exclusions, constitutes a Project Subcontract.

CP 34.

In the Master Subcontract, drafted by Prestige, there were two clauses which provided for awards of attorney’s fees, and in the Project Subcontract, drafted by Huard, there was one attorney’s fee provision.

a. Attorney’s Fee Provision in “Indemnification” Clause of Master Subcontract.

Article XIX of the Master Subcontract Agreement contains an indemnification provision obligating Huard “to defend, indemnify and

hold Contractor [Prestige] and homeowners harmless from any and all claims, losses and liabilities to or by third parties resulting from services performed for the Contractor by the Subcontractor . . . to the fullest extent permitted by law” CP 37. Article XIX goes on to require Huard to pay Prestige’s attorney’s fees as part of its obligation to hold Prestige harmless:

Subcontractor’s obligations to defend, indemnify and hold Contractor harmless *shall include contractors’ reasonable attorney’s fees*, court costs and all other related expenses.

CP 37 (emphasis added).

b. Attorney’s Fee Provision in Project Subcontract.

Huard sent Prestige the “Project Subcontract” that covered the work of performing a site evaluation and designing an on-site septic system for the house that Prestige had agreed to build for the Keiths. CP 31. On page two of the “Project Subcontract” a provision entitled “DISPUTES” reads as follows:

Unless settled between Owner and HSDM, *all disputes*, including labor and/or materialmen’s liens, shall, be decided according to the Mandatory Arbitration Rules of the Superior Court of the county in which is located the subject property, regardless of whether the amount in dispute exceeds the maximum amount then provided for mandatory arbitration in such county. *In the event of such dispute, the prevailing party shall be entitled to recover his/her/their/its reasonable attorney’s fees and*

court costs.

CP 41 (emphasis added).

c. **Attorney's Fee Provision in "Disputes and Arbitration" Clause of Master Subcontract.**

Article XVI of the Master Subcontract was entitled "DISPUTES & ARBITRATION," and it provides for resolution of disputes under the Superior Court's Mandatory Arbitration Rules and for fees to be awarded to the prevailing party:

If any dispute arises between the parties, the parties will make a good faith effort to first resolve [³] without resort to *litigation*. If a dispute cannot be resolved between the parties, then *either party may file suit in a court of competent jurisdiction*. If suit is filed, the dispute will be decided according to the Mandatory Arbitration Rules regardless of the amount in dispute. Each party expressly waives the dollar limits currently in effect and the arbitrator may issue an award in any dollar amount. The arbitrator shall have the authority to determine the amount, validity and enforceability of a lien. The parties agree to accept the arbitrator's award as final and binding. The parties waive their right to file any appeal for trial de novo in Superior Court. *In any such arbitration proceeding, the prevailing party shall in all cases be awarded his or her reasonable attorney's fees regardless of whether the dispute is resolved through settlement or arbitration.*

CP 37 (emphasis added).

³ The word "it" is missing and presumably should have appeared here.

3. RULING OF THE SUPERIOR COURT

Prestige argued below Huard was not entitled to any attorney's fee award under the "Disputes and Arbitration" clause (Article XVI) of the Master Subcontract Agreement. According to Prestige, a victory occurring "in the context of an arbitration proceeding" was the "only vehicle" for recovery of attorney's fees under the contract. CP 136.

Prestige did not address either the attorney's fee provision in the indemnification clause or the effect of the statute, RCW 4.84.330. Prestige argued that the fee provision in the Project Subcontract "conflicted" with the "Disputes and Arbitration" fee provision in the Master Subcontract, and therefore the provision in the Project Subcontract was inapplicable. CP 135.

The Superior Court agreed with Prestige's contention that the Article XVI, the "Disputes and Arbitration" provision of the Master Subcontract, was the "only" contractual provision that provided Huard with a way to obtain a fee award: "The contract unambiguously allowed attorney's fees only for the prevailing party in an arbitration proceeding." CP 206. In her ruling, the Superior Court did not mention or acknowledge the existence of the attorney's fee provision in

the Indemnification clause of the Master Subcontract. CP 206. Nor did the Court mention RCW 4.84.330. CP 206.

The Superior Court did state in her ruling that “in case of [a] conflict between the two contracts [which the Court referred to as the “Master Contract” and the “subcontract’] the terms of the Master Contract prevail.” CP 206. This statement was apparently based on Prestige’s argument based on Article I of the Master Subcontract. But in fact that Article governs conflicts between the Master Subcontract and other contract documents prepared by Prestige. CP 34. Since the Project Contract was written by Huard and not by Prestige, the conflict provision of Article I simply has no application to conflicts between the Master Subcontract and the Project Subcontract.

