

10656-0

70656-0

No. 70656-0-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

HUARD SEPTIC DESIGN AND MONITORING, LLC.,

Appellant,

v.

PRESTIGE CUSTOM BUILDERS, INC.

Respondent.

RESPONDENT'S BRIEF

Raymond S. Weber
WSBA No. 18207
Eric W. Robinson
WSBA No. 40458
MILLS MEYERS SWARTLING P.S.
Attorneys for Prestige Custom Builders, Inc.

Mills Meyers Swartling P.S.
1000 Second Avenue, Suite 3000
Seattle, Washington 98104
Telephone: (206) 382-1000
Facsimile: (206) 386-7343

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 21 PM 4:35

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
III. COUNTER STATEMENT OF THE CASE.....	2
A. Procedural History.....	2
B. The Master Subcontract.....	3
1. The Integration Clause.....	3
2. The Indemnity Clause.....	4
3. The Prevailing Party Attorneys' Fee Clause.....	6
C. The Huard Bid.....	6
IV. ARGUMENT.....	7
A. Huard is Not Entitled to Attorneys' Fees Under the Indemnification Provision, Article XIX, of the Master Subcontract Agreement.....	7
1. Huard did not Argue in the Superior Court That it is Entitled to Fees Under the Indemnification Provision, and the Argument Should not be Considered on Appeal.....	7
2. Indemnity Clauses do not Provide for Prevailing Party Attorneys' Fees.....	8
3. Neither the Express Terms of RCW 4.84.330 nor the Public Policy Embodied by that Statute Warrant an Award of Attorneys' Fees Under the Indemnity Provision.....	14
B. The Attorney's Fee Provision in the Huard Bid Does Not Apply.....	16
C. The Disputes and Arbitration Provision Does Not Provide a Basis for a Fee Award in this Case.....	20
1. The Disputes and Arbitration Provision is not Ambiguous.....	20
2. The Fact Summary Judgment in Superior Court is a Procedure Common to Both the Superior Court and Arbitration Proceedings Does not Transform This Case into an Arbitration Proceeding.....	23
3. Any Doubts Regarding the Applicability of the Arbitration Provisions Should be Resolved by Having Each Party Bear its Own Attorney's Fees.....	25
CONCLUSION.....	26

CASES

<i>Baldwin Builders v. Coast Plastering Corp.</i> , 125 Cal. App. 4 th 1339, 24 Cal. Rptr. 3d 9 (4 th Dist. 2005).....	15
<i>Better Fin. Solutions v. Transtech</i> , 112 Wn. App. 697, 51 P.3d 108 (2002).....	18, 21
<i>Cano-Garcia v. King Cnty.</i> , 168 Wn. App. 223, 277 P.3d 34 (2012).....	7
<i>Durand v. HMC Corp.</i> 151 Wn. App. 818, 214 P.3d 189, <i>review denied</i> , 168 Wn.2d 1020, 231 P3d 164 (2009).....	19
<i>Farmers Ins. Co. of Washington v. Miller</i> , 87 Wn.2d 70, 549 P.2d 9 (1976).....	20
<i>Harmony at Madrona Park Owner Association v. Madison Harmony Development, Inc.</i> , 143 Wn. App. 333, 178 P.3d 1048 (2008).....	11, 12
<i>Harmony at Madrona Park Owner Association v. Madison Harmony Development, Inc.</i> , 160 Wn. App. 728, 253 P.3d 101 (2011).....	11, 12, 13
<i>Hertzog Aluminum, Inc. v. General American Window Corp.</i> , 39 Wn. App. 188, 692 P.2d 867 (1984).....	16
<i>Hindquarter Corp. v. Property Development Corp.</i> , 95 Wn.2d 809, 631 P.2d 923 (1981).....	22
<i>In re: Murray Industries, Inc.</i> 114 B.R. 749 (Bankr. M.D. Fla. 1990).....	23, 24
<i>Jacobs Meadow Owners Association v. Plateau 44 II, LLC</i> , 139 Wn. App. 743, 162 P.3d 1153 (2007).....	8, 9, 10
<i>Jones v. Strom Construction Co, Inc.</i> , 84 Wash.2d 518, 527 P.2d 1115 (1974).....	9, 10

