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COURT OF APPEALS

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STATE OF WASHINGTON

No. 34174-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

KEYSTONE MASONRY, INC.

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,**

Appellants/Petitioners.

**BRIEF OF APPELLANTS, GARCO CONSTRUCTION, INC.,
TRAVELERS CASUALTY & SURETY COMPANY, AND
TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA**

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Fed. Ex. Overnight 4/26/00

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I. ASSIGNMENTS OF ERROR

Appellants, Garco Construction, Inc. ("Garco"), Travelers Casualty & Surety Company, and Travelers Casualty & Surety Company of America (collectively, "Travelers") respectively submit the following assignments of error and issues pertaining to the assignments of error.

A. ASSIGNMENTS OF ERROR

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 attorneys' fees and costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Garco and Respondent/Plaintiff, Keystone Masonry, Inc. ("Keystone"), entered into a construction subcontract ("Subcontract") for a public works project located in Pierce County, Washington. The subcontract contained a forum selection clause stating that any lawsuit arising from the scope of Keystone's work must be brought in Spokane County, Washington.

After a dispute arose under the Subcontract, Keystone filed suit for breach of contract against Garco in Pierce County Superior Court. Keystone also brought suit under Washington's "Little Miller Act" against Garco's surety, Travelers, pursuant to RCW 39.08 *et seq.*, RCW 18.27 *et seq.*, and

against Sumner School District #320, the statutory surety and trustee of the retained percentage, pursuant to RCW 60.28 *et seq.* Garco and Travelers then contacted Keystone and requested that it adhere to the forum selection clause and stipulate to a transfer of venue to Spokane County. Keystone did not comply with this request. As a result, Garco and Travelers jointly moved for enforcement of their rights under the forum selection clause and for attorney fees pursuant to RCW 4.12.090. The trial court denied the motions. (CP 76-77)

The following issues are presented for review:

1. Whether a trial court may deny a motion to change venue pursuant to a forum selection clause when the party opposing the motion fails to allege, let alone attempt to establish: (a) that the forum selection clause was procured by fraud, undue influence, or some other form of unfairness in the negotiating process; or (b) that, if the provision were enforced, the party opposing the motion would be deprived of the right to a meaningful day in court.

2. Whether Defendants were entitled to an award of reasonable attorneys' fees and costs under RCW 4.12.090 where, prior to filing the motion for a change of venue, Defendants requested Plaintiff to adhere to the forum selection clause, but Plaintiff refused to do so, making the unfounded legal argument that the forum selection clause violates public policy and

amounts to unfair forum shopping.

C. STANDARDS OF REVIEW

1. Forum selection clauses are contracts and whether contracts are enforceable raise questions of law reviewed under a *de novo* standard. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342 (2005); *State v. Parada*, 75 Wn. App. 224, 235 (1994) ("the legal effect of a contract is [. . .] a question of law to be reviewed *de novo*").¹

2. Whether a party is entitled to an award of attorney fees is an issue of law reviewed *de novo*. *Ethridge v. Hwang*, 105 Wn. App. 447, 460 (2001). Whether the amount of an award is reasonable is reviewed under the abuse of discretion standard. *Id.*

II. STATEMENT OF THE CASE

A. GARCO AND KEYSTONE ENTERED INTO A SUBCONTRACT AND AGREED THAT VENUE FOR ANY DISPUTE SHALL BE IN SPOKANE COUNTY.

Garco is a general contractor headquartered in Spokane, Washington. (CP 14-15, ¶¶ 2-3; CP 1, ¶ 1.2) On or about July 22, 2003, Garco, as general contractor, and Keystone, as subcontractor, entered into the Subcontract whereby Keystone, a Washington business, agreed to perform masonry work

¹ See also *Continental Ins. Co. v. M/V Orsula*, 354 F.3d 603, 607 (7th 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 (Ala. 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 (5th Cir. 1987); but compare *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 933-34, *rev. granted*, 155 Wn.2d 1024 (2005) (applying abuse of discretion standard without considering whether reviewing the enforceability of a contract term raises questions of law).

