101877-1

Court of Appeals No. 835963

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY, a political subdivision of the State of Washington,

Plaintiff,

v.

CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation.

Defendant.

CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation,

Third-Party Respondent,

v.

D&R EXCAVATING, INC., INC., a Washington corporation; DOUGLAS D. HOFFMANN and SUSAN K. HOFFMANN, and the marital community composed thereof,

Third Party Appellants.

D&R EXCAVATING, INC., a Washington corporation,

Fourth Party Appellant,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND PAYMENT BOND NO. 9283912,

Fourth Party Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONER

D&R Excavating, Inc., Douglas D. Hoffmann and Susan K. Hoffmann ask this Court to accept review of the decision designated in Part B of this Petition.

II. COURT OF APPEALS DECISION

The Court of Appeals decisions for which review is sought is the Court of Appeals' decision filed on 02/06/2023, and the Court of Appeals' Order Denying D&R's Motion for Reconsideration dated 03/09/2023, both in the Appendix attached to this Petition.

III. ISSUE PRESENTED FOR REVIEW

Petitioner presents the following three issues for review.

(1) **Indemnification.** Whether the duty to defend, indemnify, and hold harmless can be breached before a third-party's claim against the indemnitee is either (a) paid by the indemnitee **and** the indemnitee submits proof that the indemnitee was liable to the third-party for said payment,

or (b) before the third-party's claim is actually adjudicated **and** the indemnitee is adjudicated liable to the third party.

(2) **Nuisance.** Whether an action for nuisance, other than nuisance *per se,* public or private, can be maintained absent proof of injury or harm.

(3) **Nuisance *per se.*** Whether an action for nuisance *per se* can be maintained absent an ordinance or statute that declares that the complained-of-act is itself injurious to the public and therefore not permissible under any circumstance.

(4) **Payment Bond.** Whether a claim against a payment bond can be maintained per RCW 39.08.010 notwithstanding that payment has not yet become due to the bond claimant under a pay-if-paid or contractual term.

IV. STATEMENT OF THE CASE

A. Indemnification. King County contracted ("Main Contract") with ICON to grind off the weathered asphalt

layer of the Vashon Highway and apply a new replacement layer. Exhibit 2. CP 354. The WSDOT Standard Specifications 2018 2 – 03.3(7)(C), Exhibit 4, required ICON to obtain all approvals and permits required for the disposal of waste material hauled from the project. CP 455.

ICON subcontracted with multiple trucking companies, including D&R, to haul and dispose of asphalt grindings as directed by ICON. CP 679. ICON's subcontract ("Subcontract") with D&R included "Attachment A" that stated that D&R would haul the asphalt grindings from Vashon Highway and dispose of the asphalt grindings at sites approved by D&R at which time the asphalt grindings became the property of D&R. Exhibit 17: Attachment A. The Subcontract incorporated the Main Contract wherein D&R agreed to be bound to ICON as ICON was bound to King County, including ICON's obligation to obtain all

approvals and permits required for disposal of the asphalt grindings. Exhibit 17: ¶ 1.3

King County claimed that ICON failed to obtain the approvals and permits required for the disposal sites where ICON and ICON's subcontractors, including D&R, deposited and stockpiled the asphalt grindings, one of which was known as the Hoffmann Property. (CP 8: ¶ 30; CP 118, and Exhibits 20,25). ICON denied that said permits were required. (CP 642; Exhibits 20, 25). This suit followed.

King County sued ICON and requested the Court to enter an order directing ICON to remove the asphalt grindings from the Hoffmann Property (CP 9) to disposal sites approved by King County. King County also claimed against D&R, claiming that the actions of D&R presented a risk to the health and safety of the residents on Vashon-Maury Island and therefore constituted a public nuisance, CP 74, and requested the Court to enter an order directing ICON to remove the asphalt grindings from the Hoffmann

Property. CP 9. ICON joined D&R as a third-party defendant and claimed against D&R that D&R breached its subcontract with ICON by not obtaining permits as required by King County and by not defending, indemnifying, and holding ICON harmless from King County's claim against ICON for ICON's failure to dispose of the asphalt grindings as required by ICON's contract with King County. (CP 20, 21 ¶ 28, 32). ICON demanded that D&R defend, indemnify, and hold ICON harmless against King County's claims against ICON. (CP 23: VI B). D&R offered to defend ICON. D&R's offer to defend ICON was declined by ICON who elected to retain their own counsel. (Attachments 1, 2, and 3 to CP 2287 – 2351) as ICON had the right to do under the terms of its subcontract with D&R. Exhibit 17: Attachment B - 3 – Indemnification.

D&R filed a counterclaim against ICON for breach of the Subcontract (CP 179 – 183). D&R also filed a claim against ICON's payment bond, (CP 32 – 36) issued by Fourth Party

Defendant Fidelity & Deposit Company of Maryland, Payment Bond No. 9283912 ("Fidelity"). ICON filed a Motion to dismiss D&R's claim against Fidelity's payment bond (CP 583 - 613). The trial court granted ICON's motion (CP 830 - 835) and awarded attorneys' fees to ICON (CP 2396 - 2402).

ICON also filed a Motion for Partial Summary Judgment against D&R on the issue of D&R's breach of duty to indemnify ICON for ICON's costs to remove the asphalt grindings from Vashon-Maury Island (CP 188 - 208). The trial court granted ICON's motion (CP 426 – 433) and awarded attorneys' fees and costs to ICON. (CP 2396 – 2402).

Evidence was introduced at trial that ICON and D&R disposed of asphalt grindings at Mileta Pit (CP 388), Williams Property Holdings (CP 639), and Misty Isle Farms CP 679) on Vashon-Maury Island without first obtaining grading permits required by King County. RP 103.

ICON met with King County to discuss obtaining the required permits to keep the asphalt grindings in place at the above locations on Vashon-Maury Island. RP 120. ICON decided that removing the asphalt grindings to approved locations off Vashon-Maury Island was more "cost effective" than obtaining the permits required by King County to keep the asphalt grindings in place. RP 120. ICON claimed that ICON incurred substantial costs to remove the asphalt grindings from Vashon Island and dispose of the asphalt grindings at sites approved by King County. RP 121. ICON claimed these costs as damages against King County (CP 20 ¶ 22). ICON claimed against D&R for payment of these costs. (CP 21 ¶ 32) pursuant to D&R's contractual obligation to indemnify.

During trial, ICON and King County stipulated to a dismissal of all claims against each other and the jury was so instructed. (CP 1717, Jury Instruction No. 20).

The Court of Appeals' decision (pages 14 - 16) affirmed the trial court's instruction to the jury that D&R breached its duty to defend, indemnify, and hold ICON harmless. The Court of Appeals held that ICON's settlement with King County, wherein ICON voluntarily complied with its contractual obligation to properly dispose of the recycled asphalt pavement and King County then paid ICON the full balance of ICON's contract without proof of liability or without adjudication of liability, was sufficient as a matter of law to establish such a breach.

B. Nuisance. Vashon-Maury Island is located in a Critical Aquifer Recharge Area ("CARA"). The residents of Vashon-Maury Island are dependent upon groundwater for their water supply. King County claimed that the disposal of asphalt grindings (aka recycled asphalt pavement "RAP") was prohibited by King County Code 16.82.100 which prohibits the use or deposit of RAP as fill material in a CARA unless the RAP is disposed of at a sanitary landfill,

the RAP is used as engineered fill, or the RAP is otherwise approved by the Department. (CP 1700). King County also claimed that the use of RAP in a CARA presented a risk to the public health and safety. CP 66 – 76. King County filed a Motion in Limine seeking to exclude any evidence that RAP was not hazardous, dangerous, or toxic. (CP 1234). The Court reserved ruling on King County's Motion in Limine on the basis that if King County offered no evidence at trial that RAP endangered the public health or safety or posed a danger to Vashon-Maury Island's groundwater supply then neither could D&R introduce any evidence at trial that RAP did not endanger the public health and safety. King County offered no such evidence at trial and therefore pursuant to the trial court's Order on Limine, D&R offered no evidence that RAP did not endanger the health or safety of others. At the close of evidence, no evidence of RAP's risk to health or safety had been offered by any party and accordingly the trial court specifically instructed the jury

that whether RAP posed a risk or danger to the environment or groundwater on Vashon Island was not an issue in the case. CP 1705: Jury Instruction No. 8.

The jury was also instructed that King County claimed that D&R created a public nuisance *per se* based on D&R and the Hoffmanns' violation KCC 16.82.100(A)(4)(d) by D&R's placement of RAP on the above several Vashon Island properties. CP 1700: Jury Instruction No. 3. The trial court further instructed the jury that nuisance was any unlawful act that endangered the health or safety of others. CP 1704: Jury Instruction No. 7. The jury was instructed that any civil code violation [KCC 16.82.100(A)(4)(d)] was a public nuisance.

The Court of Appeals' decision affirmed the trial court's instructions to the jury that (1) the use of recycled asphalt pavement in a critical aquifer recharge area was a public nuisance notwithstanding the preclusion of any evidence of

harm or injury, and (2) the use of recycled asphalt pavement in a critical aquifer recharge area was a nuisance *per se*.

C. Payment Bond per RCW 39.08.030. The subcontract between ICON and D&R contained a pay-if-paid clause, meaning that payment by ICON to D&R was conditioned on ICON receiving payment from King County for work performed by D&R and invoiced by D&R to ICON. Such contractual clauses are common and generally enforceable in Washington. Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 78 P.3d 161 (2003). The Court of Appeals ruled that D&R's claim against ICON's statutory payment bond was premature and untenable because ICON's payment to D&R had not yet become contractually due.

