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COURT OF APPEALS  
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No. 34174-3-II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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KEYSTONE MASONRY, INC.

Plaintiff/Respondent,

v.

GARCO CONSTRUCTION, INC., a Washington corporation;  
TRAVELERS CASUALTY & SURETY COMPANY, a  
domestic/foreign insurance company; TRAVELERS CASUALTY &  
SURETY COMPANY OF AMERICA, a domestic/foreign insurance  
company; and SUMNER SCHOOL DISTRICT #320, a municipal  
school district,

Defendants/Appellants.

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APPELLANTS' REPLY BRIEF

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Fed Ex 6/28/06

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## **I. INTRODUCTION**

Appellants, Garco Construction, Inc., ("Garco"), Travelers Casualty & Surety Company, and Travelers Casualty & Surety Company of America (collectively "Travelers") respectfully submit this Reply to Brief of Respondent Keystone Masonry, Inc. ("Keystone"). The assignment of errors are as follows:

1. The trial court erred in entering the November 18, 2005, Order Denying Defendants' Motion to Change Venue.
2. The trial court erred in entering the November 18, 2005, Order denying Defendants' motion for an award of reasonable attorney's fees and costs.

## **II. SUMMARY OF ARGUMENT**

The parties herein entered into a valid contract, and part of the consideration exchanged therefor was the promise that any attendant lawsuit be brought in Spokane County. This contract, like any other commercial contract in Washington, should be enforced absent a showing of traditional contract defenses or defenses rooted in public policy. The trial court erred in denying the motion to change venue because Keystone did not even attempt to establish that the forum selection clause in this case is unenforceable under either contract law or public policy. For the same reasons, the trial court also erred by not awarding attorney's fees pursuant to RCW 4.12.090.

### III. ARGUMENT

#### A. KEYSTONE'S ARGUMENTS ARE CONTRARY TO BLACK LETTER LAW.

As in the trial court, Keystone still does not dispute on appeal that the parties entered into a valid contract containing a forum selection clause; there is no claim of fraud, overreaching, unconscionability, or the like. *Brief of App.*, pp. 6-8. Keystone likewise does not dispute that all of its claims are within the scope of the forum selection clause and or that all parties to this suit have agreed to litigate in Spokane County. *Id.* at 8-11, 13-19. Instead, Keystone argues that, notwithstanding these undisputed facts, the trial court did not err because it exercised discretion to deny the motion to change venue upon grounds set forth in various (but unrelated) Washington venue statutes and upon public policy, and further alleges that enforcement of the forum selection clause would permit Garco and Travelers to forum shop. *See Keystone's Resp. Brief*, pp. 4-6. Keystone's arguments, however, are misplaced and contrary to Washington black letter law.

The contractual right created by a forum selection clause is a fundamental contract right recognized by Washington statute, common law and public policy. *Mangham v. Gold Seal Chinchillas*, 69 Wn.2d 37, 45 (1966); *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 238-42 (2005), citing *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613 (1997); *Bank of America v. Miller*, 108 Wn. App. 745, 748-49 (2001); RCW

4.12.080. It is no different than any other contract right and should be enforced as such.

The statutes and court decisions relied upon by Keystone in its response do not apply to the issue presented because they do not concern the enforcement of forum selection clauses.<sup>1</sup> Indeed, Keystone did not discuss the one Washington venue statute that speaks to the issue before the Court, namely, RCW 4.12.080, which requires a trial court to transfer a matter to the county agreed to by the parties.

On the other hand, the applicable case law demonstrates that Washington's venue statutes are subject to waiver between contracting parties. *See Wilcox*, 130 Wn. App. at 238-42; *Voicelink Data Services*, 86 Wn. App. at 617-18; *Miller*, 108 Wn. App. at 748-49; RCW 4.12.080; *see Brief of App.*, pp. 5, 8-11, 13-19. In direct contrast to Keystone's arguments, it is an abuse of discretion for a trial court not to enforce a forum selection clause absent the opposing party establishing the contractual defenses delineated in *Wilcox*, *Voicelink*, and *Miller*. *See, e.g., Bechtel Civil and*