<i>Kessler v. Gleich</i> , 161 N.H. 104, 12 A.3d 109, 111 (2010)	26
<i>Lake Washington School District v. Mobile Modules Northwest, Inc.</i> , 28 Wn. App. 59, 621 P.2d 791 (1980).....	25
<i>Lindblad v. Boeing Co.</i> , 108 Wn. App. 198, 31 P.3d 1 (2001).....	7
<i>Mt. Hood Beverage v. Constellation Brands</i> , 149 Wn.2d 98, 63 P.3d 779 (2003).....	16
<i>Rorvig v. Douglas</i> , 123 Wn.2d 854, 873 P.2d 492 (1994).....	25
<i>Schleicher v. Murray Industries, Inc.</i> , 130 B.R. 113 (M.D. Fl. 1991).....	24
<i>Seventh-Day Adventists v. Ferrellgas</i> , 102 Wn. App. 488, 7 P.3d 861 (2000).....	17
<i>The Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.</i> , 168 Wn. App. 86, 285 P.3d 70, rev. denied, 175 Wn.2d 1015 (2012).....	10
<i>Tradewell Group, Inc. v. Mavis</i> , 71 Wn. App. 120, 857 P.2d 1053 (1993).....	26
<i>Tri-M Erectors, Inc. v. Donald M. Drake Co.</i> , 27 Wash. App. 529, 618 P.2d 1341 (1980).....	10
<i>Wachovia SBA Lending, Inc. v. Kraft</i> , 165 Wn.2d 481, 200 P.3d 683 (2009).....	15
<i>Wagner v. Foote</i> , 128 Wn.2d 408, 908 P.2d 884 (1996).....	25
<i>Wm. Dickson Co. v. Pierce County</i> , 128 Wn. App. 488, 116 P.3d 409 (2005).....	20

STATUTES

RCW 4.84.330 passim

RULES

MAR 5.1 22
RAP 2.5(a) 7, 8
RAP 9.12..... 7, 8

I. INTRODUCTION

This appeal arises out of a construction defect action that was filed, litigated, and resolved in Superior Court. The Superior Court ruled correctly that the attorneys' fee provision in the Disputes and Arbitration clause of the Master Subcontract between general contractor Prestige Custom Builders (Prestige) and subcontractor Huard Septic Design and Monitoring, LLC (Huard) was limited to arbitration proceedings and does not authorize an award of prevailing party attorneys' fees in this case.

The Superior Court also was correct in ruling that the Master Subcontract signed by both parties controlled over inconsistent provisions in the boilerplate form accompanying Huard's bid letter which was sent before the parties signed their contract.

The parties' contract is clear that attorneys' fees are only available to the prevailing party in an arbitration proceeding. Arbitration was an available mechanism to both parties in the underlying suit, but neither elected to litigate the dispute in a final and binding arbitration proceeding.

Finally, the Superior Court never considered Huard's argument that the indemnity provision in the Master Subcontract is a prevailing party attorneys' fee provision subject to RCW 4.84.330, because Huard did not raise this argument in the trial court. In any event, Huard's argument ignores binding Washington precedent to the contrary.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Is a contractual indemnification and hold harmless provision a prevailing party attorneys' fee provision subject to RCW 4.84.330?
- B. Does the Master Subcontract incorporate the attorneys' fee provision in the Huard bid letter? If so, does that attorneys' fee provision apply in this case?
- C. Is the attorneys' fee provision in the Master Subcontract ambiguous? If so, is there a reasonable interpretation of the provision that both gives meaning to all of its terms and favors Huard?
- D. If the attorneys' fee provision at issue does not clearly authorize an award of fees, should the court default to the "American Rule" that each party should bear its own attorneys' fees?

III. COUNTER STATEMENT OF THE CASE

A. Procedural History.

Michael and Anne Keith sued their general contractor Prestige in King County Superior Court in July 2012, alleging numerous defects in the construction of their home, including a malfunctioning septic system. CP 1-6. Prestige filed a third party complaint joining four subcontractors that had performed work on the project. CP 7-14. On May 21, 2013, after 11 months of litigation, including voluminous written discovery and numerous depositions, Huard successfully moved for summary judgment.

CP 58-60.¹ Huard then moved for attorneys' fees, and the motion was decided on the briefing without oral argument.

In connection with the attorneys' fees briefing in the trial court, Huard now states Prestige "ignored the attorneys' fee provision in Article XIX, the indemnification clause," and "did not address Huard's reliance upon RCW 4.84.330." Appellant's Brief at 6. However, in the court below Huard did not argue that the indemnification clause in Article XIX was an attorneys' fee provision that should be applied reciprocally pursuant to RCW 4.84.330. CP 63-64; 160-165.

B. The Master Subcontract.

On March 27, 2006, Prestige faxed the The Master Subcontract to Huard. CP 31. The Master Subcontract was signed by Huard on April 12, 2006 and by Prestige on April 17, 2006. CP 31, 38.