V. ARGUMENT

A. Indemnification. This case is not about the duty to indemnify: all parties agree that D&R Excavating, Inc.'s subcontract required D&R to indemnify ICON from claims of liability asserted by third parties against ICON. Rather, this

case is about if and when a cause of action accrues for breach of a duty to indemnify and whether in this case the jury was improperly instructed that D&R Excavating, Inc. had already breached that duty. D&R Excavating, Inc. is contractually bound to indemnify. However, the breach of that duty was attendant upon adjudication of a third party's claim asserted against the indemnitee (ICON) or payment by the indemnitee to the third-party claimant together with proof of the indemnitee's liability to the third party.

In **Nelson v. Sponberg**, 51 Wn.2d 371, 376, 377 (1957) the Supreme Court stated the law of indemnification as follows:

> As recognized in that case, Washington is with the majority of courts which hold that an indemnitee who seeks reimbursement from his indemnitor for a payment made by him in discharge of a claim indemnified against is not bound to submit to suit before paying the claim; but if he pays without such suit, as a condition of recovery from his indemnitor, he is under the necessity of proving that he was liable for the amount thus paid.

The Court of Appeals' decision below is in direct conflict with the Supreme Court's decision in **Nelson v. Sponberg** 51

Wn.2d 371, 376, 377 (1957) and in direct conflict with **Newcomer v. Masini,** 45 Wn. App. 284, 288 (Division III, 1986) which like Court in **Nelson v. Sponberg**, stated the law as follows:

> An indemnitee who seeks **[***8]** reimbursement from his indemnitor for a payment made by him in discharge of a claim indemnified against is not bound to submit to suit before paying the claim; but if he pays without such suit, as a condition of recovery from his indemnitor, he is under the necessity of proving that he was liable for the amount thus paid.

In **Central Refrigeration v. Barbee**, 133 Wn. 2d 509, 513 (1997), Washington Supreme Court explained the meaning and application of indemnity as follows:

> [1] Indemnity in its most basic sense means reimbursement (BLACK'S LAW DICTIONARY 769 (6TH ed. 1990)) and may lie when one party discharges a liability which another should rightfully have assumed. Stevens v. Security Pac. Mortgage Corp., 53 Wn. App. 507, 517, 768 P.2d 1007 ("Indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the entire loss."), review denied, 112 Wn. 2d 1023 (1989). <<2>>
>
> [2, 3] While indemnity sounds in contract and tort <<3>> it is a separate equitable cause of action. The

> variety of indemnity relevant to this case is implied contractual indemnity, also referenced to as "implied in fact" indemnity. Such arises when one party incurs a liability the other party should discharge by virtue of the nature of the relationship between the two parties.

Here in this case, there was no payment of damages made to a third party and ICON incurred no liability to King County other than ICON's initial contractual obligation to properly dispose of the asphalt millings. ICON made a voluntary business decision to complete its contractual obligations to King County by exporting the recycled asphalt pavement to permitted disposal sites. There was no adjudication or proof offered that ICON was liable to King County for damages: only fulfillment of ICON's contractual obligation to King County. D&R Excavating, Inc. surely remained subject to ICON's claims against D&R Excavating, Inc. for breach of D&R Excavating, Inc.'s subcontractual obligations to properly dispose of the recycled asphalt pavement, but that is an entirely different legal basis or legal cause of action than ICON's claim against D&R Excavating, Inc. that D&R breached its duty to

indemnify ICON.

There exists no authority for the proposition that a contractor who has incurred expenses to complete its contract with another party may seek "indemnification" of those expenses from a subcontractor even when the contractor claims that the subcontractor caused said expenses. The contractor's claim, if any, is against the subcontractor for breach of subcontract, typically referred to as a backcharge or offset: not indemnification. See, **Stocker v. Shell Oil Co**. 105 Wn.2d 546, 549 (1986); at p.549 ("Indemnity agreements are essentially agreements for contractual contribution, whereby one tortfeasor against whom damages in favor of an injured party have been assessed may look to another for reimbursement".); **United Boatbuilders v. Tempo Prods. Co.,** Wn.App. 177, 180-181 (1969) ("…reimbursement from his indemnitor for a payment made by him in discharge of a claim".); **Parkridge Assocs. V. Ledcor Indus.,** 113 Wn.2d 592, 604 (2002); ("…our Supreme Court stated in **Barbee** that it is settled law that indemnity

actions accrue when the party seeking indemnity pays, or is legally adjudged obligated to pay, damages to a **third party**."; **Newcomer v. Masini,** 45 Wn. App. 284, 286 (1986) ("…for a payment made by him in discharge of a claim…").

Always, there must be payment to a third party claimant upon either an adjudication of liability for said payment to a third party or payment to the third party upon the payor's proof of liability to the third party. That is our caselaw in Washington, including the Washington Supreme Court and all Divisions of the Courts of Appeals, **Nelson v. Sponberg,** 51 Wn. 2d 371, 374 (1957) ("…reimbursement for a payment made in discharge of a claim"); **Central Refrigeration v. Barbee,** 133 Wn. 2d 509, 513 (1997) (Indemnity means reimbursement and may lie "when one party **discharges a liability** which another should rightfully have assumed"); and **View Condo. Ass'n v. Fortune Star Dev. Co.,** 151 Wn.2d 534, 539. (2004).

The trial court erred in instructing the jury that D&R

Excavating, Inc. had already breached a duty to indemnify ICON.

Petitioners request the Supreme Court accept review pursuant to RAP 13.4 (b)(1), (b)(2), and (b)(4) because the Court of Appeals' decision below is in direct conflict with multiple decisions of the Supreme Court and also in direct conflict with multiple published decisions of other Divisions of the Court of Appeals. Moreover, indemnification clauses are commonly included in construction contracts, both public and private. This case strongly calls for clarification from the Supreme Court that (1) indemnification involves discharge of a liability to a third party: not costs incurred to perform an indemnitee's contractual obligation to a third party and (2) the duty to indemnify is not breached until and unless the indemnitee has paid a third party's claim or been adjudged to do so.

B. Nuisance. The Court of Appeals' decision stated that a nuisance is unlawfully doing an act that endangers the health or safety of others (page 10) citing RCW 7.48.120. The Court of Appeals' decision further stated (page 10, 11) as follows:

> "A nuisance per se exists when the legislative authority has declared the complained-of-act to be unlawful".

That is an incorrect statement of the law. A nuisance *per se* exists **only** when the legislative authority expressly declares the complained-of-act to be a nuisance or otherwise detrimental to the public safety and health. The Court of Appeals relied upon **Kitsap County v. Kev, Inc**., 106 Wn.2d 135, 138 (1986). The Court's reliance on **Kitsap County v. Kev**. was misplaced. In **Kitsap County v. Kev**., the Supreme Court based its affirmance on the substantive content of the specific ordinance which Kev. Inc. was charged with violating and which ordinance (Ordinance 92, Section II) expressly stated that violation of said ordinance (Ordinance 92) was "itself an injury

to the community". In **Kitsap County v. Kev, Inc**., the Court found that "The Kitsap County Commissioners validly provided that a studio in violation of ordinance 92 would be declared a public nuisance". Here, there is no such provision in the King County Code stating that either the use of recycled asphalt pavement in a critical aquifer recharge area is a nuisance of any sort, or the failure to obtain a grading permit for the use of recycled asphalt pavement in a critical aquifer recharge area is a nuisance of any sort. D&R was only cited for failing to obtain a grading permit for both placement and use of recycled asphalt pavement on the property located at 8816 SW Cemetery Road.

Here in this case, D&R Excavating was cited for violating an ordinance that, unlike the facts in **Kitsap County v. Kev, Inc**. does **not** declare that violation of KCC 16.82.100 (A)(4)(d) is a nuisance of any kind: public, private, or per se.

Further, the Court of Appeals' following application of **Kitsap County v. Kev, Inc**. (page 11) was misplaced.

> "If the plaintiff establishes a nuisance per se, it need not separately prove injury, as the legislative body has already determined that the act is itself injurious to the public."

Here, there is nothing stated anywhere in the King County Code that the use of recycled asphalt pavement (i.e., "the act") is "…itself injurious to the community". To the contrary, the jury was instructed that harm to the environment was not an issue.

Here in the case of D&R Excavating, Inc., KCC 16.82.100(A)(4)(d) nowhere provides that the complained-of-act (i.e., use of recycled asphalt pavement in a critical aquifer recharge area) "provides for injunctions against violations". KCC 16.82.100(A)(4)(d) provides for the opposite: i.e., D&R Excavating, Inc. obtaining a grading permit to place or use recycled asphalt pavement in a critical aquifer recharge area. Surely, if KCC 16.82.100(A)(4)(d) stated or inferred that use of recycled asphalt pavement in a critical aquifer recharge area was harmful to the environment, King County would not be offering either ICON or D&R Excavating, Inc. a permit to do

so. The harm obviously would persist notwithstanding any permit issued by King County. King County's Notice of King County Code Violation to ICON dated May 3, 2019 (attached hereto as Appendix C) and referenced at page 5 of the Court of Appeals decision, cited ICON for specific violation of KCC 16.82.100(A)(4)(d) and directed ICON to "obtain the required permit" in order "to bring this property (8816 SW Cemetery Road) into compliance.