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<sup>1</sup> Keystone makes the perplexing argument that Garco and Travelers failed to submit a Washington Supreme Court decision to support its arguments, "but rather relied upon appellate cases for its proposition", implying that this Court's decisions are inadequate authority. *Keystone's Resp. Brief*, pp. 7-8. Although true that Garco and Travelers rely upon a number of dispositive decisions of the Court of Appeals, all of which alone establish the error of the trial court, Garco did cite to Supreme Court authority, which establishes the same. *See Brief of App.*, pp. 7-8 (citing *Mangham*, 69 Wn.2d at 45); *see also State ex rel. Christensen*, 108 Wash. 666, 670 (1919) (parties may agree to venue for both transitory and local actions).

*Minerals, Inc. v. South Columbia Basin Irr. Dist.*, 51 Wn. App. 143, 146-48 (1988) (finding the trial court to have abused its discretion by not enforcing a forum selection clause upon grounds similar to those averred by Keystone). Here, Keystone presented no evidence that the forum selection clause was invalid under contract law.

Finally, Keystone argues that forum selection clauses amount to forum shopping (CP 37; *Keystone's Resp. Brief*, pp. 13-14) despite that such clauses are favored in the law to enhance contractual predictability, especially in the commercial context:

Particularly in the commercial context, the enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability.

*Voicelink Data*, 86 Wn. App. at 617. Keystone presents no authority, however, and research discloses none, to support the proposition that a party seeking to litigate in a forum agreed to in a contract is somehow forum shopping.

Keystone's arguments may have had some merit had the parties *not* entered into an agreement concerning venue, but that is not the case here. Despite the venue statutes upon which Keystone relies, Keystone waived its rights under those statutes by entering into an agreement with Garco that the case would be tried in Spokane County. *Miller*, 108 Wn. App. at 748-49. Long-standing Washington authority confirms this and dictates that the forum

selection clause be enforced because Keystone failed to make any showing whatsoever that the forum selection clause was either unenforceable under contract principles, or that, if enforced, would deprive Keystone of a meaningful day in court.<sup>2</sup> *Wilcox*, 130 Wn. App. at 239-242; *Voicelink Data*, 86 Wn. App. at 618. For those reasons, as well as those presented in Appellant's opening brief, the trial court erred by refusing to enforce the forum selection clause.

**B. THE STANDARD OF REVIEW IS *DE NOVO*.**

Keystone also claims that this case is governed by the abuse of discretion standard. *Keystone's Resp. Brief*, pp. 5-6. Under Washington law, however, the question of whether a contract term, including a forum selection clause, is enforceable is a question of law reviewed *de novo*. *Erwin v. Cotter Health Centers, Inc.*, \_\_\_ Wn. App. \_\_\_, 135 P.3d 547, 2006 WL 1428167 (Div. III, May 25, 2006) (whether a forum selection clause is effective is a question of law reviewed *de novo*); *State v. Parada*, 75 Wn. App. 224, 235 (1994) (the legal effect of a contract raises legal questions to be reviewed *de novo*); *Montgomery Ward & Co., Inc. v. Annuity Bd. of Southern Baptist Convention*, 16 Wn. App. 439, 445 (1976) (whether a contract is unconscionable and thus not enforceable presents questions of law for the

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<sup>2</sup> To reiterate, the burden of proof as to these issues, which is described as a "heavy one", rested upon Keystone. *Voicelink Data*, 86 Wn. App. at 618.

court); *see also Ware Else, Inc. v. Ofstein*, 856 So.2d 1079, 1081 (Fla. App. 2003) (interpretation of forum selection clause is to be reviewed *de novo*).<sup>3</sup> Because, as described above, the only question before the appellate court is whether an unambiguous forum selection clause was effective as a matter of law, the standard of review is *de novo*. Had the trial court been presented with and resolved factual issues over contract formation or the meaning of ambiguous terms, then a different standard of review may have governed. *See Erwin*, 2006 WL 1428167. The facts here, though, are not in dispute. The only dispute is over the application of the law to the undisputed facts, making the standard of review *de novo*.