Nevertheless, in its ruling the Superior Court identified one difference between the Master Subcontract and the Project Subcontract, noting that the former specified that the parties waived their right to trial de novo after an arbitration, while the latter did not contain any language waiving the right to trial de novo after an arbitration award. CP 206. Apparently, the Superior Court viewed this difference as a “conflict.” However, no party ever claimed that there was a right to trial de novo after an arbitrator’s award. Moreover, since there never

was any arbitrator's award, there was never any issue regarding whether to conduct a trial de novo.

Prestige did argued below that the attorney's fee provision of the Project Subcontract was in conflict with the attorney's fee provision in Article XVI of the Master Subcontract, but the Superior Court made no ruling or comment on this issue. CP 206. In fact, the Superior Court's ruling does not contain any mention of, or any reference to, the attorney's fee provision in the Project Subcontract, and never ruled on the argument that Prestige raised. CP 206. But as noted above, even if there was some kind of conflict between the provisions in the Master Subcontract and those in the Project Subcontract (which there isn't), the conflict provision of Article I would not apply because the Project Subcontract document does not come "on any preprinted form from the Contractor." CP 34.

E. APPELLATE STANDARD OF REVIEW

"Whether a contract or statute authorizes an award of attorney fees is a question of law reviewed de novo." *McGuire v. Bates*, 169 Wn.2d 185, ¶ 6, 234 P.3d 205 (2010).⁴ "Whether a party is entitled to attorney

⁴ *Accord Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, ¶ 11, 210 P.3d 318 (2009); *Hall v. Feigenbaum*, ___ Wn. App. ___, ¶ 35, 2014 WL 113407 (Jan. 13, 2014); *Fairway Estates Association v. Unknown Heirs*, 172 Wn. App. 168, ¶ 29, 289 P.3d 675 (2012); *Harmony at Madrona Park v. Madison Harmony Development*, 160 Wn. App.

fees is an issue of law that we review de novo.” *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 484, 260 P.3d 915 (2011).⁵ The applicability of RCW 4.84.330, in an suit on a contract that contains a unilateral attorney’s fee provision, is a question of law that is reviewed de novo. *Wachovia SBA Lending, Inc. v. Kraft*, 138 Wn. App. 854, 858, 158 P.3d 1271, aff’d 165 Wn.2d 481, 488, 200 P.3d 683 (2007).

F. ARGUMENT

1. **HUARD IS ENTITLED TO FEES UNDER RCW 4.84.330 BECAUSE UNDER THE INDEMNIFICATION CLAUSE OF THE MASTER SUBCONTRACT, PRESTIGE WOULD HAVE BEEN ENTITLED TO FEES HAD IT PREVAILED, AND THE STATUTE MAKES THIS PROVISION BILATERAL.**

a. Text of RCW 4.84.330.

RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney’s fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties. ***The prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to***

728, ¶ 10, 253 P.3d 101 (2011); *North Coast Electric v. Selig*, 136 Wn. App. 636, ¶ 10, 151 P.3d 211 (2007); *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

⁵ If a party is entitled to an award of attorney fees, the *amount* of that award is reviewed under an abuse of discretion standard. *Hall*, ___ Wn. App. at ¶ 35; *Fairway Estates*, 172 Wn. App. at ¶ 29; *Unifund CCR Partners*, 163 Wn. App. at ¶ 22; *Northcoast*, 136 Wn. App. at ¶ 10; *Ethridge*, 105 Wn. App. At 460. In this case, since the Superior Court decided Huard was not entitled to fees under the contract, the Court never got to the point of exercising any discretion regarding the reasonableness of the amount of attorney fees requested.

reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section, "prevailing party" means the party in whose favor final judgment is rendered.

(Emphasis added).

b. Statutory Purpose

The Supreme Court has explained that the purpose of the statute is to transform unilateral attorney fee provisions in contracts into bilateral provisions:

By its plain language, *the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral*. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision. It does so by expressly awarding fees to the prevailing party in a contract action. It further protects its bilateral intent by defining a prevailing party as one that receives a final judgment.

Wachovia v. SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 489, 200 P.3d 683 (2009) (emphasis added).

The rule requiring mutuality of remedy is a well established principle of equity. *See, e.g., Kaintz v. PLG, Inc.*, 147 Wn. App. 782,

789, 197 P.3d 710 (2008);⁶ *Fairway Estates Association v. Unknown Heirs*, 172 Wn. App. 168, 289 P.3d 675 (2012).⁷ As this Court recognized in *Fairway*, “This same equitable principle underlies the legislature’s enactment of RCW 4.84.330, which requires that a unilateral attorney fee provision contained in a contract be applied on a reciprocal basis.” *Id.* at ¶ 30.