Here, the complained-of-act was D&R Excavating, Inc.'s failure to obtain a grading permit allowing for the placement of recycled asphalt pavement at the property located at 8816 SW Cemetery Road. KCC 16.82.100(A) states that cuts and fills must conform to 16.82.100 (A-1 to A-4) "unless otherwise approved by the department". The King County Department of Local Services, Peruritting's Notice (attached hereto) states that ICON and D&R Excavating needed to "apply for and obtain the required permit" in order to retain the recycled asphalt pavement at the 8816 SW Cemetery Road property. Thus, the

"department" approves if only ICON or D&R Excavating, Inc. obtains a permit.

The Court of Appeals decision (page 11) incorrectly reads KCC 16.82.100(A)(4)(d) as itself declaring that use of recycled asphalt pavement in a critical aquifer recharge area "constitutes an injury to the public". Nothing contained or expressed with KCC 16.82.100(A)(4)(d) or King County's Notice dated May 3, 2019 references injury or harm to the environment or public health. To the contrary, KCC 16.82.100 permits placement or use of recycled asphalt pavement in all critical aquifer recharge areas if (1) those areas are sanitary landfills, (2) the placement is engineered, or (3) placement is otherwise approved by the Director. "When a statute or local ordinance declares conduct illegal without labeling it as a nuisance (such as the case sub judice) it will be considered a nuisance as a matter of law (as the Court of Appeals did in the case sub judice) **only** if that conduct interferes with others' use and enjoyment of their lands." **Tiegs vs. Boise Cascade Corp**.,

83 Wn.App. 411, 418 (1996). Here in this case, KCC 16.82.100 does not declare it is a violation to constitute a nuisance. Injury or interference must be proven. Tiegs at p. 418.

There are two complained-of-acts operating in this case: (1) use of recycled asphalt pavement in a critical aquifer recharge area KCC 16.82.100((A)(4)(d)), and (2) failure to obtain a grading permit for the use of recycled asphalt pavement in a crucial aquifer recharge area (King County Notice dated May 3, 2019). If use of recycled asphalt pavement in a critical aquifer recharge area "constituted an injury to the public" as stated in the Court of Appeals decision at page 11), the injury would not and could not be cured or removed by simply "applying for and obtaining the required permits" (King County Notice dated May 3, 2023). If KCC 16.82.100(A)(4)(d) was intended to protect the environment from harm caused by the use of recycled asphalt pavement in a critical aquifer recharge area, King County would not then turn around and

allow it if a grading permit was obtained. No "injury to the public" (Court of Appeals decision at page 11) is cured by obtaining a permit to perform an act if the act (use of recycled asphalt pavement) constituted an injury to the public).

The jury was instructed (Jury Instruction No. 3) that King County claimed in this case "…that D&R created a public nuisance per se because D&R and the Hoffmanns violated KCC 16.82.100(A)(4)(d) by placing RAP on several Vashon properties. This was error. "A nuisance *per se* is an activity (e.g., use of recycled asphalt pavement in a critical aquifer recharge area) that is not permissible under any circumstances. **Kitsap County v. Kitsap Rifle and Revolver Club**, 184 Wn.App. 252, 277 (2014). Here in this case, use of recycled asphalt pavement in a critical aquifer recharge area is permitted under multiple conditions.

KCC 16.82.100 does not declare that use of recycled asphalt pavement in a critical aquifer recharge area is "unlawful" per the Court of Appeals decision page 11: only that

such use requires a permit pursuant to KCC 16.82.052, and "inspections and approvals" per the King County Notice date May 3, 2019.

The Court of Appeals' decision at page 12 incorrectly concluded that "…proof of violation of KCC 16.82.100(A)(4)(d) will automatically satisfy King County's burden under parts 1 and 2 of jury instruction 10. To be clear, the "burden" here is proof of causation: King County's burden to connect the use of recycled asphalt pavement in a critical aquifer recharge area with injury to the public safety or environment. That is the "burden" for which the Court of Appeals states requires no proof. The Court of Appeals has overlooked D&R Excavating, Inc.'s, point that it is not simply about substituting "statutory" proof for evidentiary proof. Jury Instruction No. 8 entirely removed the issue of environmental harm from the jury's consideration. That instruction was given as a result of the trial court's earlier Orders in Limine. King County possessed no evidence of harm to the environment and

offered no evidence at trial to support any finding of harm to the environment by using recycled asphalt pavement in a critical aquifer recharge area. The Court of Appeals decision wrongly put causation of environmental harm right back in the case by substituting the Court's interpretation of KCC 16.82.100(A)(4)(d) for King County's absence of evidentiary proof. It is the causation issue itself, not the proof concerning the issue, that is addressed in jury instruction No. 8. The Court of Appeals' decision (pages 11, 12) states that **proof** of environmental harm is found in KCC 16.82.100(A)(4)(d) so evidentiary proof is unnecessary. But the **issue** of environmental harm was entirely removed from the case by Jury Instruction No. 8.

Petitioners urge the Supreme Court to accept review of the Court of Appeals' decision below as being directly contrary to the Supreme Court's decision in **Tieg 1 and 2** that (1) actionable common law nuisance requires proof of harm, and (2) nuisance *per se* requires a statute or ordinance that expressly

states that the act complained of (i.e., the nuisance, is itself harmful.

C. *Suit on Payment Bond.* The subcontract between ICON and D&R contained a pay-if-paid clause, meaning that payment by ICON to D&R was conditioned on ICON receiving payment from King County. Such contractual clauses are common and generally enforceable in Washington. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375; 78 P.3d 161 (2003). Pay-if-paid clauses do not relate to the validity or the enforceability of the debtor's obligation: only the timing of payment of the debt.

RCW 39.08.010 is a remedial statute and is to be liberally construed to provide security for all laborers and materialmen performing work on public works projects. RCW 39.04.900. To judicially impose a requirement upon claimants seeking payment from a surety beyond the statutory notice requirements of RCW 39.08.010 would defeat the purpose of RCW 39.08.010, and be contrary to the Legislature's intent

expressed in RCW 39.04.900. Other courts addressing the very matter have concluded that a pay-if-paid clause does not and can not defeat a subcontractor's right to seek payment from general contractor's statutorily required payment bond. *United States ex rel. Walton Tech. v. Weststar Eng'g, Inc.*, 290 F.3d 1199 (9th Cir. 2002). Notably, RCW 39.08.030 states:

> "…and all such persons mentioned in RCW 39.08.010 have a right of action…"

RCW 39.08.030 is barren of any limitations upon a persons' "right of action" against the statutory bond such as the scheduling of a payment to the person. The Court should hesitate to graft such a limitation onto RCW 39.08.030: especially where RCW 39.08.030 only requires a person provide notice of the person's claim and is not required to address contractual requirements relative to scheduling the general contractor's payment of the person's claim.

A claimant under RCW 39.08.030 must file its bond claim no later than 30 days after project acceptance by the public agency, yet it could be many months before the

contractor (e.g., ICON) receives its project close-out and final payment or 60 days following project completion (RCW 60.28.011(3)(b)).

Under the reasoning of the Court of Appeals, bond claimants' filings under RCW 39.08.030 would almost always be subject to dismissal as premature.

The Supreme Court should affirm the remedial purposes of RCW Ch. 39.08 and hold that a contractual paid-if-paid clause cannot defect a claim asserted under RCW 39.08.030.

VI. CONCLUSION

Petitioners request the Supreme Court to (1) reverse the decisions entered by the Court of Appeals below, date 02/06/2023 and 03/09/2023, and order a new trial consistent with the Supreme Court's analysis and decision in this case.

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VII. APPENDIX

APPENDIX A

Decision of Court of Appeals, dated 02/06/2023

FILED
2/6/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KING COUNTY, a political subdivision of the State of Washington,

Plaintiff,

v.

CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation,

Defendant.

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Third Party Appellants.

D & R EXCAVATING, INC., a Washington corporation,

Fourth Party Appellant,

v.

DIVISION ONE

No. 83596-3-I

UNPUBLISHED OPINION

FIDELITY & DEPOSIT COMPANY OF MARYLAND PAYMENT BOND NO. 9283912,

Fourth Party Respondent.

DWYER, J. — This appeal arises from a dispute between King County, CPM Development Corp., d/b/a ICON Materials (ICON), and D & R Excavating concerning the unlawful disposal of recycled asphalt pavement millings on Vashon Island. D & R appeals from the judgment on a jury verdict awarding damages to ICON and King County. Finding no error, we affirm.

I

On May 15, 2018, King County executed a contract with ICON to act as the general contractor for its Vashon Island Highway Pavement Preservation project. This project entailed the removal, repair, and replacement of approximately 12 miles of roadway on Vashon Island.

Under the terms of the contract, ICON was required to grind or plane the top layer of the asphalt road on Vashon Highway SW, so that new pavement could be applied. The contract specified that ICON was to dispose of the asphalt millings in accordance with section 2-03.3(7)(C) of the 2018 WSDOT[1] Standard Specifications for Road, Bridge and Municipal Construction. This provision states:

> If the Contracting Agency provides no waste site, but requires disposal of excess excavation or other materials, the Contractor shall arrange for disposal at no expense to the Contracting Agency, except as provided in Section 2-03.3(7)(B), item 2.

[1] Washington State Department of Transportation.

> The Contractor shall acquire all permits and approvals required for the use of the disposal sites before any waste is hauled off the project.