1. The Integration Clause.

The Master Subcontract contains an integration clause that addresses and resolves the issue of conflicts between its terms and those of other documents. In that regard, the Master Subcontract provides:

I. MASTER SUBCONTRACT AGREEMENT

It is the intent of the parties that **these terms and conditions apply to any provision of services by the Subcontractor regardless of**

¹ The case was subsequently resolved when the court granted summary judgment and dismissed the Keiths' claims. CP 207-209; 219-220.

whether these terms and conditions are referenced in any purchase order, subsequent contract memo, etc. during the term of this contract.

Each individual project conducted with the subcontractor will be described 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**.

Entering into the Master Agreement shall not obligate the Contractor or the Subcontractor to agree to any subsequent request for service or to any volume business during the term of this Master Agreement. **The intent is that if any services are produced and agreed by both parties 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 supersede any other terms to the contrary.

CP 34. (Emphasis supplied).

2. The Indemnity Clause.

The full text of the indemnification clause of the Master Subcontract reads as follows:

XIX. INDEMNIFICATION.

Subcontractor agrees to defend, indemnify and hold contractor and homeowners harmless from any and all claims, losses and liability to or by third parties resulting from services performed for the Contractor by Subcontractor, Subcontractor's employees or agents, Subcontractor's lower-tier subcontractors or agents to the fullest extent permitted by law and subject to the limitations provided below.

Subcontractor's duty to indemnify Contractor may be limited from liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the concurrent negligence of (A) Contractor or Contractor's agents or employees and (B) Subcontractor or Subcontractor's agents or employees.

Subcontractor agrees to defend, indemnify and hold Contractor 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, Subcontractor's employees, or agents.

Subcontractor specifically and expressly waives any immunity that may be granted under the Washington State Industrial Insurance Act, Title 51 RCW. This indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable to or for any third party under Worker's Compensation Acts, Disability Benefits Acts, or other Employee Benefits Acts provided Subcontractor's waiver of immunity by the provisions of this paragraph extends only to claims against Subcontractor by Contractor and does not include or extend to any claims by Subcontractor's employees directly against Subcontractor.

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

Subcontractor's indemnification and defense obligations hereunder shall extend to Claims occurring after this Agreement is terminated as well as while it is enforced, and shall continue until it is finally adjudicated that any and all actions against the indemnified parties for such matters which are indemnified hereunder are fully and finally barred by applicable laws.

CP 37.

3. The Prevailing Party Attorneys' Fee Clause.

The full text of the attorneys' fee provision in the Master Subcontract is as follows:

XVI. Disputes and Arbitration

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 affect 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 each 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 attorneys' fees** regardless of whether the dispute is resolved through settlement or arbitration.

CP 37. (Emphasis added).

C. The Huard Bid.

By letter dated April 10, 2006, Huard sent Prestige a proposal for a "Site Evaluation Study" to determine the feasibility of an on-site sewage disposal system for the Keith property. CP 40-42. The three-page document consisted of, on the first page, a specific scope of work, pricing and other information specific to the project. CP 40. The remaining two pages set forth standard terms and conditions, including a warranty and lien disclosures, CP 41-42, and culminate with a line to be populated by the date and signature of the "owner." CP 42. The document is signed

and dated (April 26, 2006) by Anne Keith, one of the owners of the property. *Id.* The document does not bear the title “Project Subcontract”, but it is the document Huard refers to as the Project Subcontract in its appellate brief.

Huard signed the Master Subcontract on April 12, 2006, two days after it mailed the bid letter.

IV. ARGUMENT

A. **Huard is Not Entitled to Attorneys’ Fees Under the Indemnification Provision, Article XIX, of the Master Subcontract Agreement.**

1. Huard did not Argue in the Superior Court That it is Entitled to Fees Under the Indemnification Provision, and the Argument Should not be Considered on Appeal.

RAP 2.5(a) an appellate court to “refuse to review any claim of error which was not raised in the trial court.” RAP 9.12 provides that on review of a summary judgment order “the appellate court will consider only evidence and issues called to the attention of the trial court.” Accordingly, appellate courts generally do not consider arguments or theories not presented to the lower court. *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001); *see also Cano-Garcia v. King Cnty.*, 168 Wn. App. 223, 248, 277 P.3d 34 (2012), *review denied*, 175 Wn.2d 1010, 287 P.3d 594 (2012) (“Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for

summary judgment may not be considered for the first time on appeal.”)
(Citations omitted).

Huard’s opening brief in the trial court is devoid of any reference to Section XIX or the reciprocity principle stated in RCW 4.84.330. Similarly, the only reference to Article XIX in Huard’s reply brief is the following footnote: “Section XIV of the Master Subcontract regarding Default by Huard, Section XV regarding Huard’s Insurance obligations, and Section XIX regarding Huard’s Indemnity obligations, all grant Prestige one-way attorney fee recovery rights. This underscores Prestige’s intent that attorneys’ fees be recoverable in any dispute.” CP 162 (emphasis in original). This is not a coherent articulation of the reciprocal indemnity obligation argument Huard now advances in this Court. Pursuant RAP 2.5(a) and 9.12, the Court should not consider this new argument on appeal.