The statute was applied in *Hackney v. Sunset Beach Investments*, 31 Wn. App. 596, 644 P.2d 138 (1982), where the language of the “contract authorized attorney’s fees if *the seller* terminated the purchaser’s rights” (italics added), but did not authorize an award of fees to *the purchaser*. This Court held that because “the statute gives the purchaser the same rights the contract gives the seller,” the trial court erred in refusing to award any attorney’s fees to the purchaser. *Id.* at 603. Since the purchaser prevailed and obtained a final judgment in its favor in an action on a contract (by winning rescission of the contract), this Court held the purchaser was entitled to fees by virtue of

⁶ There this Court ruled that where a party has successfully argued that a statute is invalid (thus rendering invalid the statute’s attorney fee provision) that party is nevertheless entitled to an award of attorney fees because such fees would have been awarded to the opposing party if the statute had been deemed valid.

⁷ In *Fairway* this Court dealt with a one-way statute which recognized the right of a prevailing homeowners’ association to recover attorney fees if it prevailed in action to collect delinquent assessments. The homeowners’ association lost, but applying the equitable principle of mutuality of remedy this Court held that the prevailing defendant

RCW 4.84.330. *Id.*

c. Where The Statute Applies, An Award of Fees Is Mandatory and the Trial Judge Has No Discretion to Deny Fees.

“Washington public policy forbids one-way attorney fee provisions.” *Mahler v. Szucs*, 135 Wn.2d 398, 425 n.17, 957 P.2d 632 (1998), citing RCW 4.84.330. As a result of the Legislature’s clear policy decision to prohibit unilateral attorney fee provisions in contracts, “[t]he language [of RCW 4.84.330] must be read into a contract that awards fees to one party . . .” *Wachovia SBA*, 165 Wn.2d at 489. “RCW 4.84.330 is designed to make a unilateral attorney fee provision bilateral when a contracting party receives a final judgment.” *Id.* at 494. *Accord QFC v. Mary Jewell T, LLC*, 134 Wn. App. 814, 817, 142 P.3d 206 (2006).

There are no exceptions to RCW 4.84.330. The language of the statute is mandatory. *Singleton v. Frost*, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987). “There is no authority to support an interpretation of RCW 4.84.330 other than as mandating an award of reasonable attorney’s fees to the prevailing party where a contract so provides.” *Id.* “The denial of attorney’s fees in circumstances such as this is not

was entitled to attorney fees even though the statute granted a right to a fee award only to prevailing homeowners.

within the ambit of broad trial court discretion.” *Id.* at 730. “While the amount awarded under RCW 4.84.330 is reviewed for abuse of discretion, the language is mandatory in requiring an award of fees.” *Mary Jewell T*, 134 Wn. App. at 817. *Accord Farm Credit Bank v. Tucker*, 62 Wn. App. 196, 207 P.2d 619 (1991).

Indeed, this policy is so strong, that even when a defendant in a breach of contract action prevails by winning a judicial determination that there never was a valid contract, if that *invalid* contract contained a unilateral attorney’s fee provision then by operation of RCW 4.84.330 the defendant is entitled to an award of attorney’s fees because the plaintiff would have been entitled to attorney’s fees if the plaintiff had prevailed. *Labriola v. Pollard Group*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (“Attorney’s fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee provision is invalidated.”). *Accord Herzog Aluminum Inc. v. General American Window Corp.*, 39 Wn. App. 188, 196-97, 692 P.3d 867 (1984); *Yuan v. Chow*, 96 Wn. App. 909, 915-18, 982 P.2d 647 (1999); *Stryken v. Pannell*, 66 Wn. App. 566, 572-73, 832 P.2d 890 (1992).

d. RCW 4.84.330 Controls This Case.

“For RCW 4.84.330 to apply: (1) the action must be ‘on a contract or lease,’ (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a prevailing party.” *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 859, 158 P.3d 1271 (2007), aff’d *Wachovia Lending v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). “The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the statute’s first two requirements.” *Wachovia SBA*, 138 Wn. App. at 859. In this case, Prestige brought an action “on a contract” and specifically notified Huard that the contract contained a unilateral attorney fee provision. CP 20, 21, 149.