for the construction of the Bonney Lake High School in Bonney Lake, Washington. (CP 1, 15, ¶ 4; CP 18-28; CP 40, ¶¶ 2, 4) The contract amount was \$1,579,725. (CP 18) The owner of the Bonney Lake High School is Sumner School District #320 ("Sumner"). (CP 19) Travelers bonded the project for Garco. (CP 3, ¶¶ 4.6, 5.2)

Keystone signed the Subcontract on July 2, 2003, in Yelm Washington. (CP 28; CP 40, ¶ 4) Garco signed the Subcontract in Spokane on or about July 22, 2003. (CP 28). Section "V" of the "Subcontract General Conditions" reads:

V. MISCELLANEOUS. This Subcontract shall be considered to have been made in and shall be interpreted under the laws of the State of WASHINGTON. The site of any arbitration or venue of any lawsuit arising out of this Subcontract or the work hereunder shall be at SPOKANE County, WASHINGTON.

(CP 27, § V) (hereinafter the "forum selection clause")

B. THE TRIAL COURT DENIED DEFENDANTS' MOTION TO ENFORCE THE FORUM SELECTION CLAUSE DESPITE KEYSTONE FAILING TO SUBMIT EVIDENCE THAT THE CLAUSE EITHER WAS UNENFORCEABLE UNDER CONTRACT LAW OR, IF ENFORCED, WOULD DEPRIVE KEYSTONE OF A MEANINGFUL DAY IN COURT.

On September 1, 2005, Keystone, in contravention of the forum selection clause, filed suit in the Superior Court of Pierce County. (CP 1-5) Keystone filed suit against Garco for breach of the Subcontract and, pursuant to Washington's "Little Miller Act", RCW 39.08 *et seq.*, RCW 18.27 *et seq.*, and RCW 60.28 *et seq.*, Keystone also filed suit against Travelers and against

the retained percentage. (CP 2-4, ¶¶ 3.3-5.5) All claims alleged by Keystone were within the scope of the forum selection clause. (CP 27, § V.)

Garco and Travelers contacted Keystone and requested them to transfer the case to Spokane County per the Subcontract but, despite the clear language in the Subcontract and the case law supporting the enforcement of forum selection clauses in commercial contracts, Keystone refused to stipulate to a transfer to Spokane County. (CP 65, ¶¶ 4-5; CP 69-73) As a result, Garco and Travelers jointly moved to change venue to Spokane County and requested attorney fees under RCW 4.12.090. (CP 6-12; CP 46-52)

Although not obligated to do so, Garco and Travelers also contacted Sumner about the proposed change of venue pursuant to the forum selection clause. (CP 51, n.4) Sumner had no objection to changing the venue to Spokane County and permitted Garco and Travelers to inform the Court of its position. (CP 51, n.4) Keystone, contrary to its promise in the Subcontract, was the only party who opposed the proposed transfer to Spokane County. (CP 29-38)

At the hearing on the motion to change venue, Keystone presented no evidence of fraud or unfairness in the negotiation of the Subcontract or the forum selection clause. (CP 39-45). Nor did Keystone present any evidence that, if enforced, the forum selection clause would effectively deprive

Keystone of a meaningful day in court. (CP 39-41) Instead, Keystone opposed the motion upon the grounds that the forum selection clause violated public policy, was akin to forum shopping on the part of Garco, and that the doctrine of *forum non conveniens* required the trial to take place in Pierce County, all in stark contravention of Washington law. (CP 35-37)

The trial court nonetheless denied the motion to change venue and for attorney fees and entered an order to that effect on November 18, 2005. (CP 76-77) Garco and Travelers jointly moved for discretionary review to Division II of the Court of Appeals on December 15, 2005, which was granted by a memorandum decision issued by Court Commissioner Ernetta G. Skerlec on or about February 9, 2006.

III. ARGUMENT

A. THE TRIAL COURT ERRED BECAUSE KEYSTONE FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT THE FORUM SELECTION CLAUSE WAS INVALID UNDER CONTRACT LAW OR, IF ENFORCED, WOULD DEPRIVE IT OF A MEANINGFUL DAY IN COURT.

1. Keystone Bore The Burden To Establish Either That The Forum Selection Clause Was Unenforceable Upon Contract Grounds Or , If Enforced, Would Deprive Keystone Of A Meaningful Day In Court If Enforced.

