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.

D&R EXCAVATING, INC.'s REPLY TO KING COUNTY AND CPM DEVELOPMENT CORE'S ANSWER TO PETITION FOR REVIEW

LINVILLE LAW FIRM PLLC

Lawrence B. Linville, WSBA #6401
Attorneys for Appellants
4025 Delridge Way SW Suite 540,
Seattle, WA 98106
206-515-0640

TABLE OF CONTENTS

I. INTRODUCTION

At issue is whether violation of a King County ordinance that permits conduct under certain circumstances can ever be a nuisance *per se* absent the presentation of evidence of harm to public safety. Past precedent from Division II of the Court of Appeals [*Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, (2014)] and the Supreme Court [*Tiegs v. Watts*, 135 Wn. 2d 1 (1998)] have each and all been based on a factual presentation of proof of harm to the public safety.

II. STATEMENT OF CASE

The jury was instructed (Jury Instruction No. 8) that:

> Whether or not RAP or asphalt grindings presents a risk or danger to the environment or groundwater on Vashon Island is **not** an issue in this case.
>
> (emphasis applied)

Consistent with Jury Instruction No. 8, King County presented **no** evidence or argument that RAP presented a risk or danger to the environment or groundwater on Vashon Island. Instead, King County requested and received Jury Instruction No.s 9 & 10 from the trial court.

Jury Instruction No. 9 instructed the jury that a violation of KCC 16.82.100 A.4.d was a public nuisance as a matter of law. Jury Instruction No. 10 instructed the jury to find Petitioner liable "on the nuisance claim", leaving to the jury only the issue of calculation of King County's damages. The jury awarded King County damages not for environmental harm, but for the cost to King County to process permits to property owners who wished to retain the same RAP on their property that the County claimed was harmful and prohibited.

III. ARGUMENT

No King County ordinance declares that placement of RAP in a Critical Aquifer Recharge Area ("CARA") is either a nuisance or is in any way harmful to the environment. No such

King County ordinance exists. The **only** ordinance referencing public health, safety, and the environment is KCC 23.02.030(A) which merely states that **civil code violations** are detrimental to public health, safety, and the environment.

KCC 23.02.010 B.1 defines "**civil code violation**" as an ordinance that regulates or protects public health or the environment.

Petitioner's first point is that no evidence was presented at trial regarding the public heath or environment other than Jury Instruction No. 8 that stated that public health and environmental issues were **not** an issue for the jury to consider.

Petitioner's second point is that KCC 16.82.100 A.4.d states nothing about public health or safety. To the contrary, KCC 16.82.100 A.4.d expressly permits the placement of RAP in a CARA if placed as engineered fill. Placement of RAP is also permitted at all sanitary landfills located within a CARA. Further, placement of RAP in a CARA can and always is at the direction and discretion of the Director. There is no ordinance that limits or

restricts or conditions or regulates the Director's discretion to permit the placement of RAP in a CARA: just a statement of the Director may approve the placement of RAP anywhere in a CARA.

Without evidence of any harm to public health or safety, there must always be an underlying ordinance or statute that identifies an act as either harmful to the public safety or declares said act to be a public nuisance.

> "When a statute or local ordinance [declares] conduct --- illegal, without---- labeling [it] as a nuisance, it will be considered a nuisance as a matter or law only if that conduct interferes **with others' use and enjoyment of their lands**…".

Tiegs v. Boise Cascade Corp. 83 Wn. App. 411, 418 (Div III, 1996).

In all nuisance per se cases from Divisions II and III of the Court of Appeals and as well as the Supreme Court, evidence of harm to the public health or safety has always been required in the

absence of an ordinance or statute expressly declaring an act to present harm to the public safety or expressly declaring the act to be a public nuisance. Here, there was no such ordinance.