The only remaining requirement is whether Huard was the prevailing party in the action.⁸ By definition Huard is the prevailing party in this case because it received a final judgment in its favor in the contract action brought against it by Prestige. The Superior Court’s order granting Huard’s summary judgment motion states that “Third-

⁸ In *Wachovia*, the debtor was held not to be a prevailing party within the statutory definition of that term – “the party in whose favor final judgment is rendered” – because no final judgment was entered in that case. Instead, Kraft’s creditor took a voluntary nonsuit, leaving the case without a formal decision or determination. 138 Wn. App. at 862. Thus, both the Court of Appeals and the Washington Supreme Court held that Kraft did not satisfy the last requirement of the statute. *Id* at 863 (a voluntary dismissal without prejudice is not a ‘final judgment’ within the meaning of RCW 4.84.330’s prevailing party language.”); *Wachovia*, 165 Wn.2d at 494 (“a voluntary dismissal is not a final judgment as contemplated under RCW 4.84.330. . .”).

Party Plaintiff Prestige's third-party claims herein against Third-Party Defendant Huard Septic Design and Monitoring, LLC are hereby *dismissed with prejudice.*" CP 59-60 (italics added).

Prestige brought a claim against Huard "on a contract" -- the Master Subcontract Agreement. The Master Subcontract specifically provides that Huard's indemnification obligation includes the obligation to pay Prestige's attorney's fees. Even though Huard is "not the party specified in the contract," under RCW 4.84.330 that attorney fee obligation is a bilateral obligation. Huard is "the prevailing party" because final judgment was entered in its favor. Therefore, under the statute Huard is "entitled to reasonable attorney's fees in addition to costs and necessary disbursements." RCW 4.84.330.

- e. **In Harmony Madrona Park, Pursuant to A Unilateral Indemnification Clause That Obligated a Subcontractor to Indemnify a General Contractor For Its Reasonable Attorney's Fees, Fees Were Awarded to a Prevailing General Contractor. In This Case, the Master Subcontract Contains a Nearly Identical Unilateral Indemnification Clause and the Subcontractor Prevailed. Therefore, Fees Must Be Awarded to the Subcontractor Pursuant to RCW 4.84.330.**

This Court has had occasion to affirm an award of attorney fees in a case involving a nearly identical indemnification clause. In the present case the indemnification clause, Article XIX, provides:

Subcontractor's obligations to defend, indemnify and hold Contractor harmless shall include contractors' reasonable attorney's fees, court costs and all other related expenses.

CP 37 (emphasis added). Comparable language is also found in the indemnification clause at issue in *Harmony Madrona Park*. There the indemnification clause read:

Subcontractor's duty to defend, indemnify and hold Contractor and Owner harmless shall include, as to all claims, demands, losses and liability to which it applies, Contractor's and/or Owner's personnel-related costs, consultant fees, reasonable attorneys' fees, court costs and all other claim related expenses.

160 Wn. App. at ¶ 23 (emphasis added).

Like this case, *Harmony Madrona Park* involved a homeowner's suit for construction defects. A homeowners' association sued a developer, who then brought a third-party claim against Leducor Industries, the general contractor. Leducor brought a fourth-party claim against several subcontractors including Serock Construction. After it prevailed on its fourth-party claim against Serock, Leducor sought an award of attorney fees. Finding that Leducor had "substantially prevailed" in its suit, the trial court awarded Leducor attorney fees for fees it incurred in prosecuting its indemnification claim. *Id.* at ¶ 24. This Court affirmed and awarded fees on appeal. *Id.* at ¶ 26.

Like Ledcor, in this case Prestige brought a claim for indemnification against Huard. When it tendered defense of the case to Huard, Prestige explicitly reminded Huard that its duty to indemnify included the obligation to pay Prestige's attorney fees. CP 154.⁹ But unlike Ledcor, Prestige *lost* on its indemnification claim. And unlike Serock Construction, the subcontractor in *Harmony Madrona Park*, Huard, the subcontractor in this case, was the prevailing party since Prestige's third-party claim was dismissed with prejudice. CP 59-60.

In the present case, the indemnification clause in the Master Subcontract recognized only the general contractor's right to attorney fees in an action brought to enforce the indemnification clause. But by virtue of RCW 4.84.330, Huard, the subcontractor, has the exact same right to an award of fees if it prevails in such an action. *Wachovia SBA Lending*, 165 Wn.2d at 485, 489 (loan contract gave fees right to lender but not to debtor); *Hackney*, 31 Wn. App. at 603 (contract mentioned seller but not purchaser); *Klaas v. Haueter*, 49 Wn. App. 697, 708, 745 P.2d 870 (1987); RCW 4.84.330 ("The prevailing party, ***whether he is the party specified in the contract or lease or not***, shall be entitled to

⁹ Letter of 8/1/12 from Prestige's attorney to Huard's registered agent, attached to Declaration of Raymond Weber, CP 149-50.

reasonable attorney's fees.") (emphasis added). Here, as in *Harmony Madrona Park*, the prevailing party obtained a final judgment and is therefore entitled to an attorney's fee award.