Forum selection clauses are contracts and a party opposing them faces a heavy burden of establishing that the clause is unenforceable upon the same grounds that other contracts would be deemed unenforceable. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 238-42 (2005) (enforcing a forum

selection clause after reviewing whether there was evidence of inadequate consideration, fraud, misrepresentation, or unequal bargaining power); *Bank of America v. Miller*, 108 Wn. App. 745, 748 (2001); *Voicelink Data Svs. v. Datapulse, Inc.*, 86 Wn. App. 613, 618 (1997). In other words, so long as the parties enter into a contract containing a forum selection clause, it must be respected as the express intent of the parties:

[A]bsent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigation in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the express intent of the parties.

Voicelink, 86 Wn. App. at 618 (quoting, *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984)).

Moreover, the enforcement of such a clause, particularly in the commercial context, "serves the salutary purpose of enhancing contractual predictability." *Voicelink*, 86 Wn. App. at 617. Accordingly, such clauses are not only enforceable, but as indicated above, if the parties agree to a particular venue, that agreement must be respected and "the trial court cannot allow suit to be brought in any county other than the one agreed on by the parties." *Mangham v. Gold Seal Chinchillas*, 69 Wn.2d 37, 45 (1966); RCW

4.12.080.² Simply put, Washington's public policy favors and supports 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.

2. *The Undisputed Facts Establish A Binding Forum Selection Clause, and Keystone Presented No Evidence Concerning Its Validity.*

In this case, it is undisputed that all parties agreed to suit in Spokane County. Keystone and Garco agreed to venue in Spokane County by virtue of the forum selection clause in the Subcontract. Travelers and Sumner, as sureties whose liability will be determined under the Subcontract, are bound by and entitled to enforce the forum selection clause. *Arrow Plumbing & Heating, Inc. v. North America Mech. Svs.*, 810 F. Supp. 369, 372 (D. R.I. 1993); *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984) (a non-party to a forum selection clause may join in a motion to enforce it); *see also* Section V.B., *infra*. Independent of the forum selection clause, Travelers also agreed to venue in Spokane simply by joining in the motion to change venue,

² In addition to Washington common law regarding forum selection clauses, RCW 4.12.080 reads, in part:

[T]he parties to the action by stipulation in writing . . . may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon.

and Sumner likewise consented to venue in Spokane by agreeing not to oppose the motion and authorizing Garco and Travelers to represent its position to the trial court. *See Kane v. Kane*, 35 Wash. 517, 521 (1904) (consent to change venue established by attorney's open court statement that third party defendants, not signatories to the forum selection agreement, had agreed to it); *Taag Linhas Aereas de Angola v. Transamerican Airline, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("because all defendants agreed to jurisdiction in the selected forum, the fact that one had not signed the contract was no basis for denying enforcement of the clause"); *quoting Coastal Steel Corp. v. Tilghman Wheelabrator, Inc.*, 709 F.2d 190, 203 (3rd Cir. 1983). At the hearing on Defendants' motion, Keystone did not dispute that all the parties had agreed to venue in Spokane County; it just argued that the forum selection clause is against public policy and that Garco was forum shopping. (CP35-37)

In addition to not controverting that all parties had agreed to venue in Spokane County, Keystone more importantly failed to present any of the requisite evidence of fraud or unfairness in the negotiation of the forum selection clause. (CP 39-45) Indeed, Keystone did the opposite. Keystone confirmed the existence and validity of the forum selection clause. Mr. Borman, the President of Keystone, admitted in his declaration in opposition

to the motion to change venue that he voluntarily executed the Subcontract without suggesting any changes to the forum selection clause or any other part of the Subcontract. (CP 40-41) Mr. Borman's admission alone establishes a binding contract with respect to venue. *Chadwick v. Northwest Airlines, Inc.*, 33 Wn. App. 297, 303 (1983) ("[u]nless there is showing of fraud, deceit, coercion, mutual mistake or mental incompetency at the time the instrument is executed, one having the opportunity to read [a contract] is deemed by law to have understood its contents and cannot claim to have been misled thereby"). As a result, the undisputed facts established a valid forum selection clause not obtained by fraud, duress, overweening bargaining power, or in any other manner that would render it unenforceable under contract law. *Wilcox*, 130 Wn. App. at 238-42.