IV. CONCLUSION

All precedent in our caselaw has required, as a basis for any claim of nuisance *per se*, that there either exist an ordinance or statute expressly stating that an act is harmful to the public safety or is a public nuisance, or there must be actual proof of harm to the public health or safety. Harm cannot be presumed, let alone be removed from consideration by the trier of fact (Jury Instruction No. 8) unless there exists a statute or ordinance declaring harm to public health or safety. KCC 16.82.100 A.4.d is not such an ordinance.

King County does not argue that the issue presented in D&R Excavating, Inc.'s Petition for Discretionary Review is not one of significant public interest. Nor could they. Many, many nuisance *per se* actions are specifically provided by statute. RCW 7.48.010 ("…whatever is injurious to health…"). *Tiegs* at page

14. To allow litigation to proceed in nuisance actions in the absence of any proof of harm, or proceed in the absence of an express legislative declaration that a specific act or omission is a nuisance, or in the absence of an express legislative declaration that a specific act as harms the public safety and health as a matter of law, will remove the constraints on such litigation that have been consistently the law in Washington and elsewhere [Restatement 2d, Torts 286 (1956)].

Nuisance *per se* is a form of strict liability because the harm of the act has been legislatively established. It would place unwarranted burden on defendants, and wrongly allow plaintiffs to avoid a key element in their burden of proof (i.e., proof of harm) if the error in the Court of Appeals decision is left unaddressed by the Supreme Court.

TABLE OF CONTENTS

I. INTRODUCTION

King County sued ICON for breach of contract. The breach was based on ICON's failure to dispose of the RAP at sites approved by King County and instead disposing of the RAP at sites not approved by King County. Rather than go through the permitting process to obtain the County's approval, ICON removed the RAP and disposed of it in other counties. ICON incurred costs in doing so.

ICON sued D&R Excavating, Inc. (third-party claim) for breach of ICON's subcontract with D&R Excavating, Inc. The subcontract contained an indemnification clause. The trial court instructed the jury that D&R Excavating, Inc., breached its subcontract with ICON by failing to indemnify ICON for ICON's costs to remove the RAP and dispose of it.

II. STATEMENT OF CASE

The issue presented is whether the duty to indemnify can be breached in the absence of proof or an adjudication that in fact the indemnitee (ICON) has incurred a liability to a third

party (King County). Here in this matter, ICON never incurred a liability to King County. On the contrary, King County paid its complete contract price without deduction or offset as soon as ICON properly removed and disposed of the RAP.

III. ARGUMENT

Regardless of whether a duty to indemnify stems from a contract or elsewhere, the indemnitor's breach of that duty is always subject to the condition precedent that the indemnitee has either (1) settled with the third party upon proof that the indemnitee was liable to the third party, or (2) the indemnitee's liability to the third party has actually been adjudicated.

If the law were otherwise, there would be no restraints or safeguards (e.g. proof of liability, proof of damages) governing settlements between third parties and indemnitees. Instead, indemnitors would just be bound and saddled with whatever the indemnitee and third party agreed upon. The indemnitor would have no opportunity to object: to have his/her day in court.

It has consistently been the law in Washington that, as between the indemnitee and the third party, there must either be a settlement with proof of liability, or an actual adjudication of liability. This law is sound and there are no cases in Washington or elsewhere to the contrary that hold an indemnitor liable for breach of his/her duty to indemnify the indemnity until and unless the third party's claim has been adjudicated or paid by the indemnitee upon proof of liability. *United Boatbuilders v. Temps Prods*. (Wn. App. 177, 180 (1919); *Nelson v. Sponberg*, 51 Wn. 2d 371, 376 (1957); *Cheney v. Mountlake Terrace*, 20 Wn. App. 854, 862, 863 (Div I 1978); *Parkridge Assocs. v. Ledcor Indus*., 113 Wn. App. 192, 604 (Div I 2002).