2. APPELLANT HUARD IS ALSO ENTITLED TO ITS ATTORNEY'S FEES UNDER THE FEE PROVISION OF THE PROJECT SUBCONTRACT, WHICH WAS INCORPORATED INTO THE MASTER SUBCONTRACT.

a. General Principles of Contract Construction.

"The touchstone of contract interpretation is the parties' intent." *Tanner Electric Coop v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). "When contract provisions seem to conflict [courts] will harmonize with the goal of giving effect to all the provisions." *Id. Accord Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007); *Certain Underwriters v. Travelers Property Cas. Co.*, 161 Wn. App. 265, 256 P.3d 368 (2011).

When construing contracts, courts "consider only what the parties wrote." *Renfro v. Kaur*, 156 Wn. App. 655, 662, 253 P.3d 800 (2010). Following the objective manifestation theory of contracts, courts "do not interpret what was intended to be written but what was written." *Hearst Communications v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). "Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately

made for themselves.” *Little Mountains Estates Tenants Ass’n v. Little Mountain Estates MHC*, 169 Wn.2d 265, 269, 236 P.3d 193 (2010).

Finally, when there is ambiguity in a contract such ambiguity is resolved against the party that drafted the contract. *Jones v. Strom Construction*, 84 Wn.2d 518, 527 P.2d 1115 (1974).

b. Prestige Argues That the Provision of Article I of the Master Subcontract, Which Governs Conflicts Between Contract Documents, Applies to Conflicts Between the Master Subcontract, Which it Wrote, and the Project Subcontract, Which Came From Huard. However, the Clear Language of Article I Shows That It Does Not. By Its Own Plain Terms Article I Only Covers Conflicts Between the Master Subcontract and Prestige’s Own Preprinted Forms.

In the court below, Prestige asserted that the Master Subcontract addressed “the issue of conflicts between its terms *and those of other documents*” by specifically providing that “if” there was any such conflict, the terms of the Master Subcontract would control. CP 135 (emphasis added). Prestige’s description of the pertinent provision within Article I of the Master Subcontract is not entirely accurate.

Prestige described this Article as controlling how conflicts between terms in the Master Subcontract and terms in all “other documents” would be resolved. But in fact, the conflict provision is not that broad. Actually, it only controls conflicts between terms in the Master Subcontract and terms *in Prestige’s own* preprinted forms. Because the

Project Subcontract is *not* one of Prestige's own preprinted forms, Article I's provision for resolving conflicts between the Master Subcontract and other forms "from the Contractor" simply does not apply at all.¹⁰

Article I's provision for resolving conflicts between documents states in pertinent part:

Entering into this Master Agreement shall not obligate either the Contractor or the Subcontractor to agree to any subsequent request for services or to any volume of business during the term of this Master Agreement. The intent is that if any services are procured and agreed by both parties during the term of this Agreement, the terms and conditions of this Master Agreement shall apply. ***If any terms and conditions on any preprinted written form from the Contractor conflicts with this Master Agreement, the terms of this Master Agreement apply and supercede any other terms to contrary.***

CP 34 (emphasis added).

The Project Subcontract is *not* a form that comes "from the Contractor." The Project Subcontract came from Huard. CP 31.¹¹ The

¹⁰ In the Court below, Prestige never explicitly identified what the conflict was between the Master Subcontract and the Project Subcontract. It simply said when there is a conflict between the two, the Master Subcontract governs: "Accordingly, the application of the terms of a project subcontract is governed by the Master Subcontract." CP 135. But since the motion before the Superior Court was a motion to grant an award of attorney's fees, the clear implication of Prestige's brief was that there was some kind of conflict between the attorney's fee provision in the Project Subcontract and the attorney's fee provision in Article XVI of the Master Subcontract.

¹¹ "On April 10, 2006, Huard Septic sent to Prestige the 'Project Subcontract' . . . A true and correct copy is attached hereto as Exhibit B."

Project Subcontract was written on Huard stationary, it was written by Huard, it was addressed to Prestige and it was sent to Prestige. CP 40-42. Since the Project Subcontract came *from the subcontractor*, the conflict provision of Article I of the Master Subcontract Agreement is simply inapplicable.