The King County Code (KCC) specifies that asphalt millings may not be disposed of in any area classified as a critical aquifer recharge area. KCC 16.82.100(A)(4)(d). King County has classified all of Vashon Island as a critical aquifer recharge area.

In accordance with the contract, King County provided a temporary disposal site for asphalt millings at a location known as the Melita Pit on Maury Island. All millings needed to be removed from the Melita Pit within 30 days after substantial completion of the pavement project. If ICON wished to use any additional disposal sites, it was required to obtain any permits necessitated by law, as well as receive approval from the County.

ICON entered into a subcontract with D & R[2] to haul the asphalt millings away from the project site and properly dispose of them. The subcontract between ICON and D & R expressly incorporated all terms of ICON's contract with King County. Paragraph 1.6 of the subcontract also stated:

> Subcontractor has fully acquainted itself with and shall be solely responsible for all physical and nonphysical conditions affecting the Subcontractor's Work, the Project site, and surrounding conditions, as well as all laws, ordinances, regulations, and governmental requirements applicable to the Work, including the proper removal and disposal of waste and contaminants encountered on the Project.

Additionally, the scope of the work defined by the subcontract clarified that all "Milled Asphalt to be disposed of at approved site."

[2] D & R is a construction service company owned by Douglas and Susan Hoffmann.

Attached to the subcontract was an addendum which reads, in relevant part, as follows:

> Subcontractor shall defend, indemnify and hold harmless Contractor and its affiliates and corporate parents, officers, directors, sureties, agents and employees, and any entities to whom Contractor has Indemnification obligations under the Contract ("the Indemnities"), from and against any and all losses, costs, claims (even though such claims may prove to be false, groundless, or fraudulent), demands, penalties, damages, expenses or liabilities, arising from, resulting in any manner directly or indirectly from or connected with or in the course of the performance of the Subcontractor Work or the Subcontractor obligations.

ICON initially sought approval from King County to utilize a property known as the Williams Property as a temporary disposal site for the asphalt millings, in addition to the Melita Pit. King County rejected the request. ICON notified D & R of King County's rejection.

Despite knowing that the site was not approved, D & R nevertheless disposed of some of the asphalt millings at the Williams Property. After County staff observed asphalt millings stockpiled at the Williams Property, King County sent a notice to ICON to cease further disposal of asphalt millings at the property. King County subsequently issued a stop work order, directing ICON to immediately cease stockpiling asphalt millings at the Williams Property and directed it to relocate the millings to an approved location. ICON informed D & R of the notice and stop work order, advised D & R that it was in breach of its subcontract, and demanded that D & R remove the millings. D & R took no action.

King County subsequently received complaints from members of the

community about asphalt millings being disposed of at various private properties on Vashon Island, including the Misty Isle Farm and property belonging to the Hoffmanns. D & R had disposed of asphalt millings at these sites without obtaining either permits or approval from King County. On August 14, 2018, King County issued stop work notices for the Williams Property, the Misty Isle Farm, and the Hoffmanns' private property. Again, D & R took no action.

On October 10, 2018, King County declared the project substantially complete, triggering the 30-day window for removal of all millings from the Melita Pit. ICON sent two letters to D & R, requesting that it provide ICON with a mitigation plan for removal of millings from the Melita Pit and various private properties that D & R had used to dispose of asphalt millings. D & R responded that it would take no action until it "worked through these matters with King County."

In light of D & R's failure to remove any of the millings after multiple demands from ICON, ICON terminated the subcontract on November 19, 2018. ICON then removed the millings from the Williams Property, Melita Pit, Misty Isle Farm, and six other private properties, incurring substantial costs in doing so. ICON contacted D & R and the Hoffmanns on two separate occasions, requesting that they grant access to the Hoffmann property so that ICON could remove the asphalt millings located on that property. The Hoffmanns refused to grant ICON access to their property.

On May 3, 2019, King County issued a Notice of King County Code Violation to ICON and the Hoffmanns for improperly disposing of asphalt millings

in a critical aquifer recharge area. ICON appealed through administrative channels and tendered a defense to D & R's insurer.[3] D & R refused to provide ICON with conflict-free counsel.

King County filed suit against ICON on August 30, 2019, asserting a claim for breach of contract for ICON's failure to remove the asphalt millings from the Hoffmann property.[4] ICON answered, asserted counterclaims for breach of contract and unjust enrichment, and pleaded claims against third party defendants D & R and the Hoffmanns for breach of contract, express indemnity, equitable indemnity, and tortious interference. After being joined as a party, D & R filed a fourth party complaint against Fidelity, ICON's surety and bonding agent, for amounts it asserted were unpaid by ICON for work performed. D & R separately asserted claims for breach of contract, conversion, and tortious interference with a business expectancy against ICON and a tortious interference claim against King County. King County then filed a counterclaim against D & R for public nuisance.

On February 5, 2021, ICON filed a motion for partial summary judgment requesting a ruling that D & R breached its contractual requirement to defend, indemnify, and hold ICON harmless from all costs and damages incurred. The trial court granted the motion. The trial court accordingly ordered that:

> 3. D&R is in breach of the Subcontract for failing to defend, indemnify, and hold ICON harmless.
>
> 4. D&R is contractually required to indemnify, defend, and hold

[3] ICON later submitted a second tender of defense in connection with this litigation.

[4] King County later amended its complaint to include other private properties that ICON was unable to access for remediation.

> harmless ICON against the King County claims and directives related to D&R's work, including but not limited to D&R's failure to remove the millings as directed by King County and ICON, King County's Code Enforcement Actions related to D&R's work and the above-captioned litigation against ICON commenced by King County.

On July 9, 2021, ICON filed a motion for partial summary judgment seeking dismissal of D & R's tort claims against it and the claim against its bond and surety. The trial court ruled that D & R's tort claims were barred by the independent duty doctrine and that D & R had no valid claim against the bond or the surety because ICON had not failed to pay D & R under the terms of the subcontract. Accordingly, the trial court granted ICON's motion.

A jury trial was conducted via Zoom from September 27, 2021 to October 14, 2021. While trial was ongoing, King County and ICON settled all claims between each other. The jury was so instructed.

At the close of the evidence, the trial court provided the jury with the following pertinent instructions:

> Any civil violation of King County code is detrimental to the public health, safety and environment and is declared public nuisances.
>
> King County Code Title 16.82.100 A.4.d states that recycled asphalt shall not be used as fill in areas subject to exposure to seasonal or continual perched ground water, in a critical aquifer recharge area or over a sole-source aquifer.
>
> If you find that Third-Party Defendants violated King County Code 16.82.100A.4.d, then you must find that the Third-Party Defendants committed a public nuisance, and that King County has satisfied its burden of proving the first and second propositions found in Instruction No. 10.

Jury Instruction 9.

> King County has the burden of proving each of the following propositions with respect to the claim of nuisance:
>
> (1) That D&R Excavating Inc., Douglas and Susan Hoffmann acted unlawfully; and
>
> (2) That the unlawful act: annoyed, injured, or endangered the comfort, repose, health, or safety of others; and
>
> (3) That D&R Excavating Inc., and/or Douglas and Susan Hoffmanns' acts were the proximate cause of damages to King County. Damages may include but are not limited to the following: costs related to the remediation, mitigation and/or removal of the asphalt grindings from the private properties on Vashon Island.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for King County on the nuisance claim. On the other hand, if any of these propositions has not been proved, your verdict should be for D&R Excavating Inc., and/ or Douglas and Susan Hoffmann, on the nuisance claim.

Jury Instruction 10.

> With respect to ICON's claims against D&R, the Court has ruled that:
>
> 1. D&R is in breach of the Subcontract for failing to defend, indemnify, and hold ICON harmless.
>
> 2. D&R is contractually required to indemnify, defend, and hold harmless ICON against the King County directives related to D&R's work, including but not limited to D&R's failure to remove the millings as directed by King County and ICON.
>
> Based on this Order, if you find that ICON proved it incurred damages resulting from D&R's breach, then you shall award damages to ICON.

Jury Instruction 18.

The jury returned a verdict finding that D & R had violated KCC 16.82.100(A)(4)(d) and awarded King County damages in the amount of $12,571.52. The jury awarded ICON damages in the amount of $683,764.81 for D & R's breach of the duty to defend, indemnify, and hold harmless. The jury found against D & R on its claim for tortious interference with a business

expectancy against King County and its claim for an unpaid balance owed on the subcontract against ICON.[5]

When ICON moved for entry of judgment on the jury verdict, D & R argued that it had no indemnity obligation to ICON because there was no judgment entered on King County's claims against ICON. The trial court rejected this argument and entered judgment against D & R in favor of ICON in the amount awarded by the jury plus prejudgment interest. The trial court also awarded attorney fees and costs to ICON. D & R filed a motion for a new trial, which the trial court denied. D & R appeals.

II

D & R asserts that the trial court incorrectly instructed the jury on the law concerning public nuisances. This is so, it contends, because Washington law does not recognize "nuisance per se," and that, accordingly, King County was required to prove that D & R's disposal of asphalt millings was harmful. We disagree.

This court reviews claims of legal error in jury instructions de novo. Gosney v. Fireman's Fund Ins. Co., 3 Wn. App. 2d 828, 863, 419 P.3d 447 (2018). "Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." City of Bellevue v. Raum, 171 Wn. App. 124, 142, 286 P.3d 695 (2012) (citing Caruso v. Local Union No.