The governing principals of indemnification were well stated in *Newcomer* and those principles apply to all cases involving a duty of indemnification and any breach of that duty. Any other principle would silence the indemnitor and make the indemnitor strictly liable to an indemnitee without any proof or adjudication offered by either the third party or the indemnitee:

only an agreement jointly fashioned by the third-party and the indemnitee without notice to the indemnitor and without any opportunity extended to the indemnitor to object to the agreement.

The Court of Appeals' (Decision at page 15) held that this principal was **not** the law in Washington, citing the case of *N. Pac. Ry v. National Cylinder Gas Div. of Chemetron Corp*., 2 Wn. App. 338 (1970). In the *Northern Pacific* case, Northern Pacific (indemnitee) tendered to National Cylinder (indemnitor) the defense of a Northern Pacific employee (a third party named Sisk). National Cylinder refused to defend notwithstanding a contractual obligation to defend and indemnify. Northern Pacific settled with Sisk. The Court of Appeals found "…no reason to suspect the settlement was unreasonable or that it was made in bad faith…". Northern Pacific then sued National Cylinder for breach of contract which contained an indemnity clause. There was a trial. National Cylinder was found solely responsible for Sisk's injury, and was ordered to indemnify Northern Pacific the amount paid by Northern Pacific in settlement with Sisk.

The difference between D&R Excavating, Inc.'s case and the *Northern Pacific* case is that there was a trial in the *Northern Pacific* case at which the court found that National Cylinder (indemnitor) wrongly refused to defend Northern Pacific and Northern Pacific then settled in good faith with Sisk on terms found by the Court of Appeals to be reasonable.

The duty to indemnify as well as an alleged breach of that duty is separate from an actual breach of that duty. The duty to indemnify is not breached until the indemnitee has made payment to a third party upon proof of a liability ["…they (NP) might face some liability to Sisk…"]. *Northern Pacific* at 345. In D&R Excavating, Inc.'s case, the trial court ruled on summary judgment that D&R Excavating, Inc. had already breached its subcontract with ICON as a matter of law by refusing to pay ICON's costs to remove and dispose of the RAP. All Washington authority is to the contrary, including the *Northern Pacific* case wherein the Court found Northern Pacific settlement with Sisk to be reasonable and made in good faith.

In the instant case, the rule announced by the Court of Appeals was as follows:

> "…the language of the contract controlled and that, as written, did not require a finding of liability before National Cylinder was required to indemnify."

Decision at Page 15.

The Court of Appeals reasoning that the contractual duty to indemnify "controls" and does not require a finding of liability is incorrect. Of course the contract controls. The contract is the basis of the duty to indemnify. But there always has to be proof or adjudication of actual vs. contractual liability to establish the **breach** of a contractual duty to indemnify.

IV. CONCLUSION

In part, RAP 13.4 reserves discretionary review to matters of public interest. Parties engaging in commercial transactions wherein indemnification clauses are commonly included have a keen interest in knowing the outer limits of their liability under those indemnification clauses. The Court of Appeals' misplaced reliance upon the *Northern Pacific* case introduces a precedent for

the proposition (at page 15 of Decision) that an indemnitee (ICON) may voluntarily incur costs to complete its contract with a third party, receive its full contract balance due from the third party (King County), and then claim that the indemnitor (D&R Excavating, Inc.) has already breached its duty to indemnity without any proof or adjudication of the indemnitee's liability to the third party (King County) to incur those costs.

TABLE OF CONTENTS

I. INTRODUCTION

D&R Excavating, Inc. filed an action against ICON's Payment Bond No. 9283912 issued by Fidelity and Deposit Company to King County pursuant to RCW 39.04.010.

The Court of Appeals dismissed D&R Excavating, Inc.'s claim against this bond on summary judgment on the basis that D&R Excavating, Inc. "…had no viable claim against ICON for sums owed".