- c. **Even If the Conflict Provision of Article I Were Applicable (and It Isn't), There is No Conflict Between the Master Subcontract and the Project Contract. Nothing in The Master Subcontract States or Implies That the "Only Vehicle" For Awarding Attorney's Fees Is the Disputes and Arbitration Clause in Article XVI.**

Even if the conflict provision of Article I applied, there is no conflict between the Project Subcontract and the Master Subcontract. Prestige has consistently maintained that there is a conflict between Article XVI of the Master Subcontract and the attorney fee provision of the Project Subcontract. It has created the illusion of a conflict by misrepresenting the language of Article XVI.¹²

Prestige argues that Article XVI created the "*only*" vehicle for obtaining an award of attorney's fees. But Article XVI does not say that. The word "*only*" never appears in Article XVI. Article XVI does

¹² Prestige never contested the point that the Project Subcontract was explicitly incorporated into the Master Subcontract Agreement. Nor could it, since Article I of the Master Subcontract explicitly states that "each individual project conducted with the Subcontractor will be described in a separate addendum agreement called a Project Subcontract." CP 34.

say: “In any such arbitration proceeding, the prevailing party shall in all cases be awarded his or her reasonable attorney’s fees regardless of whether the dispute is resolved through settlement or arbitration.” CP 37. But it does *not* say, “*Only* in any such arbitration proceeding, the prevailing party shall in all cases be awarded” such fees. And it does *not* say, “*Provided* such an arbitration proceeding has been held . . .” Nor does it say, “*If* such an arbitration proceeding has been held,” or “*If* such an arbitration proceeding has been initiated or commenced . . .” Thus, there is no language in Article XVI which purports to *restrict* in any way, the availability of, or the entitlement to, an award of attorney’s fees. Article XVI provides when attorney’s fees “shall” be awarded, and clearly states they “shall” be awarded “in all cases” covered by this article. It does *not* say they “shall not” be awarded in other situations or circumstances. Indeed, the very mention of the fact that attorney’s fees “shall” be awarded to all prevailing parties who resolved the dispute “through settlement *or* arbitration” demonstrates that there will be some cases where fees shall be awarded to the prevailing party even though that party did not prevail through arbitration. There is no conflict.

3. HUARD IS ALSO ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER ARTICLE XVI, THE "DISPUTES AND ARBITRATION" CLAUSE OF THE MASTER SUBCONTRACT.

a. The Language of Article XVI Gives a Fee Entitlement to The Party Who Prevails in an "Arbitration Proceeding," and That Proceeding Is Contractually Defined as Including a Suit Filed in a Court of Competent Jurisdiction and Determined According to the Mandatory Rules of Arbitration.

The last sentence in Article XVI of the Master Subcontract provides that "In any *such arbitration proceeding*, the prevailing party shall be awarded his or her reasonable attorney's fees regardless of whether the dispute is resolved through settlement or arbitration." CP 37 (italics added). Although the clause refers to "such arbitration proceeding," Prestige would have this Court read Article XVI as if it said, "In any dispute resolved by *an arbitrator's decision*, the prevailing party shall be awarded his or her reasonable attorney's fees" Prestige's reading of the last sentence in Article XVI ignores the rest of the Article. Additionally, it ignores the provision of the Mandatory Arbitration Rules which Article XVI explicitly states are to govern such disputes.

Courts construing contracts "harmonize clauses that seem to conflict in order to give effect to all the contract's provisions." *Certain Underwriters*, 161 Wn. App. at 278. Prestige ignores this fundamental

rule. Prestige also ignores Article XIX of the Master Subcontract, which contains another attorney's fee provision. Prestige never even acknowledges the existence of Article XIX's attorney's fee provision, much less tries to give it effect. Nor does Prestige make any attempt to harmonize Article XVI with the Project Subcontract's attorney's fee provision.

Even the very *title* of Article XVI – “Disputes and Arbitration” – demonstrates that it applies to more than just the decisions of arbitrators. Similarly, the first sentence of Article XVI makes it clear that this article applies to all disputes regardless of whether they ever get as far as arbitration. Article XVI begins, “In any dispute between the parties . . .” CP 37. No one can deny that this case involved a “dispute” between the contractor and the subcontractor.