2. Indemnity Clauses do not Provide for Prevailing Party Attorneys’ Fees.

As this court explained in *Jacobs Meadow Owners Association v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P.3d 1153 (2007), there is distinction between attorneys’ fees awardable as costs of maintaining or defending an action and attorneys’ fees recoverable as damages incurred as a result of prior actions by the adverse party which have exposed the

claimant to litigation with a third party. *Id.* at 760. “Attorney’s fees recoverable pursuant to a contractual indemnity provision are an element of damages rather than costs of suit.” *Id.* Applying this principle, Washington courts repeatedly have rejected efforts to recover prevailing party attorneys’ fees under indemnity provisions.

In *Jones v. Strom Construction Co, Inc.*, 84 Wn.2d 518, 527 P.2d 1115, 527 P.2d 1115 (1974), a subcontractor’s employee sued general contractor Strom Construction for work place injuries. Strom brought a third party suit against subcontractor Belden & Thompson for indemnification under the indemnity clause of the subcontract. The clause required the subcontractor:

To indemnify and save harmless the CONTRACTOR from and against any and all suits, claims, actions, losses, costs, penalties, and damages of whatsoever kind or nature including attorney’s fees arising out of, in connection with, or incidental to the SUBCONTRACTOR’S performance of this SUBCONTRACT.

Id. at 521.

Strom settled the claim of the injured plaintiff and proceeded to trial on its indemnification claim against the subcontractor. At the conclusion of the trial, the court directed a verdict in favor of Strom on the indemnification issue. The court entered judgment which included Strom’s attorneys’ fees incurred in defense of the action instituted by the

employee, and Strom's attorneys' fees in prosecuting the third party claim for indemnification. *Id.* at 523.

The Supreme Court reversed the directed verdict and remanded the case for a new trial. The Court took the opportunity to address, for the first time, "whether attorneys' fees attributable solely to litigation of the indemnity issue itself are recoverable." *Id.* at 523. Consistent with the "general, and virtually unanimous rule," the Court held that in the absence of express contractual terms to the contrary, an indemnitee may not recover legal fees in establishing his right to indemnification." *Id.* The court instructed that should Strom prevail on retrial, it would not be entitled to prevailing party attorneys' fees under the indemnity clause at issue. *Id.*

The rule stated in *Strom* has been applied consistently and uniformly in subsequent cases in the Court of Appeals. See *The Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86, 102, 285 P.3d 70, *rev. denied*, 175 Wn.2d 1015, 287 P.3d 10 (2012); *Jacob's Meadow Owner's Association v. Plateau 44 II, LLC*, 139 Wn. App. 743, 757-60, 162 P.3d 1153 (2007); *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 538, 618 P.2d 1341 (1980).

The *Harmony* case cited by Huard is not an exception to this rule. *Harmony at Madrona Park Owner Association v. Madison Harmony*

Development, Inc., 160 Wn. App. 728, 253 P.3d 101 (2011), was originally brought by a condominium association against the owner/developer of the project. The owner brought a third party claim against the general contractor Leducor. Leducor filed a fourth party complaint against various subcontractors. All but one subcontractor, Searock, settled and the case proceeded to a bench trial. The trial court found in favor of Leducor on some but not all issues and awarded damages for breach of contract, breach of the indemnity agreement, and attorneys fees. On appeal, the judgment was affirmed in part, reversed in part, and remanded in *Harmony at Madrona Park Owner Association v. Madison Harmony Development, Inc.*, 143 Wn. App. 333, 178 P.3d 1048 (2008) (*Harmony I*). The court remanded the fee issue, because the attorneys' fees arising out of Searock's work were not properly segregated from attorneys' fees arising out of the work of other subcontractors. *Id.* at 364.

On remand, the court awarded additional indemnity damages and Leducor's costs and fees incurred on remand. This court affirmed the judgment in *Harmony at Madrona Park Owner Association v. Madison Harmony Development, Inc.*, 160 Wn. App. 728, 253 P.3d 101 (2011)(*Harmony II*).