[5] Although the trial court ruled on summary judgment that ICON had not breached the subcontract, the jury was nevertheless asked whether ICON owed any sums to D & R. It is not clear from the appellate record why this occurred.

690 of Int'l Bhd. of Teamsters, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987)).

If a jury instruction is legally erroneous, it constitutes reversible error only if it is prejudicial. Fergen v. Sestero, 182 Wn.2d 794, 803, 346 P.3d 708 (2015) (citing Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012)). "If the instruction contains a clear misstatement of law, prejudice is presumed and is grounds for reversal unless it can be shown that the error was harmless." Fergen, 182 Wn.2d at 803. Otherwise, the party claiming error has the burden to demonstrate prejudice. Fergen, 182 Wn.2d at 803.

Jury instruction 9, to which D & R assigns error, reads as follows:

> Any civil violation of King County code is detrimental to the public health, safety and environment and is declared public nuisances.
>
> King County Code Title 16.82.100 A.4.d states that recycled asphalt shall not be used as fill in areas subject to exposure to seasonal or continual perched ground water, in a critical aquifer recharge area or over a sole-source aquifer.
>
> If you find that Third-Party Defendants violated King County Code 16.82.100A.4.d, then you must find that the Third-Party Defendants committed a public nuisance, and that King County has satisfied its burden of proving the first and second propositions found in Instruction No. 10.

Our legislature has defined a "nuisance" as "unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others." RCW 7.48.120. A public nuisance is a nuisance "which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." RCW 7.48.130.

A nuisance per se exists when the legislative authority has declared the

complained-of act to be unlawful. Kitsap County v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986); see also Moore v. Steve's Outboard Serv., 182 Wn.2d 151, 156, 339 P.3d 169 (2014). If the plaintiff establishes a nuisance per se, it need not separately prove injury, as the legislative body has already determined that the act is itself injurious to the community. Kev, Inc., 106 Wn.2d at 139 (quoting King County ex rel. Sowers v. Chisman, 33 Wn. App. 809, 819, 658 P.2d 1256 (1983)).

The King County Council, the legislative authority governing King County, adopted KCC 23.02.030(A) in 2008, declaring that "[a]ll civil code violations are hereby determined to be detrimental to the public health, safety and environment and are hereby declared public nuisances." King County's claim of nuisance against D & R was based on D & R's violation of KCC 16.82.100(A)(4)(d). That provision of the code states, "Recycled asphalt shall not be used in areas subject to exposure to seasonal or continual perched ground water, in a critical aquifer recharge area or over a sole-source aquifer." KCC 16.82.100(A)(4)(d). Because the King County legislative authority has declared use of recycled asphalt in critical aquifer recharge areas to be unlawful and declared that such use constitutes an injury to the public, there was no need for King County to separately prove an unlawful act and injury. Jury instruction 9 thus correctly stated the law.

Relying on case law concerning *negligence* per se, D & R contends that Washington no longer recognizes nuisance per se as a valid legal principle. But, as King County points out, the law of negligence has no bearing on the law of

nuisances. Unlike negligence per se, neither the legislature nor our Supreme Court have rejected nuisance per se as a controlling legal principle.[6]

Jury instruction 10 also correctly states the law. Jury instruction 10 reads as follows:

> King County has the burden of proving each of the following propositions with respect to the claim of nuisance:
> (1) That D&R Excavating Inc., Douglas and Susan Hoffmann acted unlawfully; and
> (2) That the unlawful act: annoyed, injured, or endangered the comfort, repose, health, or safety of others; and
> (3) That D&R Excavating Inc., and/or Douglas and Susan Hoffmanns' acts were the proximate cause of damages to King County. Damages may include but are not limited to the following: costs related to the remediation, mitigation and/or removal of the asphalt grindings from the private properties on Vashon Island.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for King County on the nuisance claim. On the other hand, if any of these propositions has not been proved, your verdict should be for D&R Excavating Inc., and/or Douglas and Susan Hoffmann, on the nuisance claim.

Parts (1) and (2) of jury instruction 10 directly track the language of RCW 7.48.120, defining the word "nuisance." This instruction is consistent with jury instruction 9, because jury instruction 9 explicitly states that proof of a violation of KCC 16.82.100(A)(4)(d) will automatically satisfy King County's burden under parts 1 and 2 of jury instruction 10. Jury instructions 9 and 10 are not legally erroneous and the trial court did not err by giving them.

III

D & R asserts that the trial court erred by instructing the jury that it had

[6] For this reason, neither jury instruction 9 nor jury instruction 10 are inconsistent with jury instruction 8, as D & R contends.

breached its duty to defend, indemnify, and hold ICON harmless pursuant to the subcontract. This is so, D & R asserts, because it cannot have breached a duty when ICON was never found liable to King County. We disagree.

D & R phrases this issue as a challenge to jury instruction 18. However, jury instruction 18 copies word for word the trial court's order granting summary judgment to ICON. Thus, as ICON rightly points out, D & R's argument is in actuality a challenge to the trial court's ruling on ICON's motion for partial summary judgment on its breach of contract claim. [7]

We review a trial court's order on summary judgment de novo. Boyd v. Sunflower Properties LLC, 197 Wn. App. 137, 142, 389 P.3d 626 (2016).

"When interpreting an indemnity provision, we apply fundamental rules of contract construction." MacLean Townhomes, LLC v. Am. 1st Roofing & Builders Inc., 133 Wn. App. 828, 831, 138 P.3d 155 (2006). The words in a contract should be given their ordinary meaning and should not be read so as to render other provisions meaningless. MacLean Townhomes, 133 Wn. App. at 831. Additionally, indemnification provisions are to be read as to effectuate the intent of the parties. Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 835, 271 P.3d 850 (2012).

The plain language of the subcontract between ICON and D & R is not consistent with D & R's argument that ICON needed to be held liable to King

[7] D & R also assigns error to jury instruction 3 and question 4 on the special verdict form. Both the instruction and question merely inform the jury that the trial court had previously ruled that D & R was in breach of the subcontract. Both of these assignments of error are thus also properly deemed a challenge to the partial summary judgment order.

County before it could be in breach of the indemnity provision. Exhibit B to the subcontract reads:

> Subcontractor shall defend, indemnify and hold harmless Contractor and its affiliates and corporate parents, officers, directors, sureties, agents and employees, and any entities to whom Contractor has Indemnification obligations under the Contract ("the Indemnities"), from and against any and all losses, costs, claims (even though such claims may prove to be false, groundless, or fraudulent), demands, penalties, damages, expenses or liabilities, arising from, resulting in any manner directly or indirectly from or connected with or in the course of the performance of the Subcontractor Work or the Subcontractor obligations.

(Emphasis added.) This language contemplates that D & R would defend, indemnify, and hold ICON harmless regardless of whether ICON was held liable by a jury. Indeed, the indemnity clause does not require that a lawsuit be filed at all. The provision mandates that D & R indemnify and hold ICON harmless for "any and all losses," "costs," and "expenses" incurred as the result of D & R's work. This necessarily includes the costs and expenses ICON incurred in removing the asphalt millings that D & R stockpiled in a critical aquifer recharge area in violation of King County Code. See Thomas Ctr. Owners Ass'n v. Robert E. Thomas Tr., 20 Wn. App. 2d 690, 703, 501 P.3d 608, review denied, 199 Wn.2d 1014 (2022) ("In plain English, 'any and all' means any and all.").

D & R nevertheless asserts that under the common law, an indemnitor need not pay an indemnitee unless and until the indemnitee is found liable to a third party. However, Washington law has long recognized that common law defenses cannot defeat the express language of a contractual indemnification provision. Stocker v. Shell Oil Co., 105 Wn.2d 546, 549-50, 716 P.2d 306

(1986). To hold otherwise "would frustrate the reasonable expectations of the contracting parties and thus interfere with their freedom to contract." Stocker, 105 Wn.2d at 550.

Indeed, D & R's argument was rejected over 50 years ago in N. Pac. Ry. v. Nat'l Cylinder Gas Div. of Chemetron Corp., 2 Wn. App. 338, 467 P.2d 884 (1970). In that case, National Cylinder entered into a contract containing a provision whereby it agreed to defend, indemnify, and hold Northern Pacific harmless for claims against Northern Pacific incurred as the result of National Cylinder's actions. Nat'l Cylinder, 2 Wn. App. at 339. When an employee of National Cylinder sued Northern Pacific for injuries he sustained, Northern Pacific tendered its defense to National Cylinder's insurer. Nat'l Cylinder, 2 Wn. App. at 339. After National Cylinder refused to defend, Northern Pacific settled the employee's claim and filed a breach of contract action against National Cylinder. Nat'l Cylinder, 2 Wn. App. at 340.

National Cylinder argued that because Northern Pacific was not found liable but instead settled with the employee, it could not be obligated to indemnify Northern Pacific. Nat'l Cylinder, 2 Wn. App. at 344. As D & R does here, National Cylinder based this argument on cases concerning common law indemnification. Our learned predecessors rejected that argument, holding that the language of the contract controlled and that, as written, it did not require a finding of liability before National Cylinder was required to indemnify. Nat'l Cylinder, 2 Wn. App. at 344-45. Although the parties could contract to limit the duty to indemnify to only those cases in which a finding of liability was entered,

the parties in that case did not do so. Nat'l Cylinder, 2 Wn. App. at 347. In addition, the court held that "the failure of the indemnitor to defend the action when the subject matter of the suit is within the scope of the indemnity agreement is itself a breach of contract and entitles the indemnitee to recover from the indemnitor the amount of any reasonable settlement made in good faith." Nat'l Cylinder, 2 Wn. App. at 345.