Likewise, Keystone failed to present any evidence that the enforcement of the forum selection clause would deprive it of a meaningful day in court. *See Voicelink*, 86 Wn. App. at 619 n.3 ("Unreasonableness requires more than a conclusion that the trial would be *more* convenient than the chosen [forum]"). In fact, Keystone could not have made such a showing. It is well settled that "the mills of justice grind with equal fineness in every county of the state." *Russell v. Marenakos Co.*, 61 Wn.2d 761, 765 (1963); *Bechtel v. South Columbia Basin Irrigation*, 51 Wn. App. 143, 148 (1988).

Furthermore, Spokane County would have subject matter jurisdiction over all of Keystone's claims as alleged in the complaint. *See Shoop v. Kittitas County*, 149 Wn.2d 29, 37-38 (2003); *Young v. Clark*, 149 Wn.2d 130, 133-34 (2003); *Russell*, 61 Wn.2d at 766 (subject matter jurisdiction over local and transitory actions is state-wide). Simply put, every Washington Superior Court is equally equipped to adjudicate claims of Washington residents. Therefore, despite Keystone's attempts to the contrary, no reasonable argument exists to support the claim that litigating in Spokane County would deprive Keystone of a meaningful day in court so as to invalidate the forum selection clause.

Because Keystone presented no evidence that the forum selection clause was invalid upon contract grounds or would deprive it of a meaningful day in court, the trial court erred in not granting Garco's and Traveler's motion to change venue.

3. *As A Matter Of Contract, Keystone Agreed To Assume The Inconvenience That Would Arise From A Trial In Spokane County.*

Relying on various provisions of RCW 4.12 *et seq.* and a variation of the doctrine of *forum non-conveniens*, one of Keystone's argument made in opposition to the motion to change venue was that it would be too inconvenient and unfair for Keystone to litigate in Spokane County, insofar as it may have up to 10 witnesses from in or around Pierce County. (CP 31-

37) Keystone's potential witness list, however, is immaterial to the enforcement of the forum selection clause.³ Instead, the matter is controlled by contract law and the agreement made by the parties. In other words, contrary to what Keystone argued and the trial court accepted, forum selection clauses govern over any application of the doctrine of *forum non-conveniens*. *Miller*, 108 Wn. App. at 748.

For example, in *Miller*, the plaintiffs alleged a forum selection clause should be declared void because of the inconvenience that would be caused by having to litigate their case in Washington as both they and their witnesses lived in Michigan. Applying contract law, the Court held:

Although litigating in Washington may be inconvenient for the Millers, they knew of this inconvenience when they agreed to the forum selection clause [T]he Millers have not shown that litigating in Washington is any more inconvenient now than it was when they signed the agreement.

Miller, 108 Wn. App. at 748-49. In other words, in *Miller*, the court held that, as part of the bargain, the plaintiff assumed the risk of any claimed inconvenience caused by having to litigate in another forum. *Id.*

³ Contrary to what Keystone has suggested before the trial court, Sumner's limited role in the lawsuit under RCW 60.28.030 negates any claim that it would also be inconvenient for Sumner to have to litigate in Spokane County. Under RCW 60.28.030, Sumner need not even appear in court. It is only required to certify to the Court in writing the name of the contractor; the work contracted to be done; the date of the contract; the date of completion and final acceptance of the work; the amount of the contract price retained; the amount of taxes owing; and the names and status of any other claimants to the retained percentage. RCW 60.28.030. Nonetheless, Sumner did not oppose having the case transferred to Spokane County (CP 51, n.4)

Miller is controlling, especially in this case, because Garco and Travelers did not seek to move the case to another state's jurisdiction as in *Miller*, but to a different county within the same state pursuant to the parties' agreement. More importantly, as in *Miller*, Keystone failed to introduce any evidence that litigating in Spokane County was any more inconvenient at the time it filed suit than it was at the time of contracting. Put differently, Keystone signed the agreement knowing of the inconvenience that may arise from having to litigate in Spokane County, but nonetheless agreed to that term as an essential part of the parties' bargain. To reiterate, such agreements are supported by public policy and encouraged in commercial transactions. *Mangham*, 69 Wn.2d at 45; *Miller*, 108 Wn. App. at 748; *Voicelink*, 86 Wn. App. at 618-19; RCW 4.12.080.