The *Harmony I* opinion, in describing the outcome in the trial court after the first trial, states: "The court awarded attorney fees to Leducor

under the indemnification agreement.” *Harmony I*, 143 Wn. App at 351. While this is correct, it does not mean the fees referenced were incurred in litigating the indemnity issue. The contract at issue had an indemnification clause that provided: “Subcontractor’s duty to defend, indemnify, and hold Contractor and Owner harmless shall include, as to all claims, damages, 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.” *Harmony II*, 160 Wn. App. at 739. The contract also contained a prevailing party attorneys’ fee provision allowing the prevailing party to seek “its actual attorneys’ fees and all costs of litigation.” *Id.*

It is clear from the *Harmony I* opinion that the attorneys’ fees at issue in that appeal were incurred by Leducor in defending against the owner’s claims, rather than litigating Serock’s obligations under the indemnity agreement. This is evident from the fact that the attorneys’ fees as issue were incurred between May 1, 2004 and October 31, 2004. *Harmony I*, 143 Wn. App. at 363. However, Serock was not even joined in the litigation until November 30, 2004. *Id.* at 351. Accordingly, these fees were properly awardable as damages under the indemnity provision, but not as prevailing party attorney’s fees. To the extent Leducor obtained an additional attorneys’ fee recovery against Serock for post-November

2004 fees, such an award would have been justified under the separate prevailing party attorneys' fee provision.

On remand after the first appeal, the trial court awarded additional indemnity damages and Ledor's costs and attorney's fees incurred during the remand proceedings. *Harmony II*, 160 Wn. App. at 734. This court affirmed the trial court's attorneys' fee award "because the parties' contract authorized reasonable fees and costs to the prevailing party." *Id.* at 731. The court's analysis of the attorneys' fee issue begins with a paraphrase of both the indemnity clause and the prevailing party attorney fee provision. *Id.* at 740. The court concluded that because Ledor improved its position on remand, it "met the definition of a prevailing or substantially prevailing party," and was entitled to fees. *Id.*

It is neither logical nor reasonable to conclude that the *Harmony II* court awarded attorneys' fees under the indemnity provision when the contract contained an applicable prevailing party fee provision, and an award of fees under the former would be a departure from the "general, and virtually unanimous rule," adopted by the Washington Supreme Court in *Jones v. Strom Construction Co, Inc.*, 84 Wn.2d 518, 527 P.2d 1115 (1974).

As the above cases make clear, and contrary to Huard's argument, an indemnity provision does not allow a general contractor such as

Prestige to recover its fees expended litigating the applicability of the indemnity provision with a subcontractor. Because the indemnity clause does not function as a prevailing party attorneys' fee provision in favor of Prestige, RCW 4.84.330 does not apply. Simply stated the statute cannot be used to make reciprocal a right that is not present in the first place.

3. Neither the Express Terms of RCW 4.84.330 nor the Public Policy Embodied by that Statute Warrant an Award of Attorneys' Fees Under the Indemnity Provision.

a. The Plain Language of the Statute does not apply to Indemnity Provisions.

The Washington case law cited above refutes Huard's claim that the indemnity provision is a unilateral prevailing party attorneys' fee provision subject to RCW 4.84.330. The same result is obtained by analyzing the language of the statute. RCW 4.84.330 applies to contracts containing a provision "that attorneys' fees and costs, which are incurred to enforce the provisions of such contract . . . shall be awarded to one to the parties" This clause does not encompass the indemnity provision of the contract at issue. The attorneys' fees recoverable under the indemnity provision are those fees incurred to defend against the claims of third parties, in this case the homeowners claim that Prestige has breached its contractual obligations under *their contract* with Prestige. Since the indemnity clause does not apply to fees incurred to enforce the indemnity

clause, the statute does not apply. *See Baldwin Builders v. Coast Plastering Corp.*, 125 Cal. App. 4th 1339, 1344, 24 Cal. Rptr. 3d 9 (4th Dist. 2005)(“Because an indemnity agreement is intended by the parties to unilaterally benefit the indemnitee, holding it harmless against liabilities and expense incurred in defending against third party tort claims, application of reciprocity principles would defeat the very purpose of the agreement.”)

b. There is no Public Policy Basis for Applying the Statute to Indemnity Provisions.

The purpose underlying the reciprocal rights provision of RCW 4.84.330 is to “ensure[] that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision.” *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481,489, 200 P.3d 683 (2009) in this case, the contract contains a bilateral fee provision in the Disputes and Arbitration clause of the Master Subcontract. Either party could have taken advantage of the fee provision by compelling arbitration, but neither chose to do so. The outcome in the trial court does not thwart the purpose underlying the reciprocal provisions of RCW 4.84.330.

Nevertheless, Huard seeks to invoke the statute’s strong public policy by asserting that it even justifies an award of attorneys’ fees in

situations in which the unilateral attorneys' fee provision appears in a voided contract. But results like this are not emblematic of the courts' ability to employ public policy to enlarge the reach of the statute or to rewrite private contracts willy-nilly. Rather these cases reflect straightforward construction and application of the statutory language. *See Mt. Hood Beverage v. Constellation Brands*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003) (noting that this result follows from the construction that "in any action on a contract' include[s] actions that invalidate the contract.") (citing *Hertzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 192, 692 P.2d 867 (1984)).