Nevertheless, application of the abuse of discretion standard would make no difference. As discussed above, a trial court abuses its discretion when it refuses to enforce a valid forum selection clause. *Bechtel*, 51 Wn. App. at 146-48. Because Keystone failed to demonstrate that the forum selection clause in this case was unenforceable, the trial court not only erred by denying the motion to change venue, but its ruling also constituted an abuse of discretion. *Id.*; *see also* RCW 4.12.080 (when parties have agreed

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<sup>3</sup> *See also Continental Ins. Co. v. M/V Orsula*, 354 F.3d 603, 607 (7<sup>th</sup> Cir. 2003) (review of enforceability of forum selection clause, a contractual term, is *de novo*); *Bodzai v. Arctic Fjord, Inc.*, 990 P.2d 616, 618 (Ak. 1949) (whether forum selection clause is enforceable is a question of law reviewed *de novo*); *Mitsui & Co., Inc. v. MIRA M/V*, 111 F.3d 33, 35 (5<sup>th</sup> Cir. 1987).

to a venue, the trial court "must order the change agreed upon") (emphasis added).

**C. GARCO AND TRAVELERS ARE ENTITLED TO ATTORNEY'S FEES AND COSTS FOR THIS APPEAL AND UPON REMAND.**

Keystone claims that attorney's fees and costs should not be awarded to Garco and Travelers under RCW 4.12.090 and RAP 18.1 because it exercised due diligence in determining that venue was proper in Pierce County. Garco and Travelers submit that Keystone's arguments to the trial court establish just the opposite. For example, in the trial court (and also in this court), Keystone argued that venue was proper in Pierce County under the doctrine of *forum non-conveniens*. (CP 31-33, 35-37); *Keystone's Resp. Brief*, pp. 8-10, 13-14. However, Washington law is clear that forum selection clauses govern over the application of the doctrine of *forum non-conveniens*. *Miller*, 108 Wn. App. at 748-49. Further, Keystone argued and continues to argue that the forum selection clause violates public policy (CP 36-37), while any amount of due diligence would have revealed that, according to the Supreme Court, public policy favors such clauses:

[W]e believe it is clear that the policy of this state is that, if the parties agree to a venue for a suit, the trial court cannot allow the suit to be brought in any county other than the one agreed to by the parties.

*Mangham*, 69 Wn.2d at 45 (emphasis added).

In short, the facts as to the negotiation and formation of the forum selection clause are undisputed, and Washington law is clear on the enforceability of such clauses. Keystone had to present evidence that the clause was unenforceable under contract law, and because it did not even attempt as much, Keystone failed to exercise due diligence as a matter of law. Therefore, Appellants are entitled to a *de novo* ruling that they are entitled to attorney's fees and costs, and request the Court to enter such a ruling under with instructions to the trial court to exercise its discretion and determine the amount of the award. *Ehridge v. Huang*, 105 Wn. App. 447, 460 (2001) (whether a party is entitled to attorneys' fees is a question of law reviewed *de novo*). Garco and Travelers are likewise entitled to an award of attorneys' fees and costs under RAP 18.1.

#### IV. CONCLUSION

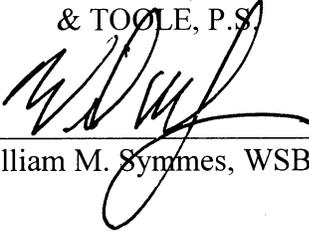
Forum selection clauses are contractual provisions and should be enforced as any other contractual promise. Only upon a showing of fraud, overreaching, unconscionability, and the like should such clauses be set aside. No such showing has been made. As such, the trial court erred in not adhering to the well-established law of Washington enforcing forum selection clauses. Therefore, the Court should vacate the November 18, 2005 Order Denying Defendant's Motion to Change Venue, award Garco and Travelers

their attorneys' fees and costs on appeal, and remand for an award of attorneys' fees and costs.

DATED this 27 day of June, 2006.

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.

By:

  
\_\_\_\_\_  
William M. Symmes, WSBA # 24132

**CERTIFICATE OF SERVICE**

On the 28<sup>th</sup> day of June, 2006, I served the within document described as **APPELLANTS' REPLY BRIEF** on all interested parties to this action as follows:

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