As in Nat'l Cylinder, the indemnification clause at issue herein contains no wording that would limit D & R's duty to indemnify to cases in which ICON was found liable. Nor does the indemnification clause limit D & R's duty to indemnify only to sums ICON paid to third parties. Furthermore, as in Nat'l Cylinder, D & R refused to provide conflict-free counsel to ICON, or to pay for ICON's counsel of choice, in an action that pertained to its work under the subcontract, which itself is a breach of contract that entitled ICON to damages. The trial court did not err by entering judgment in favor of ICON on its claim for breach of the duty to defend, indemnify, and hold ICON harmless, nor did it err by informing the jury of its ruling.

IV

D & R next asserts that the trial court erred by dismissing its claim against Fidelity on summary judgment. This is so, it asserts, because it followed the statutory requirements of RCW 39.08.030, which does not include a requirement that the subcontractor complied with all the terms of the subcontract. D & R's argument is without merit.

To establish a viable claim on a bond, the claimant must establish that it is

owed a sum for work performed or materials furnished. Puget Sound Bridge & Dredging Co. v. Jahn & Bressi, 148 Wash. 37, 47, 268 P. 169 (1928). If the company that furnished the bond is not liable to the claimant, neither is the bond surety. Tucker v. Brown, 20 Wn.2d 740, 848, 150 P.2d 604 (1944); McChord Credit Union v. Parrish, 61 Wn. App. 8, 13-14, 809 P.2d 759 (1991).

Contrary to D & R's assertion, RCW 39.08.030 does not create an independent cause of action against a bond. RCW 39.08.030 is a notice statute, outlining the conditions that must be met before a claimant may pursue an action on a bond. D & R's claim against Fidelity was not dismissed due to a failure to follow procedural rules; it was dismissed because D & R had no viable claim against ICON for sums owed. Thus, RCW 39.08.030 has no bearing on the merits of D & R's appeal.

D & R did not assign error to the trial court's decision dismissing its claims against ICON, nor does it argue that the trial court erred by doing so. Similarly, D & R does not assign error to or discuss the jury's verdict finding that ICON did not owe any sums to D & R. We typically do not review decisions of the trial court to which the appellant has neither assigned error nor discussed in its briefing, RAP 10.3(a)(4); Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992), and we will not further do so here.

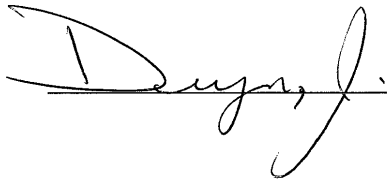
Because D & R has no claim against ICON, it cannot have a claim against Fidelity. The trial court did not err by dismissing D & R's claim against the surety.

V

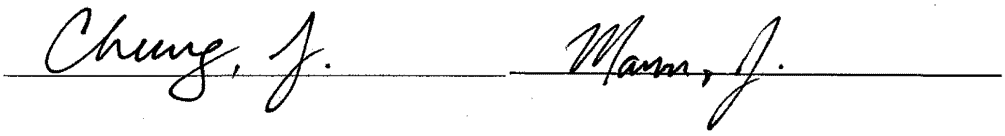
Both D & R and ICON request an award of fees pursuant to RAP 18.1 and

the terms of the subcontract between them. Paragraph 16.9 of the subcontract between ICON and D & R states that "[i]f Contractor should require the services of an attorney . . . in order to give effect to any of the provisions hereof . . . then Subcontractor shall pay all of Contractor's fees and disbursements associated with such services, including fees and disbursement of Contractor's counsel." We hereby award ICON its attorney fees and costs on appeal in accordance with this provision. Upon proper application, a commissioner of our court will enter an appropriate award.

Affirmed.[8]



WE CONCUR:



[8] Weeks after oral argument (and the case being submitted to the court for decision), and at a point in time after this opinion had been drafted and placed in circulation to the nonauthoring members of the panel, appellants filed a motion seeking either leave to file supplemental briefing or an order by which the court agreed to truncate its analysis so as to conform with the litigants' analyses of the issues presented. This motion is denied.

Supplemental briefing will not assist the panel. Furthermore, as always, we are guided by our Supreme Court's admonition that a court's "obligation to follow the law remains the same regardless of the arguments raised by the parties before it." State v. Quizmundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008). In this opinion, we resolve only the claims of error assigned by the parties and do so only with resort to the established trial court record. If, during our de novo review of the trial court's pretrial summary judgment ruling, we have placed emphasis on different words in an exhibit than were emphasized by either or both of the litigants, that is the product of our analyses—not the introduction of a new "issue" into the litigation.

APPENDIX B

Order Denying Reconsideration, dated 03/09/2023.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KING COUNTY, a political subdivision of the State of Washington,

Plaintiff,

v.

CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation,

Defendant.

CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation,

Third-Party Respondent,

v.

D & R EXCAVATING, INC., a Washington corporation; DOUGLAS D. HOFFMANN and SUSAN K. HOFFMANN, and the marital community composed thereof,

Third Party Appellants.

D & R EXCAVATING, INC., a Washington corporation,

Fourth Party Appellant,

v.

DIVISION ONE

No. 83596-3-I

ORDER DENYING MOTION FOR RECONSIDERATION

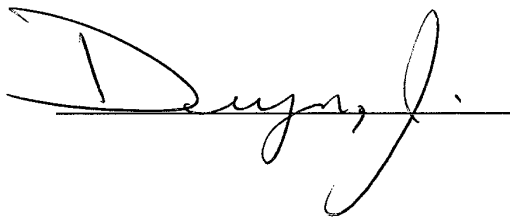
FIDELITY & DEPOSIT COMPANY OF MARYLAND PAYMENT BOND NO. 9283912,

Fourth Party Respondent.

The appellants, D & R Excavating, Inc., and Douglas D. Hoffman and Susan K. Hoffman, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

FOR THE COURT:



APPENDIX C

Notice of Violation, dated 05/03/2019.

King County
Department of Local Services
Permitting Division
Code Enforcement
35030 SE Douglas St., Ste. 210
Snoqualmie, WA 98065-9266

V.

CPM Development Corp.,dba
ICON Materials
1508 Valentine Avenue
Pacific, WA 98047-2103

AND

Douglas D. & Susan K. Hoffmann
8820 SW Cemetery Road
Vashon, WA 98070

NOTICE OF KING COUNTY CODE VIOLATION: CIVIL PENALTY ORDER: ABATEMENT ORDER: DUTY TO NOTIFY

Case Number: ENFR19-0332

Zoning: RA-2.5-SO
Address: 8816 SW Cemetery Rd, Vashon, WA 98070

Account: 2495600031
Legal Description: QSTR: NE 05 22 03
FAY'S FIVE ACRE TRACTS LOT 1 & UNDIVIDED 1/4 INT IN TRACT "X" KING CO SHORT PLAT NO 1227124 RECORDING NO 8212210848 (BEING A POR LOT 3 FAY'S FIVE ACRE TRACTS IN NW QTR NE QTR STR 05-22-03) TGW POR S HALF N HALF NW QTR NE QTR STR 05-22-03 LY ELY OF FOLG DESC LINE: BEG AT SW COR SD SUBD TH S 89-48-07 E ALG S LINE SD SUBD 765.65 FT TO TPOB TH NWLY TO POINT BEING ON N BOUNDARY SD SUBD SD POINT BEING 666.21 FT EAST OF NW COR SD SUBD & TERMINUS -- AS DELINEATED PER KING COUNTY BOUNDARY LINE ADJUSTMENT NO S92L0007 REVISED 20 MAY 1993 & RECORDED UNDER NO 9306150947

YOU HAVE BEEN FOUND TO HAVE COMMITED A CIVIL CODE VIOLATION AND TO BE A PERSON RESPONSIBLE FOR CODE COMPLIANCE, AND YOU ARE HEREBY NOTIFIED AND ORDERED PURSUANT TO KING COUNTY ORDINANCE 14309, AS AMENDED, OF THE FOLLOWING:

CIVIL CODE VIOLATIONS (Including KCC Section 23.02.010B)
The King County Department of Local Services Permitting Division has found the above- described location is maintained or used in violation of the King County Code (KCC).
THEREFORE, YOU ARE ORDERED TO CORRECT VIOLATIONS LISTED BELOW IN ACCORDANCE WITH LISTED CODE PROVISION AND CODES ADOPTED UNDER THE AUTHORITY OF TITLE 16 OF THE KING COUNTY CODE AS AMENDED BY ORDINANCE 15802 AND INCLUDING BUT NOT LIMITED TO CHAPTER 21A.50 AND TITLE 23 OF THE KING COUNTY CODE; REVISED CODE OF WASHINGTON (RCW) 19.27.020, 19.27.031, 19.27.040, 19.27.074, AND THE WASHINGTON ADMINISTRATIVE CODE (WAC) 51-40-003:

1. Filling in excess of three feet in vertical depth (stockpiling asphalt grindings) and/or creation of 2,000 sq. ft. or more of new and/or replaced impervious surface without the required grading permit, inspections and approvals and within an environmentally critical area (Critical Aquifer Recharge Area) in violation of Sections 16.82.050, 16.82.051, 16.82.100 A 4 d of the King County Code.