B. The Attorney's Fee Provision in the Huard Bid Does Not Apply.

The contract between Prestige and Huard consists of the Master Subcontract Agreement as supplemented by the "Project Subcontract." "Project Subcontract" means: "signed proposal or quote, including specific details on Project Scope of Work, Price, Schedule, and Payment Terms and exclusions." CP 34. These terms are set forth on the first page of the bid letter. The balance of the bid letter consists of boilerplate terms, which include a prevailing party attorneys' fee provision. Some of these provisions, such as the lien notification and warranty, are specifically germane to the project owner. But the incorporation of terms from the bid

letter is limited to the enumerated items; it is not a wholesale incorporation. *See Seventh-Day Adventists v. Ferrellgas*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (“Incorporation by reference must be clear and unequivocal. . . . Where incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes.”)

The trial court found that the “Disputes” provision in the Huard bid conflicts with the Disputes and Arbitration provision in the Master Subcontract and that the latter provision controls. CP 230. The trial court was correct. In signing the Master Subcontract on April 12, 2006, Huard agreed that its “terms and conditions apply to any provision of services by [Huard] regardless of whether these terms and conditions are referenced in any purchase order, subsequent contract memo, etc. during the term of [the Master Subcontract].” CP 34.

Huard relies upon the final sentence in Article I, which provides “[i]f 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 supersede any other terms to the contrary.” CP 34. By focusing on the last sentence in isolation, Huard advocates an absurd construction of Article I of the Master Subcontract Agreement that nullifies the balance of the clause. According to Huard, the import of this

sentence is that while Prestige's extrinsic pre-printed forms cannot vary the terms of the Master Subcontract, pre-printed forms from Huard will vary the terms and will be controlling. By the same logic, hand written terms or forms that are not "pre-printed" prepared by either party could also vary the terms of the Master Subcontract.

The express intent of Article I is to establish the agreed, predictable, and final terms of the parties' contractual relationship, supplemented only by the price, scope, and timing particulars of individual product subcontracts initiated under the Master Agreement. A harmonious reading of Article I is that the terms of Master Agreement drafted by Prestige will prevail even if Prestige subsequently employs a pre-printed form that includes terms and conditions. Such a reading clarifies, rather than nullifies, the balance of the clause. It comports with the rule that "prevents courts from disregarding contract language the parties used and favors an interpretation of a contract which gives effect to all of its provisions over one which renders some of the language meaningless or ineffective." *Better Fin. Solutions v. Transtech*, 112 Wn. App. 697, 711, 51 P.3d 108 (2002).

The temporal context is also significant. Huard received the Master Subcontract on March 27, 2006. CP 31. The Huard bid letter was sent to Prestige on April 10, 2006. It is not signed by Huard (as

contemplated by the defined term “Project Subcontract”) or by Prestige.² Both parties subsequently executed the Master Subcontract Agreement. (Huard on April 12; Prestige on April 17). Even if the Huard bid letter were considered a contract between Huard and Prestige, which it is not, where two contracts between the same parties address the same subject matter, the second agreement prevails if there are any inconsistencies. *Durand v. HMC Corp.* 151 Wn. App. 818, 830, 214 P.3d 189, review denied, 168 Wn.2d 1020, 231 P3d 164 (2009). If Huard desired to alter the terms of its agreement with Prestige, the time to do so was when it reviewed and signed the Master Subcontract.

Finally, Huard’s argument begs the question of whether the Disputes provision in Huard bid letter authorizes prevailing party attorney’s fees in this case. The Disputes provision provides that “all disputes . . . shall be decided according to the Mandatory Arbitration Rules In event of such dispute, the party prevailing shall be entitled to recover his/her/their/its reasonable attorney’s fees and court costs.” Since “all disputes” must be decided in Mandatory Arbitration, “such disputes” in which prevailing party attorneys’ fees are available are disputes in arbitration.

² The bid letter does appear to contain initials next to an interlineation relating to the price of the septic design. CP 40. There is nothing in the record identifying the initials or the circumstances in which they were added.

C. **The Disputes and Arbitration Provision Does Not Provide a Basis for a Fee Award in this Case.**

1. **The Disputes and Arbitration Provision is not Ambiguous.**

A contractual provision is ambiguous “when it is fairly susceptible to two different, reasonable interpretations; a contract is not ambiguous simply because the parties suggest opposing meanings.” *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493-94, 116 P.3d 409 (2005). In interpreting a contract “the court cannot rule out of the contract the language which the parties thereto have put into it, nor can the court revise the contract under the theory of construing it, nor can the court create a contract for the parties which they did not make themselves, nor can the court impose obligations which never before existed.” *Farmers Ins. Co. of Washington v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976).