Article XVI goes on to state that in the event the dispute is not resolved, “either party may file suit in a court of competent jurisdiction.” CP 37. After authorizing the filing of a suit in a court, Article XVI then requires that all such suits “will be decided *according to the Mandatory Arbitration Rules* regardless of the amount in dispute.” CP 37 (*italics added*). Again, the language of the contract does *not* say that all such suits “will be decided by an arbitrator.”

b. **Prestige's Indemnification Claim Was Properly Decided by a Superior Court Judge According to Rule 1.3 of the Mandatory Arbitration Rules. Since Huard Prevailed in a Decision Made According to That Rule, Huard Was Entitled Under Article XVI to An Award of Fees.**

Since the Mandatory Arbitration Rules governed how the Prestige/Huard dispute was to be resolved, it is instructive to read those rules. Prestige ignores MAR 1.3, which expressly provides that Superior Court judges also have the power to make decisions:

- (a) Superior Court Jurisdiction. A case filed in the superior court *remains under the jurisdiction of the superior court in all stages of the proceeding, including arbitration.* Except for the authority expressly given to the arbitrator by these rules, *all issues shall be determined by the court.*
- (b) Which Rules Apply. *Until a case is assigned to the arbitrator under Rule 2.3, the rules of civil procedure apply.* After a case is assigned to the arbitrator, these arbitration rules apply except where an arbitration rule states that a civil rule applies.

Under MAR 1.3(b), since no arbitrator was ever assigned, the Civil Rules, including CR 56, applied to the case. And under MAR 1.3(a), at “all stages of the proceeding, “including arbitration,” the superior court retained jurisdiction over the case and had the authority to decide “all issues.”

Huard brought a summary judgment motion against Prestige. CP 58. Huard brought its motion in the same forum in which Prestige had

chosen to sue Huard. Prestige argued in its complaint that it was entitled to a judgment against Huard, and that such judgment should include an attorney's fee award. CP 21. Huard made exactly the same claim against Prestige and litigated its claim in a summary judgment motion.

The Superior Court judge granted Huard's summary judgment thereby making Huard the prevailing party. CP 59-60. This procedure was perfectly consistent with Article XVI of the Master Subcontract because the case was decided "according to the Mandatory Arbitration Rules." CP 37. Therefore, under Article XVI, Huard was the prevailing party entitled to an award of attorney's fees.

When all the sentences in Article XVI are read and construed together, as they must be in order to give effect to all the words written, it is clear that the term "arbitration" was used in the last sentence as a shorthand way of referring to lawsuits filed in superior court and decided according to the Mandatory Arbitration Rules. Therefore, the last sentence in Article XVI authorizes an award of fees to Huard because the judge of the court of competent jurisdiction decided the issues presented by Huard's summary judgment motion pursuant to MAR 1.3 and Huard prevailed on that motion.

c. The Phrase “In All Cases” Also Supports the Conclusion That Huard is Entitled to a Fee Award Under Article XVI.

The word “cases” in the last sentence of Article XVI compels the same result. Since the prevailing party “shall in all cases” be awarded his or her fees, this demonstrates that fees are awardable in any “case” arising out of a dispute about the contract between Prestige and Huard, regardless of whether the case was ultimately resolved by a Superior Court judge or by an arbitrator.

This construction not only gives effect to all the words in Article XVI, it also avoids any conflict with the attorney’s fee provision in the Project Subcontract. It would contravene the basic principle of harmonization to read Article XVI as denying any fee award to Huard because it did not prevail by means of a ruling made by an arbitrator, when the Project Subcontract explicitly states that in “all disputes” the prevailing party is entitled to a fee award without regard to who (a judge or an arbitrator) made the ruling that finally resolved the case in the prevailing party’s favor.

d. Prestige’s Proffered Construction of Article XVI Leads to Absurd Consequences.

Courts avoid interpreting contracts in ways that lead to absurd results. *Forest Marketing Enterprises v. Department of Natural*

Resources, 125 Wn. App. 126, 132, 104 P.3d 40 (2005). If Prestige's construction of the Master Subcontract and Project Subcontract were to prevail, the resulting consequences would be manifestly absurd. Under Prestige's view of the Master Subcontract, no matter how weak its claim of indemnification is against a third-party defendant, Prestige can always take a shot at winning, and if Prestige prevails then Prestige will be entitled to an award of fees under the Indemnification Clause (Article XIX). But according to Prestige, if its third-party claim against a subcontractor like Huard is completely insupportable, and so weak that it does not even survive a summary judgment motion because there is no evidence to support it, then so as long as the subcontractor prevails by obtaining a ruling in its favor from a Superior Court judge – instead of from an arbitrator – the subcontractor will never be entitled to an attorney fee award.¹³

In this case, the Master Subcontract and the Project Subcontract have a total of *three* attorney's fee clauses, and Prestige was unable to generate any evidence to support its claim that Huard's negligence was responsible for some part of the Keiths' damages. Nevertheless,

¹³ Prestige has never even attempted to explain how such a result could possibly be squared with the equitable principle that this Court recognized as underlying the policy codified in RCW 4.84.330. See *Fairway*, 172 Wn. App. at ¶ 30.

according to Prestige there can be no award of attorney's fees to Huard because Prestige's claim against it was so weak that it never even survived to the point in time in the proceeding where an arbitrator was assigned to the case. This leads to the absurd result that the weaker Prestige's claim against a subcontractor like Huard is, the less likely it is that the subcontractor will ever be entitled to a fee award for successfully defending against it.