II. STATEMENT OF THE CASE

D&R Excavating, Inc. filed a counterclaim against ICON for payment to D&R Excavating, Inc. under the terms of D&R's subcontract with ICON. D&R Excavating, Inc. also filed a fourth-party claim against Fidelity and Deposit Company of Maryland Bond No. 9283912 that was issued to King County pursuant to RCW 39.04.010.

D&R most certainly maintained and asserted its claims against ICON all the way through trial and the Special Verdict Form given to the jury. D&R Excavating, Inc.'s claim against

ICON was not dismissed on summary judgment by the Court and did indeed go to the jury in support of its claim for damages for ICON's breach. RP 981 – 984. D&R's claim against ICON was never dismissed by the trial court, D&R presented testimony and exhibits of Doug Hoffmann to the jury regarding the balance due ($162,000.00) [(RP 834 Attached) (Exhibit 590 JSE)] D&R Excavating, Inc. from ICON.

III. ARGUMENT

The trial court dismissed D&R Excavating Inc.'s claim against he payment bond on summary judgment because ICON had not received full payment from King County at the time of ICON's motion for summary judgment, and D&R Excavating Inc.'s subcontract with ICON contained a pay-if-paid clause. D&R Excavating Inc. assigned error to this ruling. (Assignment of Error No. 4).

D&R's claim on Fidelity's payment [CP 673 – 742 (Attachment 4)] was properly and timely filed and D&R was a "laborer or mechanic" to whom RCW 39.08.030 expressly

provided a "right of action" against the bonds. The statutory claim is set out in RCW 39.08.030 and minimally requires the subcontractor to aver that the claimant "…has a claim in the sum of $ _____ against the bond…".

The timing requirement for filing a claim against the general contractor's payment bond (RCW 39.08.030) has nothing to do with pay-if-paid clauses or any other clause or term in a subcontract. The filing requirements are that the subcontractor (D&R) must file its claim against a payment bond no later than 30 days after project acceptance.

Nothing contained within RCW 39.08.030 conditions a claimant's entitlement to file its claim against a payment bond upon proof that a claimant has complied with all terms of its subcontract or that the general contractor is in breach of the subcontract. A general contractor's denial of a subcontractor's claim that money is owed to the subcontractor cannot and does not defeat the subcontractor's statutory right to file and proceed upon its claim against the general contractor's payment bond.

RCW 39.04.900(2) expressly states that the bond laws (1992 c223) are "…to be liberally construed to provide security for all parties intended to be protected by its provisions. The trial court should not have dismissed D&R's claims against Fidelity's payment bond.

The Court of Appeals did not address the true basis of the trial court's dismissal of D&R Excavating Inc.'s claim against ICON's payment bond, but instead (Decision, page 17) stated that D&R Excavating, Inc. had no claim against ICON's payment bond because the trial court dismissed D&R Excavating Inc.'s claims against ICON. This is patently incorrect.

The Court of Appeals thus effectively affirmed the trial court's incorrect dismissal of D&R Excavating Inc.'s bond claim by filing a decision that further incorrectly framed the issue before and decided by the trial court, and awarded fees and costs to ICON. Litigants have a significant interest in obtaining a focused review on errors assigned by the litigant to a decision of the trial court. Further, all litigants rely upon a Court of Appeals' accurate

review of the proceedings below as the basis for any decision filed in a matter.

IV. CONCLUSION

D&R's claim against ICON's payment bond should be reinstated.

Dated this 26th day of June, 2023.

Respectfully submitted

/s/ Lawrence B. Linville
Lawrence B. Linville, WSBA #6401
Attorney for Petitioners
LINVILLE LAW FRIM PLLC
4025 Delridge Way SW Suite 540, Seattle, WA 98106

Word Count: 3097

TABLE OF AUTHORITIES

Cases

Rules and Statutes

LINVILLE LAW FIRM PLLC

June 26, 2023 - 11:54 AM

Transmittal Information

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Appellate Court Case Number:	101,877-1
Appellate Court Case Title:	King County, et al. v. D & R Excavating, Inc., et al.

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