Supreme Court No. 927448

Court of Appeals No. 70432-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV, a Washington joint venture; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a Connecticut corporation; LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts corporation; FEDERAL INSURANCE COMPANY, an Indiana corporation; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation; and ZURICH AMERICAN INSURANCE COMPANY, a New York corporation,

Petitioners.

RESPONDENT KING COUNTY'S ANSWER TO AMICUS CURIAE BRIEF OF CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS IN SUPPORT OF PETITIONS FOR REVIEW

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GLOSSARY

Brightwater Project	The King County regional wastewater treatment system at issue in this appeal
CP	Clerk's Papers
Op.	*King County v. Vinci Const. Grands Projets*, 191 Wn. App. 142, 364 P.3d 784 (2015)
STBM	Slurry tunnel boring machine
Sureties	Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company
Trade Associations	Associated General Contractors of Washington, Associated Builders & Contractors of Western Washington, National Electrical Contractors Association, and the National Utility Contractors Association of Washington
Trade Ass'n Br.	Amicus Curiae Brief Of Construction Industry Trade Associations In Support Of Petitions For Review
VPFK	Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV

ANSWER

The Trade Associations do not assert or even suggest that the Court of Appeals' opinion conflicts with this Court's case law. Instead, they claim that the opinion "vitiates the central concept of the *Spearin* Doctrine" and that the Court of Appeals "applied the *Spearin* Doctrine" in a manner that is both "illogical and inequitable." Trade Ass'n Br. at 9-10.[1] Yet the Court of Appeals in this matter did not cite *United States v. Spearin*, 248 U.S. 132 (1918), nor did it expressly apply the *Spearin* Doctrine. And an asserted conflict with federal law is not in any event one of the considerations for granting discretionary review under RAP 13.4.

While Washington courts have cited *Spearin* in other cases, the Court of Appeals' analysis in this case is consistent with the *Spearin* Doctrine as discussed in those cases. In *Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wn.2d 214, 484 P.2d 399 (1971), this Court quoted *Spearin* and generally described the *Spearin* Doctrine as follows:

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered (citing cases). Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil (citing cases). But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will

[1] As with the County's previous briefing, a glossary of relevant abbreviations can be found after the Table of Authorities.

> not be responsible for the consequences of *defects in the plans and specifications* (citing cases).

Dravo, 79 Wn.2d at 218 (quoting *Spearin*, 248 U.S. at 136) (emphasis added). Similar to *Dravo*, the court in *Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 696 P.2d 1270 (1985), recognized that *Spearin* "holds only that *a design must be 'defective'* for there to be a breach of the implied warranty." *Id.* at 102 (emphasis added).

The Court of Appeals' analysis in this case is entirely consistent with these previous cases. Just as this Court in *Dravo* required "defects in the plans and specifications" and the Court of Appeals in *Donald B. Murphy Contractors* required a "defective design," the Court of Appeals in this case affirmed the trial court's ruling dismissing VPFK's defective specifications claim on summary judgment because "VPFK failed to create a material question of fact that the STBM [specification] was *defective*." Op. ¶ 78 (emphasis added). The trial court also found that "[t]here is no evidence that the specifications were *defective*." CP 1083 ¶ 2 (emphasis added). Both the Court of Appeals and the trial court correctly identified the dispositive inquiry: did VPFK establish fact issues regarding whether the plans were defective? As noted, it did not.

The Court of Appeals also stated that King County, by furnishing the plans and specifications for the Brightwater Project, "impliedly

guarantee[d] that the plans are workable and sufficient." Op. ¶ 68. Contrary to the Trade Associations' argument, the Court of Appeals did not misstate, overlook, or misinterpret the applicable legal principles. To the contrary, it correctly apprehended and applied long-standing Washington precedent – consistent with the *Spearin* Doctrine – requiring a party asserting a defective specifications claim to show that the specifications were *defective*.

The Court of Appeals' fact-intensive application of the controlling legal principles is not a basis for granting discretionary review under RAP 13.4. But even if it were, the Court of Appeals did not erroneously apply those legal principles. The Trade Associations identify two such alleged errors. First, they claim that the Court of Appeals erroneously required that "a contractor establish the existence of a viable alternative to the specified method in order to establish a breach of warranty claim." Trade Ass'n Br. at 9. That assertion misreads the Court of Appeals' opinion. There is no holding, express or implied, that a contractor must establish a viable alternative to a specified method in order to establish a breach of warranty claim. Instead, as noted above, the contractor must establish that the plans and specifications are "defective." Op. ¶ 78. A contractor's inability to establish a viable alternative is, of course, relevant to that inquiry, as the Court of Appeals correctly held. Op. ¶ 72.

Second, the Trade Associations complain that "both the trial court and Division One cited VPFK's preference for the STBM as grounds for the finding that there was 'no evidence' to support VPFK's breach of implied warranty claim." Trade Ass'n Br. at 9. King County addresses this issue at pages 13-15 of its answer to the pending petitions for review, which explains that VPFK was required on summary judgment to come forward with *evidence* that the STBM requirement was defective. Applying the established summary judgment framework, the trial court found "no evidence" and the Court of Appeals found no "material question of fact" that the STBM requirement was "defective." Op. ¶ 78; CP 1083 ¶ 2. That is the dispositive holding here, and it is entirely consistent with controlling case law. For this reason too, the issues addressed by the Trade Associations do not merit discretionary review.

The Trade Associations also claim that the Court of Appeals' analysis somehow "dilut[es] the owner's responsibility to provide accurate plans and specifications" and in fact creates a "disincentive ... to provide plans and specifications that are free from error." Trade Ass'n Br. at 7. The notion that the County, another project owner, or the many licensed professionals involved in construction projects would prepare defective plans "to pass the hidden risk of errors and omissions in the plans and specifications to contractors" (*id.*) is insulting and wrong. It is

unreasonable to suggest – even as a hypothetical – that a project owner would knowingly provide defective specifications. But even if one assumes a complete disregard for public safety and absence of professional restraint and governmental oversight, a project owner or designer who provides such plans would appropriately be held liable because the plans would be "defective" and, as the Court of Appeals held, the owner "impliedly guarantees that the plans are workable and sufficient." Op. ¶¶ 68, 78. There is no public policy reason to grant discretionary review.

CONCLUSION

The Court of Appeals correctly stated and applied the implied warranty doctrine as set forth in applicable case law. For all these reasons, the Court should deny review.

DATED: May 26, 2016

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CERTIFICATE OF SERVICE

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Enclosed for filing in the above-referenced matter are the following:

1. Respondent King County's Answer to the Surety & Fidelity Assn. of America's Amicus Curiae Memorandum in Support of Petitions for Review
2. Respondent King County's Answer to the Amicus Curiae Brief of Construction Industry Trade Assns. in Support of Petitions for Review

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Thank you for your attention to this matter.

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