TO BRING THIS PROPERTY INTO COMPLIANCE:

1. Apply for and obtain the required permits, inspections and approvals with complete application to be submitted **by the following schedule:**

A. Submit a complete pre-screening meeting request to PERMITTING **by June 7, 2019.**

B. Submit a complete permit application within **30 days** of the pre-application meeting.

C. Meet all deadlines for requested information associated with the permit(s) and pick up the permit(s) within the required deadlines. Make any required corrections and obtain final inspection approval **within 3 months** of permit issuance.

** ANY PERMITS REQUIRED TO PREFORM THE CORRECTIVE ACTION MUST BE OBTAINED FROM THE PROPER ISSUING AGENCY. **

FAILURE TO COMPLY WITH THIS NOTICE AND ORDER MAY SUBJECT YOU TO ADDITIONAL CIVIL PENALITIES, ABATEMENT AND/OR MISDEMEANOR ACTIONS, AND COULD LEAD TO THE DENIAL OF SUBSEQUENT KING COUNTY PERMIT APPLCATIONS ON THE SUBJECT PROPERTY.

CIVIL PENALTY/NOTICE OF LIEN (Including KCC Section 23.24.070):
You shall correct each violation by the above dates or you will incur daily civil penalties against you according to the following schedule:

Violation 1: $130.00 per day for the first 30 days, then $260.00 per day each day thereafter.

In addition re-inspection fees of $150.00 (1st), $300.00 (2nd) and $450.00 (3rd) may be assessed for one to three compliance inspections if the property is not found to be in compliance at the time of the inspection (KCC 23.32.010). Any costs of enforcement including legal and incidental expenses, which exceed the amount of the penalties, may also be assessed against you.

This Department shall periodically bill you for the amount incurred up to and through the date of billing. PERIODIC BILLS ARE DUE AND PAYABLE 30 DAYS FROM RECEIPT. If any assessed penalty, fee or cost is not paid on or before the due date, King County may charge the unpaid amount as a LIEN against the real property of all persons responsible for code compliance and as a JOINT AND SEVERAL PERSONAL OBLIGATION of all persons responsible for code compliance.

CRIMINAL MISDEMEANOR/NON-COMPLIANCE WITH FINAL ORDER (KCC Section 23.02.030)
Any person who willfully or knowingly causes, aids or abets a civil violation by any act of commission or omission is guilty of a misdemeanor. Upon conviction, the person shall be punished by a fine of not to exceed one thousand dollars and/or imprisonment in the County jail for a term not to exceed 90 days. Each week (7 days) such violation continues shall be considered a separate misdemeanor offense. **Failure to correct cited violations may lead to denial of subsequent King County permit applications on the subject property.**

NOTIFICATION OF RECORDING (KCC Section 23.24.040)
A copy of this Notice and Order shall be recorded against the property in the King County Office of Records and Elections. King County shall file a Certificate of Compliance when the property is brought into compliance.

ABATEMENT WORK/NOTICE OF LIEN (Including KCC Section 23.24.030 and RCW 35.80.030.1H)
King County may proceed to abate the violation(s) and cause the work to be done, and charge the costs thereof as a lien against the real property of all persons responsible for code compliance and as a joint and several personals obligation of all persons responsible for code compliance.

APPEAL (Including KCC Chapter 23.36)
Any person named in the Notice and Order or having any record or equitable title in the property against which the Notice and Order is recorded may appeal the order to the Hearing Examiner of King County. A statement of appeal must be received in writing by DLS Permits within twenty-four (24) days **by May 28, 2019** of the date of issuance of the Notice and Order. A statement of appeal form is included in this packet. You are not required to use the enclosed form. FAILURE TO APPEAL WITH THE SPECIFIC REASONS WHY THE NOTICE AND ORDER SHOULD BE REVERSED OR MODIFIED MAY RESULT IN A MOTION TO HAVE THE APPEAL DISMISSED BY THE HEARING EXAMINER. FAILURE TO FILE A TIMELY STATEMENT OF APPEAL WITHIN THE DEADLINES SET FORTH ABOVE RENDERS THE NOTICE AND ORDER A FINAL DETERMINATION THAT THE CONDITIONS DESCRIBED IN THE NOTICE AND ORDER EXISTED AND CONSTITUTED A CIVIL CODE VIOLATION, AND THAT THE NAMED PARTY IS LIABLE AS PERSON RESPONSIBLE FOR CODE COMPLIANCE.

DUTY TO NOTIFY (KCC Section 23.24.030N)
The person(s) responsible for code compliance has the DUTY TO NOTIFY the Department of Local Services Permitting Division- Code Enforcement of ANY ACTION TAKEN TO ACHIEVE COMPLIANCE WITH THE NOTICE AND ORDER.

DATED THIS MAY 03, 2019

Sheryl Lux
Code Enforcement Product Line Manger

NS

APPENDIX D

King County Code 16.82.100.

16.82.100 Grading standards. A person conducting a grading activity shall comply with the following standards:

A. Cuts and fills shall conform to the following provisions unless otherwise approved by the department:

1. A slope of cut and fill surfaces shall not be steeper than is safe for both the intended use and soil type and shall not exceed two horizontal to one vertical;

2. All disturbed areas including faces of cuts and fill slopes shall be prepared and maintained to control erosion in compliance with K.C.C. 16.82.095;

3. The ground surface shall be prepared to receive fill by removing unsuitable material such as concrete slabs, tree stumps, brush, car bodies and other materials as determined by the department;

4. Except in an approved sanitary landfill or as part of engineered fill, fill material shall meet the following standards:

a. Fill material shall consist of earthen material, organic material or recycled or reprocessed materials that are not categorized as dangerous waste under Title 173 WAC and that were produced originally from an earthen or organic material;

b. Fill material shall have a maximum dimension of less than twelve inches;

c. Recycled concrete shall be free of rebar and other materials that may pose a safety or health hazard;

d. Recycled asphalt shall not be used in areas subject to exposure to seasonal or continual perched ground water, in a critical aquifer recharge area or over a sole-source aquifer; and

e. Recycled materials that have not been reprocessed to meet the definition of common borrow shall be intermixed with well-graded, natural, earthen materials in sufficient quantities and of a suitable size to assure filling of all voids and to assure that the fill can be compacted to ninety percent of the maximum density;

5. Provisions shall be made to:

a. prevent any surface water or seepage from damaging the cut face of any excavation or the sloping face of a fill; and

b. address any surface water that is or might be concentrated as a result of a fill or excavation to a natural watercourse in accordance with K.C.C. chapter 9.04 and the Surface Water Design Manual;

6. Benches and any swales or ditches on benches shall be designed in accordance with the King County Surface Water Design Manual;

7. The tops and the toes of cut and fill slopes shall be set back from property boundaries and structures as far as necessary:

a. for the safety of the adjacent properties;

b. for adequacy of foundation support;

c. to prevent damage resulting from water runoff or erosion of the slopes; and

d. to preserve the permitted uses on the adjacent properties; and

8. All fill shall meet the following:

a. Fill greater than three feet in depth shall be engineered and compacted to accommodate the proposed use unless a notice on title documenting the location of the fill is recorded and the fill is sufficiently stable to not pose a hazard; and

b. Any fill in the floodplain shall, from the face of the fill to a horizontal distance of six feet back from the face, meet the compaction requirements for pond embankments in the Surface Water Design Manual, unless determined by the department that inundation is not a threat to fill integrity or that other requirements necessary for compliance with the King County Guidelines for Bank Stabilization (Surface Water Management 1993) are met.

B. Access roads to grading sites shall be:

1. Maintained and located to the satisfaction of the King County department of local services, road services division, to minimize problems of dust, mud and traffic circulation;

2. Located where the permanent access to the site is proposed in the permit application to minimize site disturbance; and

3. Controlled by a gate when required by the department.

C. Signs warning of hazardous conditions, if determined by the department to exist on a particular site, shall be affixed at locations as required by the department.

D. Where required by the department, to protect life, limb and property, fencing shall be installed with lockable gates that must be closed and locked when not working on the site. The fence shall be no less than six feet in height and the fence material shall have no opening larger than two inches.

E. Rocks, dirt, mud, vegetation and any other materials used or produced on-site in the course of permitted activities shall not be spilled onto or otherwise left on public roadways or any off-site property not specifically authorized as a receiving site under a valid permit.

F. The duff layer and native topsoil shall be retained in an undisturbed state to the maximum extent practicable. Any duff layer or topsoil removed during grading shall be stockpiled on-site in a designated, controlled area not adjacent to public resources and critical areas. The material shall be reapplied to other portions of the site where feasible.

G.1. Except as otherwise provided in subsection G.2. of this section, areas that have been cleared and graded shall have the soil moisture holding capacity restored to that of the original undisturbed soil native to the site to the maximum extent practicable. The soil in any area that has been compacted or that has had some or all of the duff layer or underlying topsoil removed shall be amended to mitigate for lost moisture-holding capacity. The amendment shall take place between May 1 and October 1. The topsoil layer shall be a minimum of eight inches thick, unless the applicant demonstrates that a different thickness will provide conditions equivalent to the soil moisture-holding capacity native to the site. The topsoil layer shall have an organic matter content of between five to ten percent dry weight and a pH suitable for the proposed landscape plants. When feasible, subsoils below the topsoil layer should be scarified at least four inches with some incorporation of the upper material to avoid stratified layers. Compost used to achieve the required soil organic matter content must meet the definition of "composted materials" in WAC 173-350-220.