Huard’s construction of the attorneys’ fee provision would require the reader to ignore the first five words in the sentence: “**In any such arbitration proceeding**, the prevailing party shall in all cases be awarded his or her reasonable attorneys fees” By doing so, Huard rewrites the contract and fundamentally changes its meaning.

The clause “in any such arbitration proceeding” is an adverbial prepositional phrase modifying the verb “awarded.” As an adverb, a prepositional phrase will answer questions such as *How? When?* or

Where? The clause is essential to the meaning of the sentence as demonstrated by the following example:

“In any prosecution for capital murder, the convicted defendant shall in all cases be sentenced to death.”

Removing the prepositional phrase results in:

“The convicted defendant shall in all cases be sentenced to death.”

As is readily apparent, the meaning of the sentence is substantively changed by deleting the adverbial prepositional phrase.

Huard is essentially substituting the phrase “in all cases” for “in any such arbitration proceeding.” But both phrases can serve a grammatical function in the sentence. The word “cases” in the phrase “in all cases” is best understood to mean “instances” as opposed to a legal action with a plaintiff and defendant. The word “always” would serve the same function as “in all cases.” Although the phrase “in all cases” does not contribute to the fundamental meaning of the sentence, it does serve to make the sentence more emphatic by connoting “without exception.” The court should not “disregard contract language the parties used,” but adopt an interpretation “which gives effect to all of its provisions over one which renders some of the language meaningless or ineffective.” *Better Fin. Solutions*, 112 Wn. App. at 711.

In a case like this one, refraining from arbitration can be a rational choice. It provides the advantage of the superior court's broad discovery and joinder of parties rules as well as the right to appeal. Accordingly, while arbitration may be an ideal remedy for a lien dispute, it may not be an ideal forum for a construction defect claim with multiple third party defendants. The logic of limiting attorneys' fee awards to arbitration proceedings is that the truncated nature of arbitration – hearing within a 21-63 day window after appointment of the arbitrator (MAR 5.1), limited deposition discovery, no written discovery, liberal proof requirements for admissibility – tends to limit the amount of the attorney fee exposure, an exposure that is reciprocal and creates a risk for all parties. Huard is now enjoying one of the benefits of eschewing arbitration by bringing this appeal. Ultimately, the court need not decide whether Huard waived its right to arbitration; it is enough to recognize that it did not place the case into arbitration and did not prevail “in an arbitration proceeding.”

The court should enforce the contract as written and not expand the right to attorneys' fees beyond the parameters set forth in the parties' contract. *See Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 926, 631 P.2d 923 (1981) (reversing award of attorneys' fees incurred in litigating a lease renewal issue on the grounds that the contract

authorized attorney's fees for curing defaults in the lease, not for litigating renewal.)

2. The Fact Summary Judgment in Superior Court is a Procedure Common to Both the Superior Court and Arbitration Proceedings Does not Transform This Case into an Arbitration Proceeding.

The fact the Master Subcontract Agreement contains an arbitration clause does not convert an 11-month superior court litigation, with voluminous written discovery and seven depositions, into a mandatory arbitration proceeding. Huard's summary judgment victory did not occur in the context of an arbitration proceeding, which is the only vehicle for recovery of attorneys' fees under the contract. Huard's argument would lead to the perverse result in which one subcontractor prevailing on a motion for summary judgment could obtain a fee recovery while a second subcontractor, in the same case, prevailing after a three week jury trial could not. The application of the clause should not depend upon the manner in which the prevailing party prevails.

Prestige has located one case involving language similar to the Master Subcontract. *In re: Murray Industries, Inc.* 114 B.R. 749 (Bankr. M.D. Fla. 1990), considered a prevailing party attorneys' fee provision substantively identical to the provision in the Master Subcontract. In *Murray*, an executive officer was dismissed from employment and served a demand for arbitration pursuant to a provision of his employment contract. The employer subsequently filed for Chapter 11 bankruptcy, and

the matter was transferred to the jurisdiction of the federal bankruptcy court. In connection with the creditor claim in the bankruptcy proceeding, the executive made a claim for \$350,000 in attorneys' fees under the terms of his employment contract. The claim was based upon the following paragraph from his employment contract:

Any dispute or controversy between the parties relating to or arising out of this Agreement shall be determined by arbitration . . . If the Executive is the prevailing party **in any such arbitration proceeding**, he shall be entitled to recover from the Company any actual expense for attorneys' fees and disbursements incurred by him.