4. AT THE VERY LEAST, ARTICLE XVI IS AMBIGUOUS, AND THEREFORE, SINCE IT WAS DRAFTED BY PRESTIGE, IT MUST BE INTERPRETED IN HUARD'S FAVOR.

When read in harmony with all the other provisions of Article XVI, and with the other provisions of the Master Subcontract and of the Project Subcontract, the language of the last sentence in Article XVI clearly entitles Huard to an award of its fees. But even assuming, *arguendo*, that this entitlement were not clear, and that the language employed in Article XVI were ambiguous, Huard would still be entitled to an award of fees because Prestige drafted the Master Subcontract.

Courts construe ambiguities in a contract against the party that drafted the language, and in favor of the other party. *Chevalier v. Woempner*, 172 Wn. App. 467, 476, 290 P.3d 1031 (2012); *Jones v. Strom Construction, Co.*, 84 Wn.2d 518, 527 P.2d 1115, 1119 (1974)

(“since [the general contractor] ostensibly provided and/or required the subcontract form embracing the instant indemnity clause, the doubt created by the ambiguity must be resolved against it.”).

This Court has frequently had occasion to apply this rule of construction to cases where the language of a contract was ambiguous as to whether it provided for a right to an award of attorney’s fees. *See, e.g., Lietz v. Hansen Law Offices*, 166 Wn. App. 571, 271 P.3d 899 (2012) (where attorney/employer drafted the offer of judgment made to paralegal/employee that did not explicitly mention attorney’s fees, ambiguity construed against the attorney so that paralegal was entitled to a fee award); *Washington Greenview Apartment Associates v. Traveler’s*, 173 Wn. App. 663, 678, 295 P.3d 284 (2013) (ambiguous provision construed against insurance company that drafted it and in favor of insured). In sum, the rule that ambiguity must be construed against the drafter of the ambiguity provides yet another independent rationale for ruling in favor of Appellant Huard.

5. ATTORNEYS FEES ON APPEAL.

“A contract providing for an award of attorney fees at trial also supports such an award on appeal.” *Hall*, at ¶ 37. *Atlas Supply Inc. v. Realm, Inc.*, 170 Wn. App. 234, 241, 287 P.3d 606 (2012). As noted

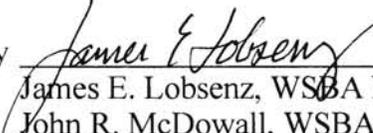
above, Huard is entitled to an award of attorney's fees under (1) the unilateral attorney fee provision contained in the indemnification clause of the Master Subcontract, which is made bilateral by virtue of RCW 4.84.330; *and* (2) under the attorney fee provision of the Project Subcontract; *and* (3) under the "Disputes and Arbitration" clause of the Master Subcontract, either because it clearly provides Huard the right to such an award; *or* because, assuming that clause is ambiguous, such ambiguity must be resolved in Huard's favor. Therefore, Huard is entitled to an award of fees for *both* the fees it incurred in litigation in the Superior Court and those it incurred in this appeal. Pursuant to RAP 18.1, appellant Huard asks this Court to award it its appellate fees and costs, as well as those incurred in the Court below.

G. CONCLUSION

For the reasons stated above, Huard asks this Court to reverse the Superior Court, to order Prestige to pay both Huard's attorney fees incurred in the course of this appeal, and the fees Huard incurred in the Superior Court where it prevailed against Prestige by successfully defending itself against Prestige's third-party claim.

DATED this 17th day of March, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
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Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies:

1. I am over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle, WA 98104.
3. On March 19, 2014, I caused to be delivered, *via Legal Messenger*, a true and correct copy of the foregoing document to the following:

Counsel for Respondent

Raymond S. Weber
Eric W. Robinson
Mills Meyers Swartling
1000 Second Ave., 30th Floor
Seattle, WA 98104-1064

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 19th day of March, 2014.


Deborah A. Groth, Legal Assistant