To reiterate, Keystone did not meet the burden imposed by Washington law on a party opposing the enforcement of a forum selection clause. As such, the trial court erred by denying Garco's and Travelers' motion to change venue.

B. RCW 60.28.030 IS A VENUE STATUTE AND DOES NOT RENDER THE FORUM SELECTION CLAUSE UNENFORCEABLE.

1. Claims Against The Sureties And The Retained Percentage Were Within The Scope Of The Forum Selection Clause.

As indicated above, one of Keystone's arguments in the trial court was that RCW 60.28.030, the public works lien statute, required it, or at least

permitted it, to file suit in Pierce County notwithstanding the forum selection clause to which it agreed. (CP 35) In other words, Keystone argues that since it also brought a claim against other parties who are not signatories to the Subcontract (i.e., the construction bonds and retention fund), it was not required to adhere to its promise to litigate in Spokane County. This argument, however, ignores the reality of the transaction, the relationship amongst the Defendants, and the clear and unambiguous language of the forum selection clause itself.

First, the forum selection clause agreed to by Keystone is not limited to only lawsuits for breach of the Subcontract, but applies to "*any lawsuit arising out of this Subcontract or the work hereunder . . .*" (CP 27) (emphasis added) As such, all claims that derive from or are dependent upon the Subcontract must be brought in Spokane County, including the claims brought under RCW 39.08 *et seq.*, RCW 18.27 *et seq.*, and or RCW 60.28.030. *Coastal Steel*, 709 F.2d at 203 (there was no evidence suggesting that the clause was not intended to apply to all claims growing out of the contractual relationship); *J.S. & H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212, 216-17 (5th Cir. 1973) (plaintiff could not avoid an arbitration clause in a subcontract by also suing upon the payment bond because any claim under the bond is inextricably linked to and dependent upon the contract claim).

Second, Keystone's argument ignores the reality that any claims against the surety or the retained percentage derive from the obligations under the Subcontract and cannot precede a determination of whether there is a contract debt, an issue Keystone promised would be determined in Spokane County. Because Keystone's claim under RCW 60.28.030 is dependent on whether Garco breached the Subcontract, Keystone should not be permitted to circumvent its agreement by simply filing suit against the retention fund under RCW 60.28.030. *See Warren Bros. v. Cardi Corp.*, 471 F.2d 1304, 1308 (5th Cir. 1973) (contractual obligation between general contractor and subcontractor to arbitrate disputes arising out of public construction contract could not rendered meaningless by subcontractor's bringing suit on the general contractor's statutory bond). If Keystone were permitted to avoid the forum selection clause by simply filing a claim against the related bond or retention fund, the forum selection clause would be rendered meaningless and unenforceable despite Washington's public policy and, as discussed next, well-established construction law to the contrary. *J.S. & H.*, 473 F.2d at 217; *Cardi Corp.*, 471 F.2d at 1308.

2. *Under The Miller Act, It Makes No Difference That A Surety Is Not A Signatory To The Subcontract.*

RCWs 18.27 *et seq.*, 39.08 *et seq.*, and 60.28 *et seq.* together constitute Washington's version of what is commonly known in federal law as the Miller Act (40 U.S.C. § 270a). *See 3A Indus., Inc. v. Turner Const.*

Co., 71 Wn. App. 407, 411 (1999). The Miller Act governs federal construction projects and provides a mechanism for subcontractors and materialmen to enforce liens for services rendered on such projects. *Id.* at 411. RCWs 18.27, 39.08 and 60.28 serve the same purpose on state projects and are often referred to as Washington's "Little Miller Act". *Id.* at 411. Washington courts often rely upon the federal law under the Miller Act when interpreting the Little Miller Act. *Id.* at 418-19. (interpreting federal law to enforce an arbitration clause against a subcontractor and the non-signatory surety).