2. This subsection does not apply to areas that:

a. Are subject to a state surface mine reclamation permit; or

b. At project completion are covered by an impervious surface, incorporated into a drainage facility or engineered as structural fill or slope. (Ord. 18791 § 134, 2018: Ord. 16267 § 5, 2008: Ord. 15053 § 10, 2004: Ord. 13190 § 4, 1998: Ord. 3108 § 8, 1977: Ord. 1488 § 11, 1973).

APPENDIX E

RCW 39.08.030.

RCW 39.08.030

Conditions of bond—Notice of claim—Action on bond—Attorneys' fees.

(1)(a) The bond mentioned in RCW 39.08.010 must be in an amount equal to the full contract price agreed to be paid for such work or improvement, except under subsection (2) of this section, and must be to the state of Washington, except as otherwise provided in RCW 39.08.100, and except in cases of cities, towns, public transportation benefit areas, passenger-only ferry service districts, and water-sewer districts, in which cases such municipalities may by general ordinance or resolution fix and determine the amount of such bond and to whom such bond runs. However, the same may not be for a less amount than twenty-five percent of the contract price of any such improvement for cities, towns, public transportation benefit areas, and passenger-only ferry service districts, and not less than the full contract price of any such improvement for water-sewer districts, and may designate that the same must be payable to such city, town, water-sewer district, public transportation benefit area, or passenger-only ferry service district, and not to the state of Washington, and all such persons mentioned in RCW 39.08.010 have a right of action in his, her, or their own name or names on such bond for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements, and the state has a right of action for the collection of taxes, increases, and penalties specified in RCW 39.08.010: PROVIDED, That, except for the state with respect to claims for taxes, increases, and penalties specified in RCW 39.08.010, such persons do not have any right of action on such bond for any sum whatever, unless within thirty days from and after the completion of the contract with an acceptance of the work by the affirmative action of the board, council, commission, trustees, officer, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or subcontractor, or material supplier, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, must present to and file with such board, council, commission, trustees or body acting for the state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows:

> To (here insert the name of the state, county or municipality or other public body, city, town or district):
>
> Notice is hereby given that the undersigned (here insert the name of the laborer, mechanic or subcontractor, or material supplier, or person claiming to have furnished labor, materials or provisions for or upon such contract or work) has a claim in the sum of . . . . . dollars (here insert the amount) against the bond taken from . . . . . (here insert the name of the principal and surety or sureties upon such bond) for the work of . . . . . (here insert a brief mention or description of the work concerning which said bond was taken).
>
> (here to be signed) . . . .

(b) Such notice must be signed by the person or corporation making the claim or giving the notice, and the notice, after being presented and filed, is a public record open to inspection by any person, and in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items specified in this section, the claimant is entitled to recover in addition to all other costs, attorneys' fees in such sum as the court adjudges reasonable. However, attorneys' fees are not allowed in any suit or action brought or instituted before the expiration of thirty days following the date of filing of the notice as provided in this section. However, any city may avail itself of the provisions of RCW 39.08.010 through 39.08.030, notwithstanding any charter provisions in conflict with this section. Moreover, any city or town may impose any other or further conditions and obligations in such bond as may be deemed necessary for its proper protection in the fulfillment of the terms of the contract secured thereby, and not in conflict with this section. The thirty-day notice requirement under this subsection does not apply to claims made by the state for taxes, increases, and penalties specified in RCW 39.08.010.

(2) Under the job order contracting procedure described in RCW 39.10.420, bonds will be in an amount not less than the dollar value of all open work orders.

(3) Where retainage is not withheld pursuant to RCW 60.28.011(1)(b), upon final acceptance of the public works project, the state, county, municipality, or other public body must within thirty days notify the department of revenue, the employment security department, and the department of labor and industries of the completion of contracts over thirty-five thousand dollars.

[**2018 c 89 § 1**. Prior: **2013 c 113 § 4**; (2013 c 113 § 3 expired June 30, 2016); **2013 c 28 § 2**; (2013 c 28 § 1 expired June 30, 2016); (2009 c 473 § 1 expired June 30, 2016); **2007 c 218 § 89**; **2003 c 301 § 4**; **1989 c 58 § 1**; **1977 ex.s. c 166 § 4**; **1915 c 28 § 2**; **1909 c 207 § 3**; RRS § 1161; prior: **1899 c 105 § 1**; **1888 p 16 § 3**. Formerly RCW **39.08.030** through **39.08.060**.]

NOTES:

Effective date—2018 c 89: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 15, 2018]." [**2018 c 89 § 3**.]

Effective date—2013 c 113 § 4: "Section 4 of this act takes effect June 30, 2016." [**2013 c 113 § 10**.]

Expiration date—2013 c 113 § 3: "Section 3 of this act expires June 30, 2016." [**2013 c 113 § 9**.]

Effective date—2013 c 28 § 2: "Section 2 of this act takes effect June 30, 2016." [**2013 c 28 § 4**.]

Expiration date—2013 c 28 § 1: "Section 1 of this act expires June 30, 2016." [**2013 c 28 § 3**.]

Expiration date—2009 c 473: "This act expires June 30, 2016." [**2009 c 473 § 3**.]

Intent—Finding—2007 c 218: See note following RCW **41.08.020**.

Severability—1977 ex.s. c 166: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to the other persons or circumstances is not affected." [**1977 ex.s. c 166 § 9**.]

APPENDIX F

RCW 39.08.010.

RCW 39.08.010

Bond required—Conditions—Retention of contract amount in lieu of bond.

(1)(a) Whenever any board, council, commission, trustees, or body acting for the state or any county or municipality or any public body must contract with any person or corporation to do any work for the state, county, or municipality, or other public body, city, town, or district, such board, council, commission, trustees, or body must require the person or persons with whom such contract is made to make, execute, and deliver to such board, council, commission, trustees, or body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons must:

(i) Faithfully perform all the provisions of such contract;

(ii) Pay all laborers, mechanics, and subcontractors and material suppliers, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work; and

(iii) Pay the taxes, increases, and penalties incurred on the project under Titles **50**, **51**, and **82** RCW on: (A) Projects referred to in RCW **60.28.011**(1)(b); and/or (B) projects for which the bond is conditioned on the payment of such taxes, increases, and penalties.

(b) The bond, in cases of cities and towns, must be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor has the same right under the provisions of such bond as if such work, services, or material was furnished to the original contractor.

(2) The provisions of RCW **39.08.010** through **39.08.030** do not apply to any money loaned or advanced to any such contractor, subcontractor, or other person in the performance of any such work.

(3) On contracts of one hundred fifty thousand dollars or less, at the option of the contractor or the general contractor/construction manager as defined in RCW **39.10.210**, the respective public entity may, in lieu of the bond, retain ten percent of the contract amount for a period of thirty days after date of final acceptance, or until receipt of all necessary releases from the department of revenue, the employment security department, and the department of labor and industries and settlement of any liens filed under chapter **60.28** RCW, whichever is later. The recovery of unpaid wages and benefits must be the first priority for any actions filed against retainage held by a state agency or authorized local government.

(4) For contracts of one hundred fifty thousand dollars or less, the public entity may accept a full payment and performance bond from an individual surety or sureties.

(5) The surety must agree to be bound by the laws of the state of Washington and subjected to the jurisdiction of the state of Washington.

[**2017 c 75 § 1**; **2013 c 113 § 2**. Prior: **2007 c 218 § 88**; **2007 c 210 § 3**; **1989 c 145 § 1**; **1982 c 98 § 5**; **1975 1st ex.s. c 278 § 23**; **1967 c 70 § 2**; **1915 c 28 § 1**; **1909 c 207 § 1**; RRS § 1159; prior: **1897 c 44 § 1**; **1888 p 15 § 1**.]

NOTES:

Intent—Finding—2007 c 218: See note following RCW **41.08.020**.

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW **11.08.160**.

*State highway construction and maintenance, bond and surety requirements: Chapter **47.28** RCW.*

APPENDIX G

RCW 39.04.900(2).

RCW 39.04.900 Rights may not be waived—Construction—1992 c 223. (1) The rights provided in chapter 223, Laws of 1992 may not be waived by the parties and a contract provision that provides for waiver of the rights provided in chapter 223, Laws of 1992 is void as against public policy.

(2) Chapter 223, Laws of 1992 is to be liberally construed to provide security for all parties intended to be protected by its provisions. [1992 c 223 § 6.]

Effective date—1992 c 223: See note following RCW 39.76.011.

Application—1992 c 223: See RCW 39.04.901.

LINVILLE LAW FIRM PLLC

April 10, 2023 - 10:06 AM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	King County, et al, Respondents v. D & R Excavating, Inc., et al, Appellants (835963)

The following documents have been uploaded:

- DCA_Cert_of_Service_20230410095617SC615780_6899.pdf
  This File Contains:
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  Motion for Discretionary Review of Court of Appeals
  The Original File Name was Petition For Discretionary Review Incl. Atts.pdf

A copy of the uploaded files will be sent to:

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Comments:

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From: Chandler, Desiree
To: Wise, Laurel
Subject: 83596-3-I
Date: Monday, April 10, 2023 11:00:42 AM

This office received a petition for review today regarding your case number 83596-3-I. The Supreme Court number is 101877-1. Pursuant to our new policy, we do not need you to send your file until such time as the Supreme Court has granted review. At that time, we will send you a request for the file. Thank you.

Desireé Chandler

Senior Case Manager
Washington State Supreme Court
Desiree.Chandler@courts.wa.gov