Id. at 753. (Emphasis in original). The court disallowed the attorneys' fee claim, noting that the clause "leaves no doubt that the Claimant would be entitled to attorney fees only if he prevailed in arbitration. The record is clear, as noted earlier, that no arbitration ever occurred, no arbitration panel was ever empaneled, and none will be . . .". *Id.* at 751-752. This decision was later reversed by the federal district court in *Schleicher v. Murray Industries, Inc.*, 130 B.R. 113 (M.D. Fl. 1991). The district court agreed that the contract language "allows the recovery of attorney's fees only in arbitration proceedings." *Id.* at 115. However, it noted that the employee had filed for arbitration and that the filing of the bankruptcy, which stayed the arbitration, had "negated the parties' agreement" with the effect of "depriving Appellant of a substantive right provided in the contract." *Id.* at 115-16.

Huard does not occupy a position comparable to the creditor in *Murray*. The creditor invoked arbitration while Huard's conduct reflects a waiver of the right to arbitration. The right to arbitration is clearly waivable by conduct. *Lake Washington School District v. Mobile Modules Northwest, Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (1980) ("Parties to an arbitration contract may waive that provision, however, and a party does so by failing to invoke the clause when and action is commenced and arbitration has been ignored."). This litigation proceeded for 11 months. Huard had been a party to the litigation for 8 months before it obtained dismissal. Huard, unlike the creditor in *Murray*, never attempted to invoke arbitration. *See Lake Washington School District*, 28 Wn App. at 62 ("Ordinarily, if one party initiates court action in spite of an arbitration clause, the other party is entitled to an order staying the litigation.").

3. Any Doubts Regarding the Applicability of the Arbitration Provisions Should be Resolved by Having Each Party Bear its Own Attorney's Fees.

Washington follows the American rule concerning attorneys' fees and litigation expenses. *Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1994). The American Rule states attorneys' fees and expenses are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). "[T]he court has no power in an adversary proceeding to assess attorneys' fees in the absence of statute or contract." *Id.* at 418 (quoting *Florito v. Goerig*, 27 Wn.2d 616, 620, 179 P.2d 316

(1947)). Whether a particular statutory or contractual provision, or recognized ground in equity, authorizes an award of attorneys' fees is a legal question. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126–27, 857 P.2d 1053 (1993).

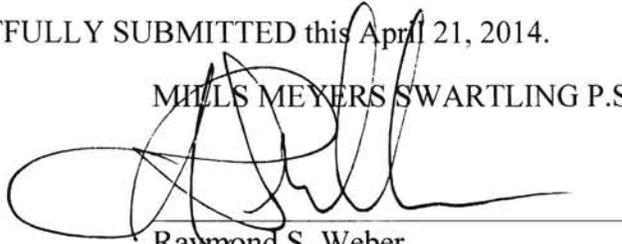
In legal disputes in Washington, the American Rule is the default position. If a contractual provision does not clearly provide for recovery of attorneys' fees, then the American Rule applies and each party bears their own fees. In this case, the contract authorizes awards of attorneys' fees only to the prevailing party in an "arbitration proceeding." The language is clear and its plain meaning should be enforced. *See Kessler v. Gleich*, 161 N.H. 104, 12 A.3d 109, 111 (2010) ("We align ourselves with those courts that will not infer a party's intention to waive the benefit of the general rule that parties are responsible for their own legal fees unless the intention to do so is *"unmistakably clear"* from the language of the promise.").

CONCLUSION

For the reasons stated above, Prestige requests the court affirm the Superior Court's order denying Huard's Motion for Attorney's Fees.

RESPECTFULLY SUBMITTED this April 21, 2014.

MILLS MEYERS SWARTLING P.S.

A handwritten signature in black ink, appearing to read 'Raymond S. Weber', written over a horizontal line.

Raymond S. Weber

WSBA No. 18207

Eric W. Robinson

WSBA No. 40458

Attorneys for Prestige Custom Builders

CERTIFICATE OF FILING AND SERVICE

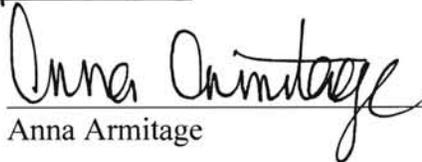
I, Anna Armitage, hereby certify that I filed the foregoing upon the following counsel of record:

Via Electronic (Email) Service and Legal Messenger:

Attorneys for Appellant (Plaintiff) Huard Septic Design and Monitoring, LLC.:

James E. Lobsenz
John R. McDowall
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
McDowall@carneylaw.com
lobsenz@carneylaw.com

DATED this 21 day of April 2014.



Anna Armitage

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 21 PM 4:36