It is well established under the Miller Act that forum selection clauses are enforceable against subcontractors notwithstanding that: (1) the federal Miller act requires suit to be filed in the district in which the contract was to be performed; and (2) the related sureties may not be signatories to the contract between the prime contractor and the subcontractor. *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1232-34 (8th Cir. 1995) (forum selection clause between prime contractor and subcontractor applied to the surety notwithstanding that the surety was not a signatory to the contract); *United States v. G & C Enterprises, Inc.*, 62 F.3d 35, 36 (1st Cir. 1995) (same); *In re Fireman's Fund Ins.*, 588 F.2d 93 (5th Cir. 1979); (same); *Arrow Plumbing and Heating, Inc.*, 810 F. Supp. at 372 (same). As the District Court in Rhode Island held:

A surety generally stands in the shoes of its principal. It may avail itself of any defense which is available to the principal except those that are purely personal, such as bankruptcy or infancy. *Although a surety is not a party to a subcontract agreement, its liability under a payment bond is determined by the agreements between its principal and the subcontractor.* The surety therefore should have all the benefits and suffer all the disadvantages that would accrue to the general contractor under those agreements.

Arrow Plumbing and Heating, Inc., 810 F. Supp. at 372 (emphasis added).

Relying upon Miller Act jurisprudence to interpret Washington's Little Miller Act, the Court of Appeals for Division I has held that a dispute resolution clause (i.e., an arbitration clause) contained in a subcontract was binding upon both the subcontractor and the related surety notwithstanding that the surety was not an actual signatory to the subcontract. *3A Indust.*, 71 Wn. App. at 418-19. This holding concerning an arbitration clause in a subcontract, simply another form of a forum selection clause⁴, applies no less to the forum selection clause in this case.

Moreover, the argument that the trial court erred by not enforcing the forum selection clause in this case is more compelling than in these cases because, as indicated above, Travelers, pursuant to its derivative right as surety under the Subcontract, was one of the moving parties with Garco in seeking to enforce the forum selection clause, and despite Sumner's limited

⁴ *3A Indust.*, 71 Wn. App. at 419 n.2; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457 (1974).

role under RCW 60.28.030, it nonetheless agreed to the forum selection clause after-the-fact by authorizing Garco and Travelers to inform the Court that it had no objection to the case being tried in Spokane County pursuant to the parties' contract. *Transamerica Airlines*, 915 F.2d at 1354; *Coastal Steel*, 709 F.2d at 203.

In sum, the only party who opposed the change of venue to Spokane County was Keystone, a signatory party who claims to have enforceable rights under the Subcontract on one hand, but on the other hand, wants to avoid the other obligations to which it agreed. In short, Keystone should not be permitted to take such a position. If Keystone is to claim any rights under the Subcontract, it must accept the reciprocal obligations to which it agreed under the same agreement. *See, e.g., Phoenix Network Tech., Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 622 (Tex. Civ. App. 2005) (when a plaintiff who is a signatory to a forum selection clause sues signatory and non-signatory defendants on claims dependent upon the contract, plaintiff is estopped from asserting the forum selection clause as invalid); *MS Denler Svc. Corp. v. Franklin*, 177 F.3d 942, 946 (11th Cir. 1999) (when a signatory to a written agreement containing an arbitration clause must rely upon the terms of the written agreement in asserting claims against a non-signatory, the plaintiff must submit to arbitration).

Accordingly, as under the federal Miller Act and other case law cited

above, the forum selection clause in this case under the "Little Miller Act" should have been enforced, and the trial court erred by not transferring the matter to Spokane County.

C. THE TRIAL COURT ERRED BY NOT AWARDING FEES AND COSTS PURSUANT TO RCW 4.12.090.

Garco and Travelers also sought an award of attorney fees and costs under RCW 4.12.090, and they seek them now under RAP 18.1. (CP 64-75)

Under RCW 4.12.090, a party is entitled to attorney fees:

. . . if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence, it shall order the plaintiff to pay the reasonable attorney's fee of the defendant for the changing of venue to the proper county.

RCW 4.12.090. The trial court, having erred in ruling that the forum selection clause was not enforceable, likewise erred in ruling that Garco and Travelers were not entitled to attorney fees.

Unlike the question of whether a trial court has abused its discretion in deciding the amount of attorney fees to be awarded, the question presented by this appeal is whether Garco and Travelers are entitled to attorney fees as a matter of law under the undisputed facts in the record, which is a question of law to be reviewed *de novo*. *Ethridge*, 105 Wn. App. at 460. For the following reasons, the Appellate Court should find that, under these facts, Garco and Travelers are entitled to attorney fees associated with their motion to change venue and this appeal under RCW 4.12.090 and RAP18.1.

First, Keystone argued to the trial court that the forum selection clause violated Washington public policy when, in fact, Washington law and public policy favors forum selection clauses like the one agreed to by the parties in this case. No amount of due diligence is needed to make that determination.

Second, the forum selection clause in the Subcontract is unambiguous and clearly states that *all* lawsuits stemming from the Subcontract must be brought in Spokane County, and Washington law states that to avoid such a clause, Keystone had to have presented evidence of extreme unfairness in the formation or application of the clause. Keystone, however, did not even attempt to make such a showing.

Third, because of the clarity of the forum selection clause and the law that favors such clauses, Garco and Travelers first requested, as a matter of courtesy, for Keystone to voluntarily transfer the case to Spokane County pursuant to its agreement in the Subcontract. (CP 64-73) Keystone refused, however, and proceeded to make arguments unfounded under Washington and general contract law. (CP 35-37) Therefore, under these undisputed facts, Garco and Travelers submit that they are entitled to a *de novo* ruling that they are entitled to attorney fees as a matter of law, and request the Court to enter such a ruling with instructions to the trial court on remand to exercise its discretion and issue the award. *Ethridge*, 105 Wn. App. at 460; *see also Shelton v. Farkas*, 30 Wn. App. 549, 554 (1982)

(affirming an award of attorney fees where the moving party first requested that the opposing party to stipulate to a transfer); *cf Cole v. Sands*, 12 Wn. App. 199, 201 (1974) (the appellate court remanding to the trial court to determine whether attorney fees were owed under RCW 4.12.090 where the sole issue on appeal was whether a party properly filed an affidavit of merits under RCW 4.12.027).

D. ATTORNEY FEES ON REVIEW

Furthermore, because Garco and Travelers were entitled to an award of attorney fees in the trial court pursuant to RCW 4.12.090, Garco and Travelers are also entitled to, and hereby request, an award of attorney fees and costs on review pursuant to RAP 18.1. *Cole*, 12 Wn. App. at 201.

IV. CONCLUSION

Forum selection clauses must be enforced as the express intent of the parties. Because Keystone failed to offer evidence of fraud, undue influence, overweening bargaining power, or that litigating in Spokane County would effectively deprive Keystone of a meaningful day in court, the trial court erred by not granting Garco's and Travelers' motion to change venue. Moreover, nothing in Washington law supports the argument that an exception to Washington's strong public policy favoring forum selection

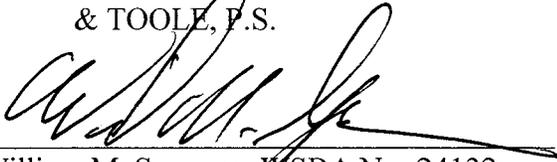
clauses exists in the construction industry.⁵ The analogous Miller Act, and the federal case law interpreting the same, recognize that the forum selection clauses should be enforced in construction contracts on public construction projects notwithstanding that the surety (statutory or otherwise), which is often also sued in the same action, is not a technical signatory to the subcontract. The Washington "Little Miller Act" has already been interpreted no differently. As such, the trial court erred.

Based upon the foregoing reasons, Garco and Travelers respectfully request that the trial court order denying the motion to change venue and for an award of attorney fees be reversed.

Respectfully submitted this 26 day of April, 2006.

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⁵ Other jurisdictions are in accord. See *A.C.E. Elevator v. V.J.B. Constr. Corp.*, 746 N.Y.S.2d 361, 360-61 (2002); *Jacobson Constr. Co., Inc. v. Teton Builders*, 106 P.3d 719, 725 (Ut. 2005); *Adams v. Bay, LTD*, 60 P.3d 509, 510-11 (Ok. App. 2002).

CERTIFICATE OF SERVICE

On the 26th day of April, 2006, I caused the within document described as **BRIEF OF APPELLANTS, GARCO CONSTRUCTION, INC., TRAVELERS CASUALTY & SURETY COMPANY, AND TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA** to be served on all interested parties to this action as follows:

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